NATIONAL MINING ASSOCIATION COMMENTS ON THE SECURITIES AND EXCHANGE COMMISSION'S PROPOSED RULE IMPLEMENTING SECTION 1502 (CONFLICT MINERALS) OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

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I. INTRODUCTION

The National Mining Association ("NMA") appreciates the opportunity to provide comments on the Securities and Exchange Commission's (the "SEC" or "Commission") Proposed Rule regarding Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or the "Dodd-Frank Act"). NMA is a trade association representing many of the world's largest mining companies. NMA membership includes more than 325 corporations involved in all aspects of the mining industry, many of whom operate internationally. NMA applauds the humanitarian goals of the Proposed Rule, and submits these comments with a view towards facilitating the creation of a regulatory structure that will be successful in achieving those goals. Indeed, NMA members operating internationally already have a keen understanding of the importance of positively impacting the communities and developing countries in which they have operations, and many have incorporated international human rights standards into their management infrastructure and work with outside organizations to further such efforts. The issues discussed in this Proposed Rule are of particular importance to NMA's members, as mining operations world-wide will be impacted in some capacity by the regulations. The views set forth herein represent those of the Association as a whole, and do not necessarily reflect the views of any individual NMA member.

II. ISSUERS INCLUDED IN THE PROPOSED RULE

Under Section 1502 of the Dodd-Frank Act, certain companies whose shares trade on a U.S. exchange and who file annual reports with the SEC must make disclosures relating to the source of named conflict minerals that are necessary to the functionality or production of products they "manufacture" or "contract to manufacture" (the "Conflict Minerals Provision"). The SEC proposed rules implementing the Conflict Minerals Provision in December 2010.[1] In the Proposed Rule, the SEC states that they "do not propose to define the term 'manufacture'…since we believe it is generally understood."[2] However, included in the Proposed Rule is an assertion that "[a] registrant that mines conflict minerals would be considered to be manufacturing those minerals for purposes of this item."[3]

Consequently, should the Proposed Rule be adopted by the SEC as written, any issuer that is a reporting company[4] and is engaged in mining activity would be required to disclose, in

[1] *See* SEC Release No. 34-63547 (Dec. 15, 2010) (the "Proposing Release," including the "Proposed Rule" at pp. 96 *et seq*).

[2] 75 Fed. Reg. at 80952. The Commission cites as an example the Second Edition of the Random House Webster's Dictionary, which defines the term "manufacturing" to include the "making goods or wares by hand or machinery, esp. on a large scale." Random House Webster's Dictionary 403 (2d ed. 1996).

[3] Proposing Release, *supra* note 1, at p. 100 *et seq* (Proposed Rule with Instructions to Item 104 of Regulation S-K).

[4] While the Conference Report (H.Rep. 111-517) does not define which type of "person" is covered by the Conflict Minerals Provisions, the Proposed Rule (see pp. 14-15) clarifies that these provisions would apply only to

its annual report filed with the SEC and on its Internet website, its determination of whether any conflict minerals it mines or processes, or contracts to mine or process, originate from the Democratic Republic of Congo ("DRC") or an adjoining country. The issuer would be required to make this determination based upon a "reasonable country of origin inquiry."[5] If the issuer determines the conflict minerals originate from such a country, or if they cannot determine such minerals do *not* originate from such a country, then, with respect to those minerals, the issuer also must furnish a "Conflict Minerals Report" as an exhibit to the annual report and post this report on its website. Such a report must disclose the due diligence undertaken by the issuer, including a mandatory private sector audit, to determine the chain of custody and the source of those conflict minerals. The Conflicts Minerals Report also must list any products that are not deemed "DRC conflict free."[6]

NMA strongly objects to the proposed inclusion of mining activities within the definition of manufacturing as contrary to the legislative intent and the four corners of the statute, as well as the plain meaning of the word "manufacturing." Unlike the approach taken in the Proposed Rule, the text of the Act shows that the Conflict Minerals Provision should apply only to persons who "source" named minerals and derivatives for use in manufactured products, not to companies that extract and produce the *minerals and derivatives themselves*. The statutory use of the term "derivative," we believe, is intended to also include processed minerals.

NMA firmly supports the humanitarian goals of Section 1502, and acknowledges that mining companies will play an important role in bringing to fruition the purposes of the Conflict Minerals Provision. However, that role should be one of aiding manufacturers in the establishment of a traceable supply chain for identified minerals by providing the necessary information regarding the original source of the covered minerals to downstream customers. The statute charges the manufacturing issuers using the minerals and derivatives in their products with the responsibility for tracking and reporting on the supply chain back to the original source. Mining issuers will be integral in providing this information to manufacturers, but should not be subject to the proposed reporting requirements.

Congress had good reason for adopting this approach in the statute, which should be preserved in the rulemaking. The statute placed the reporting burden squarely on manufacturers, as opposed to mining firms, because Congress clearly understood that manufacturers of products (other than minerals and derivatives) were the consumers who could be using minerals and derivatives that ultimately fueled conflict in the DRC region. Publicly-traded mining issuers, with their largely integrated supply chains, were never identified in the legislative process as a cause or contributor to the problem of armed conflict in the DRC region. Nor are they, in fact, such a cause or contributor. The Proposing Release also does not suggest this is the case. Thus the recognized goal of the rule – "deterring the financing of

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companies that file periodic reports under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act").

[5] Proposing Release (proposing 17 C.F.R. § 229(a)).

[6] *Id.* § 229(b).

armed groups in the DRC …" (Proposing Release, p. 84) – would not be served by the highly unusual step of treating our members as if they were manufacturers.

The Section 1502 disclosure requirements, as envisioned by Congress in the statute, are to be made by persons who *could* use conflict minerals in their manufacturing. With the integrated and/or secured supply chains that our members have, there is no question that *their* minerals are not conflict. Our members who are issuers engaged in the mining of minerals and derivatives covered by the statute sell their minerals and derivatives to processers, manufacturers, and commodity buyers mostly outside of the DRC region. The proceeds of those sales clearly accrue to the benefit of the issuer and its affiliates, who are not the "armed groups" that the statute targets. Mines at the base of informal, unsecured supply chains, on the other hand, are those that have the potential to be exploited, corrupted, or illegally controlled such that they may support human rights violations and armed groups. NMA's members and SEC reporting issuers do not operate such mines. Thus, again, no significant statutory purpose would be served by requiring mining issuers to engage in conflict minerals reporting. Moreover, requiring such reporting would impose a significant cost (burden), without a concomitant benefit to the statutory scheme. Because the Proposed Rule appears to misunderstand this fundamental point, we urge the SEC to reconsider its preliminary position.

The principal reasons why the final rule should distinguish mining companies from manufacturers are discussed below: (a) legislative history and statutory construction; (b) intertextual analysis of the Dodd-Frank Act; (c) U.S. government practice in distinguishing mining from manufacturing; and (d) the different role implicitly envisioned for mining firms by the statute.

a. <u>Legislative History and Statutory Construction Establish that Mining Issuers Are Not Required to Make Section 1502 Disclosures</u>

In late 2009, after a legislative proposal in Congress regarding conflict minerals had been introduced by Sen. Brownback and Sen. Feingold (S.891), Sen. Brownback introduced a similar proposal – S.A. 2707. Both of these earlier conflict minerals proposals explicitly applied not only to companies using covered minerals in their manufacturing processes, but also to persons engaged in "the commercial exploration, extraction, importation, exportation, or sale" of the covered minerals.[7] The final text of Section 1502, however, explicitly omits such reference to extraction-related activities.[8] Instead, the Conflict Minerals Provision refers solely to "manufacturing."[9] This omission evidences the intent of Congress to address the

[7] S.A. 891 § 5; S.A. 2707 § 604.

[8] On May 20, 2010, the U.S. Senate passed the financial reform bill, H.R. 4173, with Senate amendments including provisions on Congo Conflict Minerals (S.A. 3997) incorporated into its Title XV (the "Brownback Amendment"). H.R. 4173 as previously passed by the U.S. House of Representatives did not include a similar amendment. On June 25, 2010, the Conference Committee of members of the House and Senate voted to file a conference report. On June 29, 2010, the Congress released H.Rep. 111-517 (the "Conf. Rept."), which includes the core components of S.A. 3997, i.e., the Conflict Minerals Provision.

[9] The Brownback Amendment to the financial reform bill originally was introduced as S.A. 3791, on May 4, 2010. On May 5, 2010, S.A. 3791 was superseded by S.A. 3844, which added recitals and made a minor correction. On

manufacturing of goods which use or contain, as opposed to the extracting and processing of, the covered minerals.

The language adopted in the Conflict Minerals Provision likewise confirms that Section 1502 was not intended to apply to companies at the base of a supply chain. Section 13(p)(1)(A) of the statute requires the described manufacturers to include in their reports a description of the "measures taken… to exercise due diligence on the source and chain of custody of such minerals," as well as the "facilities used to process the conflict minerals…and the efforts to determine the mine or location of origin with the greatest possible specificity." This requirement that the persons described in Section 1502 conduct due diligence and report on their efforts to determine the mine or location of origin of and the facilities used to process conflict minerals strongly belies the notion that the mining companies themselves are the persons to whom Section 1502 was meant to apply. While such a requirement would be pertinent to persons, such as manufacturers of finished products and intermediaries, who are obtaining minerals and derivatives from third parties, it is not pertinent to the formal mining operation at the source of the supply chain. It is difficult to see how the legislative purpose would be served by adopting a rule that requires a mining issuer to conduct "due diligence" on the source of its own minerals, particularly in light of the fact that many mining companies have integrated supply chains. For such firms, there is no question regarding the origin of the minerals at the point of extraction or processing into concentrate or other more purified forms.

Similarly, the statute defines a "person described" as being one who manufactures a product for which "conflict minerals are necessary to the functionality or production of."[10] Where mining companies are concerned, the product *is* the defined mineral itself or its derivative. An additional "necessary to the product" inquiry would not be needed if Section 1502 had been intended to require disclosures from mining companies. In other words, the SEC's interpretation of manufacturers to include mining issuers in effect writes out the words "necessary to the functionality or production of the product" from the statutory text. Such an interpretation runs contrary to the plain language of Section 1502, and is impermissible under the rules of statutory construction. *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1348-49 (10th Cir. 1987) (citation omitted) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."); *see also Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The same problem arises with respect to ignoring the significance of the statutory term "derivative."[11] By treating mineral ore and processed minerals as "manufactured products," the Proposed Rule in effect concludes that these products are not "derivatives" of "minerals" (which the statute treats as inputs to

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May 12, 2010, S.A. 3844 was superseded by S.A. 3997, which included the term "manufactured" to the scope provision – indicating that producers are covered by the disclosure requirement only to the extent their product is "manufactured." The Conference Report adopted June 25, 2010, similarly elaborated the disclosure duty to clarify that disclosures must identify "products manufactured or contracted to be manufactured that are not DRC conflict free…" Conf Rept. § 1502(b) (adding Exchange Act § 13(p)(1)(A)(ii)).

[10] 13(p)(2)(B).

[11] 13(e)(4) – The term "conflict mineral" means –

(A) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives… (emphasis added).

manufactured products, rather than themselves manufactured products). Yet the Proposing Release and standard industry practice offers no basis for such an implicit assumption.

Furthermore, in the only floor statement identified on the Brownback Amendment, co-sponsor Sen. Durbin of Illinois stated that the purpose of S.A. 3997 was to "encourage[] companies using [covered] minerals to *source them* responsibly."[12] In an updated quote picked up by the press, Sen. Brownback elaborated that his amendment sought to "bring accountability and transparency to the supply chain of minerals used in the manufacturing of many electronic devices, without placing a disproportionate burden on publicly traded companies."[13] Sen. Brownback previously had indicated that similar proposals were focused on consumer electronic goods such as cell phones, PDAs, DVD players, computers, televisions, and advanced electronic goods with commercial and military applications, that were manufactured using conflict minerals.[14] Sen. Durbin also stated that the amendment was designed to address the fact that "the products we use every day – from automobiles to cell phones – may use one of these minerals from this area of conflict…"[15]

In a statement issued the day after the voice vote adopting the amendment in the Senate, one of its co-sponsors, Sen. Russ Feingold, added that the amendment was intended to address reports issued by a U.N. Group of Experts in support of U.N. S.C. Res. 1857 (2008), which called upon Member States to take measures "to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase."[16] Sen. Feingold also stated that S.A. 3997 built upon legislation previously introduced in 2009 by Senators Brownback, Durbin, and Feingold (S. 891), and that these earlier proposals had been modified based upon discussions with industry, government, and the Senate Banking Committee.[17] Sen. Feingold noted that S.A. 3997 applies to companies for which certain minerals constitute a "*necessary part* of the product they manufacture."[18]

The above-cited statements from legislators indicate that the legislation is intended to achieve its goal by requiring disclosure of the use of conflict minerals and their derivatives in manufactured products such as everyday consumer electronic goods. In modifying and

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[12] Cong. Rec. S3817 (May 17, 2010) (emphasis added).

[13] N.Y. Times (May 21, 2010). See also Nicholas D. Kristof, Death by Gadget, N.Y. Times (June 27, 2010) (discussing how the Brownback Amendment affects "[e]lectronics manufacturers" such as Intel, Motorola, and Apple).

[14] *See* Sen. Brownback Press Rel. (Apr. 24, 2009) (describing legislation as focusing on "electronic products" such as "cell phones, PDAs" and other "everyday devices"); Press Rep. (May 23, 2008) ("cell phones, computers, and DVD players"); Press Rel. (Feb. 15, 2008) ("cell phones, gaming devices, DVD players, computers, flat-screen televisions, and advanced weapons systems").

[15] Cong. Rec. S3817 (May 17, 2010).

[16] S/RES/1857 (2008) ¶ 15.

[17] *See* Cong. Rec. S3976 (May 19, 2010), reporting Press Release, Feingold Statement on Congo Conflict Minerals and Transparency Amendments to Financial Regulatory Reform Bill (May 19, 2010) (stating that Brownback Amendment was "taken from that bill," referring to S. 891 of 2009, "but includes modifications based on discussions with representatives from industry, U.S. government agencies, and the Banking Committee").

[18] *Id.* (emphasis added).

improving the legislation, Congress expressly omitted any reference to mining activities. Congress did not think it necessary to apply the Conflict Minerals Provision to mining issuers in order to accomplish the purpose, set forth in Section 1502(b) of the Conference Report, of minimizing the extent to which the "exploitation and trade of conflict minerals" helps to "finance conflict" in the Democratic Republic of the Congo. Such companies do not implicate the concerns that prompted the enactment of the statutory provision. As noted at the outset of this Section, there is no indication that publicly-traded mining issuers, often with integrated supply chains extracting minerals from their own mines, have somehow been involved in, or are at risk of, financing armed conflict in the DRC region.

Indeed, under the framework set out by the Brownback Amendment, it would not further the legislative goal of Section 1502 to subject an extractive company to the disclosure requirements. Rather, the legislation implicitly assigns a different role to extractive companies, as well as to companies involved in processing (whether integrated with the extractive company or independent of it) – that of cooperating with the efforts of buyers to conduct supply chain audits and to obtain certifications regarding the source and origin of minerals and their derivatives sold by the extractive company. These certifications, in turn, support the disclosures that are made by manufacturers. Accordingly, activities such as mere extraction and processing of conflict minerals should not trigger the disclosure requirements in the Conflict Minerals Provision.

The legislative history and adopted statutory language therefore clearly illustrate that Section 1502 was intended to apply only to issuers in industries that manufacture consumer goods which use the identified minerals and their derivatives. The reporting requirements of the Conflict Minerals Provision do not apply to extractive and mineral processing firms that mine and produce the actual named minerals and their derivatives themselves. Rather, the appropriate role of such issuers is one of disclosing and certifying to buyers and manufacturers the source and origin of the minerals and their derivatives as part of mineral supply chain audits.

b. <u>Explicit References to Mining in Sections 1503 and 1504 Further Support the Conclusion that Mining Issuers Are Not Required to Make Conflict Minerals Disclosures</u>

The language adopted by Congress in Sections 1503 and 1504 of the Dodd-Frank Act also supports the exclusion of mining companies from the scope of the Conflict Minerals Provision. Section 1503 of the Dodd-Frank Act, entitled "Reporting Requirements Regarding Coal or Other Mine Safety," requires disclosures to be made in the periodic reports of mining companies regarding certain violations of health or safety standards. The Section specifically provides that it applies to "each issuer that is required to file reports pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 *and that is an operator, or that has a subsidiary that is an operator, of a coal or other mine*…"[19] In other words, where Congress intended to address mining activities in a particular provision of the legislation, Congress made such intent clear by

[19] §1503(a) (emphasis added).

specifically naming mine operators. In contrast, the legislative history of the Conflict Minerals Provision shows that Congress specifically omitted any such reference to extraction-related activities in Section 1502.

Similarly, Section 1504 of the Act requires the disclosure of payments made to the United States or a foreign government by resource extraction issuers. Specifically, the Act states that "the Commission shall issue final rules that require *each resource extraction issuer* to include in an annual report…"[20] Furthermore, Section 1504 defines a resource extraction issuer as an issuer that engages in the commercial development of oil, natural gas, or minerals, and defines such development as including "exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity."[21] Not only does this Section of the Act reference minerals extraction as being specifically included within its scope, but it also defines commercial development to include "exploration, extraction, processing, export, and other significant actions relating to minerals" (emphasis added). Such language is quite similar to that contained in earlier versions of the conflict minerals provisions[22] which was intentionally excluded from the final version of Section 1502.

In comparison, the Commission, in explaining the scope of Section 1502, provides a much narrower view of what type of issuer is subject to the disclosure regulations by referring to "generally understood" *manufacturing* activities such as the "*making* of *goods or wares* by hand or machinery."[23] Consequently, other Sections in the Act prove that Congress purposefully made a distinction between extractive, or mining and mineral processing, operations and those processes "generally understood" to constitute the manufacturing of products containing minerals.

The Supreme Court has clearly and consistently held that "[a] familiar principle of statutory construction…is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (also citing, e.g., *Lindh* v. *Murphy,* 521 U. S. 320, 326 (1997) and *Russello* v. *United States,* 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ")).

c. Mining-Related Activities Are Not "Manufacturing" for Purposes of Section 1502

Although the SEC states that it is not defining the term "manufacturing" because it is generally understood, the Proposed Rule actually does define the term in a manner that is not consistent with the generally understood meaning – by including an explicit instruction that

[20] §1504(q)(2)(A) (emphasis added).
[21] §1504(q)(1)(A).
[22] *See* pg. 5 above, referring to S.891 and S.A. 2707.
[23] *See* Proposing Release, Fn. 1 *supra*, at footnote 52 (emphasis added).

mining issuers be treated as "manufacturers." The Proposed Rule adopts this approach in reliance on the following: (1) a sole comment from a non-governmental organization that argues that the term "manufacture" in the Conflict Minerals Provision should be analogized to a definition of that term in an entirely different context (controlled substances regulation which is part of a wholly separate statutory scheme that does not involve mining)[24] and (2) upon the definition of "reserve" in the SEC mining industry guide, which the Proposing Release even recognizes merely "implies" that mining companies "produce" minerals (at p. 64).[25]

Rather than take such an approach, NMA instead urges the Commission to clarify that the activities performed by the mining industry – namely extraction, beneficiation, and minerals processing – do not constitute manufacturing for purposes of Section 1502. The commonly accepted standards found in the U.S. Census Bureau's North American Industry Classification System (NAICS) clearly distinguish extractive and beneficiation activities from manufacturing activities. Furthermore, mineral processing operations are closely interconnected with extraction and beneficiation, and are integral to the development of commercial minerals and metals and their derivatives. Because the legislative history, statutory intent, and text of Section 1502 all indicate that activities associated with the production of conflict minerals themselves do not constitute the type of "manufacturing" described in the Conflict Minerals Provision, mineral processing activities should also be excluded from the reporting requirements.

1. Extraction and Beneficiation

NAICS standards are used by Federal statistical agencies to classify business establishments for the purposes of collecting, analyzing, and publishing data related to the U.S. business economy. More importantly, the U.S. Environmental Protection Agency (EPA) uses the NAICS definitions to administer programs that apply to mining and mineral processing operations. Under the NAICS definitions, all mining, milling, and beneficiation activities, as well as the production of concentrates, are classified as mining as opposed to manufacturing activities. Mining activities, including the mining of the identified minerals, are included under NAICS definition #21. Manufacturing is addressed under NAICS definitions #31-33.

Under section #21, the NAICS states in part:

> "The Mining, Quarrying, and Oil and Gas Extraction sector comprises establishments that extract naturally occurring mineral solids, such as coal and ores; liquid minerals, such as crude petroleum; and gases, such as natural gas. *The term mining is used in the broad sense to include quarrying, well operations, beneficiating (e.g., crushing, screening, washing, and flotation), and other preparation customarily performed at the mine site, or as a part of mining activity… While some minerals, such as petroleum and*

[24] 21 U.S.C.A. 802 (15), the United States Controlled Substances Act, which defines the term "manufacture" as the production, preparation, propagation, compounding or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin (emphasis added).

[25] *See* Mining Industry Guide 7 § (a)(1), available at http://www.sec.gov/about/forms/industryguides.pdf.

natural gas, require little or no preparation, others are washed and screened, while yet others, such as gold and silver, can be transformed into bullion before leaving the mine site…" (emphasis added)

The following is further included under section 21222 of the NAICS pertaining to gold and silver ore mining:

> "This industry comprises establishments primarily engaged in developing the mine site, mining, and/or beneficiating (i.e., preparing) ores valued chiefly for their gold and/or silver content. Establishments primarily engaged in the transformation of the gold and silver into bullion or dore bar in combination with mining activities are included in this industry."

In addition, the NACIS classification system clearly distinguishes other types of ore mining operations such as copper, nickel, silver, or zinc (which are not statutory conflict minerals), even when they may contain gold as a byproduct. The mining classification of the NAICS pertaining to copper, nickel, lead, and zinc mining, section 21223, includes:

> "This industry comprises establishments primarily engaged in developing the mine site, mining, and/or beneficiating (i.e., preparing) ores valued chiefly for their copper, nickel, lead, or zinc content. Beneficiating includes the transformation of ores into concentrates."

Under the manufacturing section (#31-33), on the other hand, the NAICS indicates that:

> "The Manufacturing sector comprises establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products… Establishments in the Manufacturing sector are often described as plants, factories, or mills and characteristically use power-driven machines and materials-handling equipment…The materials, substances, or components transformed by manufacturing establishments are raw materials that are products of agriculture, forestry, fishing, mining, or quarrying as well as products of other manufacturing establishments…" (emphasis added)

A clear distinction is made in the NAICS, therefore, between the extraction and preparation of raw materials and their derivatives, and the production of new goods from those raw materials and derivatives. NMA believes that the Commission should follow the general tenor of the definitions in the NAICS, presented above, particularly in light of the fact that the NAICS is used to classify operations under programs that apply to hardrock mining which are administered by federal U.S. agencies.

Not only is such an approach consistent with the statutory text and legislative history of Section 1502 as previously explained, it is also necessary to reduce duplicative submissions from multiple companies along a supply chain, as product manufacturers will already be including origin and chain of custody information in their reports (on the basis of the

certification or similar information provided by suppliers in the mining industry). The draft SEC rules should therefore be revised to indicate that extraction and beneficiation activities, including those related to the production of doré,[26] gold concentrate, or other concentrates (such as copper, nickel, zinc, or lead) containing gold, do not constitute product manufacturing or contracting to manufacture. The SEC rules should clearly exclude issuers engaged in extraction and beneficiation from direct reporting, and by-products derived from extraction and beneficiation including certain sludges, slimes, flue dust, carbon fines, and slag should also be considered outside the scope of the Conflict Minerals Provision.

2. Mineral Processing

While it may seem counterintuitive, there are a limited number of additional mineral processing activities included in the "manufacturing" section of the NAICS standards that should be excluded from the scope of "manufacturing" for purposes of the Conflict Minerals Provision. Exclusion of these activities is appropriate given the purposes of these processes, as well as the congressional intent of the provision. These mineral processing activities such as smelting and refining are necessary to facilitate maximum mineral recovery, and at times include the physical or chemical transformation of such materials. However, these types of manufacturing activities are uniquely associated with the mining industry and are necessary to the ultimate production of the named minerals and derivatives themselves, and, therefore, are not being manufactured for the purposes of the Conflict Minerals Provision.

The processes that fall within this category include the NAICS manufacturing classifications for "nonferrous metal (except aluminum) production and processing,"[27] "nonferrous metal (except aluminum) smelting and refining,"[28] "primary smelting and refining of copper,"[29] and "primary smelting and refining of nonferrous metal (except copper and aluminum)."[30] We believe it is appropriate to exclude these from the reporting requirements of Section 1502 in all instances, but at a minimum they must be excluded where those processes are for the primary production of metals other than those listed as "conflict minerals."

NMA is pleased that the Proposed Rule appears to acknowledge that exclusion of the primary metal is appropriate where a "conflict mineral" is produced as a byproduct of the primary production, as is the case with smelting and refining processes for base metals such as copper and other ores and concentrates that produce byproducts which may contain small amounts of gold. The Proposing Release, at p. 24, explicitly states that the Proposed Rule would only cover a mineral that is "intentionally included in a product's production process" (*see also* our answer to question 21 below). Therefore, in our example here, gold would not be necessary to the functionality or production of the primary metals being processed. This

[26] Dore is a gold-silver mixture sent by the mines for further refining and separation into gold and silver.
[27] NAICS Code 3314.
[28] NAICS Code 33141.
[29] NAICS Code 331411.
[30] NAICS Code 331419.

approach avoids effectively labeling all such primary ores and concentrates as conflict minerals - a nonsensical result not intended by Congress.

The legislative history of Section 1502 also clearly illustrates that the reporting requirements in the Conflict Minerals Provision are not intended to address the extraction and production of identified minerals, but rather to "bring accountability and transparency to the supply chain of minerals used in the manufacturing of many electronic devices"[31] so as to minimize the exploitation of conflict minerals for use in the financing of conflict in the DRC. Therefore, processes that are aimed at extracting larger amounts of secondary minerals such as gold from ores and other materials do not constitute "manufacturing" or "contracting to manufacture" products for which conflict minerals are "necessary to the functionality of." While these additional smelting and refining processes follow extraction and beneficiation, they still result in the same end – the production of minerals and their derivatives themselves. In such mineral production, materials may be transferred between beneficiation and processing operations to maximize "target" mineral recovery, which illustrates their interconnected nature as part of an integrated and/or secured process for production of commercial metals and minerals.

In other words, these processes are qualitatively different from those contemplated by the Conflict Minerals Provision. Accordingly, the SEC should exclude members of the primary metals and minerals industry from the reporting requirements contained in Section 1502, and should include within that industry exclusion those issuers engaged in the extraction, beneficiation, and processing of ores and minerals.

As previously indicated, the statutory language adopted also strongly suggests that Section 1502 is intended to facilitate the tracking of the *use* of the listed minerals and their derivatives in the creation of everyday consumer products such as cell phones. The minerals and derivatives themselves are not the "manufactured" products contemplated by the statute – they already exist, even where they require additional processing to be successfully recovered. To conclude otherwise would be to blatantly ignore the statutory language regarding "necessary to the functionality of the product," as well as the requirement that reports include a description of the efforts taken to determine the mine or location of origin and the facilities used to process the conflict minerals.

Furthermore, the SEC's cost-benefit analysis contained in the Proposed Rule appears to support the argument that an expansive view of the term manufacturing is inappropriate. Specifically, the SEC found that there will be a considerable burden placed on those required to file reports under Section 1502. Logic dictates therefore that the SEC would not intend to require duplicative reporting by multiple entities along a supply chain. Mine and mineral processing information will already be disclosed in the reports of manufacturing companies, and therefore mining issuers should be excluded from Section 1502 to avoid duplicative and costly reporting.

[31] *See* fn. 13.

For the aforementioned reasons, therefore, mining issuers who engage in extraction, beneficiation, and mineral processing activities do not constitute persons manufacturing a product for which conflict minerals are necessary to the functionality of, and should thus not be subject to the disclosure requirements of the Conflict Minerals Provision.

d. <u>The Proper Role of Mining Issuers Is that of Facilitating Efforts to Secure Supply Chains</u>

As previously mentioned, NMA is very supportive of the important humanitarian aims of the Conflict Minerals Provision. Mining issuers will play a vital role in achieving those aims by helping manufacturers establish traceable supply chains for the identified minerals by providing mineral source information to downstream purchasers. Because the statute imposes on manufacturing issuers using the named minerals and derivatives in their products the responsibility for tracking and reporting on the supply chains back to the original source (i.e., "determining the mine or location of origin" as discussed above on page 6), to avoid duplicative and burdensome requirements and to comply with the intent and text of the statute, reporting should be thus limited to those issuers that manufacture or contract to manufacture products using or containing gold, tin, tantalum, or tungsten. Reporting should not be required of the members of the primary metals and minerals industry who produce the named minerals and derivatives themselves. To require otherwise would be contrary to the text of the Dodd-Frank Act, would not make sense within the context of the Proposed Rule, and would not advance the aims of the Conflict Minerals Provision.

III. PRESUMPTION OF CONFLICT

Section 1502 provides that "It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of [this Section]."[32] According to the Act, "a product may be labeled as 'DRC conflict free' if the product does not contain conflict minerals that *directly or indirectly finance or benefit armed groups* in the Democratic Republic of the Congo or an adjoining country."[33] In the only floor statement identified on the Brownback Amendment to Section 1502, co-sponsor Sen. Durbin of Illinois stated that the purpose of S.A. 3997 was to "encourage[] companies using [covered] minerals to source them responsibly."[34] Sen. Durbin also stated that the amendment was designed to address the fact that "the products we use every day – from automobiles to cell phones – may use one of these minerals from this area of conflict…"[35] The proposed regulatory scheme, however, does not properly take into consideration the issue at the very heart of the Conflict Minerals Provision –

[32] 13(a).
[33] 13(p)(1)(D) (emphasis added).
[34] Cong. Rec. S3817 (May 17, 2010) (emphasis added).
[35] Cong. Rec. S3817 (May 17, 2010).

determining whether minerals used in consumer goods helped to finance or benefit armed groups in designated conflict areas.

a. Disclosure Requirements Inadequately Address Whether Minerals Finance or Benefit Armed Groups

Both the statutory language as well as the legislative history of Section 1502 underscore the fact that the Conflict Minerals Provision is intended to discourage the use of those minerals from the DRC and adjoining countries which directly or indirectly finance or provide benefit to armed groups. However, the due diligence requirements concerning supply chain determinations included in the Proposed Rule focus primarily on facilities and countries of origin. The inquiry central to the purpose of Section 1502 – whether the minerals used in manufactured products directly or indirectly financed or benefited armed groups – is ignored. The Proposed Rule therefore creates a presumption that, after the source of origin of a mineral is determined, the question of whether it actually benefited armed groups is at best unimportant, at worst irrelevant. In other words, the Proposed Rule creates a seemingly non-rebuttable presumption that all listed minerals and derivatives from designated conflict areas are, in fact, financing violence. Such a presumption could likely unintentionally damage the reputation and economic viability of legitimate business enterprises operating in the designated areas, and could have a devastating impact on the economies of the named countries.

A clear distinction must be created between those minerals originating from "benevolent" sources located within the designated conflict areas, and those originating within the designated conflict areas that indirectly or directly benefit armed groups. Such a distinction is necessary to avoid the potential negative ramifications of creating a non-rebuttable presumption of conflict funding. NMA endorses the creation by the SEC, in conjunction with the U.S. State Department, Commerce Department, and any other relevant international agencies, of a list of accredited sources and entities along the supply chains of the designated minerals within the identified conflict regions. This approach is consistent with the text of Section 1502, which specifically calls on the Secretary of State to develop "a plan to provide guidance to commercial entities seeking to…formalize the origin…of conflict minerals…[and] to ensure that conflict minerals used in the products of…suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations."[36] If this distinction is not made, and the final rule has the effect of stigmatizing legitimate sources of minerals and derivatives, then those sources will be driven out of the market. The resulting vacuum likely would only be filled by armed groups. As a result, the regulation could foster the very problem it is seeking to deter.

Additionally, in acknowledgement of the complicated realities on the ground in and around the DRC, the Commission should also ensure that proper measures are taken so that the rule does not negatively impact international mining companies and the communities in the DRC and surrounding countries whose only form of revenue and income generation is mining.

[36] 13(c)(1)(A).

The Commission must be responsible for ensuring that adequate developmental work is focused on the DRC and surrounding countries so that benevolent large-scale and artisanal mining is not presumed to be financing armed groups. The income and employment generated by mining in these areas is essential to the local communities, and formalizing small-scale mining operations to allow them to participate in supply chain audits is essential for the success of the Conflict Minerals Provision.

Furthermore, the Proposed Rule does not provide a definition for the phrase "directly or indirectly finance or benefit armed groups," nor has the Commission provided any guidance as to how this phrase could be interpreted. The *OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas,* finalized in December 2010, provides relevant guidance on a similar term - *"direct or indirect support to non-state armed groups through the extraction, transport, trade, handling or export of minerals."* In Annex II, the *"Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas,"* provides:

'Direct or indirect support' to non-state armed groups through the extraction, transport, trade, handling or export of minerals includes, but is not limited to, procuring minerals from, making payments to or otherwise providing logistical assistance or equipment to, non-state armed groups or their affiliates who:

> *i. illegally control mine sites or otherwise control transportation routes, points where minerals are traded and upstream actors in the supply chain; and/or*
> *ii. illegally tax or extort money or minerals at points of access to mine sites, along transportation routes or at points where minerals are traded; and/or*
> *iii. illegally tax or extort intermediaries, export companies or international traders.*

The SEC should provide a definition or further guidance on the meaning of the phrase *"directly or indirectly finance or benefit armed groups…"* Important necessary components, as expressed in the OECD definition, include the illegal control of mine sites and transportation routes by armed groups, and illegal taxation or extortion. These components are also expressed in the definition of the phrase "under the control of armed groups" provided in the text of Section 1502.[37]

[37] Section 1502(e)(5): The term "under the control of armed groups" means areas within the Democratic Republic of the Congo or adjoining countries in which armed groups –

(A) physically control mines or force labor of civilians to mine, transport, or sell conflict minerals;
(B) tax, extort, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export from the Democratic Republic of the Congo or an adjoining country; or
(C) tax, extort, or control trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country.

Further clarification should also be included differentiating groups that are part of a legitimate government or military, and those that are linked to illegal armed conflict. Similarly, legal payments to government or military groups for security or other purposes need to be clearly distinguished from the type of illegal payments contemplated by the statute.

b. Minerals Not Originating In Designated Conflict Areas Should Be Exempt from Disclosure Requirements

The broad language used in the Proposed Rule also creates a presumption that any named minerals are conflict unless investigated and proven otherwise. While the Dodd-Frank Act is clearly designed to address minerals originating in those areas identified as "conflict" and mapped as such by the U.S. State Department, the exceedingly broad regulations proposed by the SEC trigger disclosure requirements for minerals not originating in designated conflict areas. The geographic area addressed in the legislation is specific with respect the DRC and adjoining countries, and the regulations need to be revised to align with the conflict mapping performed by the State Department so as to be consistent with the text of the statute. The Commission should therefore adopt a reporting approach that limits unnecessary reputational harm to the identified minerals and reporting companies by requiring disclosure only with respect to those minerals that actually come from an area identified in the conflict mapping performed by the State Department under § 1502.

V. RESPONSES TO DIRECTED QUESTIONS

1. Should our reporting standards, as proposed, apply to all conflict minerals equally?

Please see Section III above.

Furthermore, in acknowledgement of the fact that less than 3% of the world gold supply originates in the DRC and adjoining countries, it is particularly important for the Commission to structure its regulations so as to limit the type of gold that is subject to the pejorative connotation of the statutory term "conflict mineral." Given the small likelihood that a particular shipment of gold originated from a conflict area, rather than using terms that confuse investors and the public into thinking that all gold finances or potentially could finance armed groups in the DRC region, the final rule should make it clear that gold originating from outside the conflict areas in the DRC region is presumed to be "DRC conflict free." That is, the final rule should only apply the "conflict" presumption to gold that actually is found to originate from a conflict area after either a reasonable country of origin inquiry or a reasonable due diligence and chain of custody process is undertaken. Such an approach would permit application of the regulatory reporting requirements to gold from actual conflict areas of the DRC and adjoining countries, but would not unfairly stigmatize or blemish the reputation of gold generally. This approach would be consistent with the statute, which does not expressly state that minerals that originate from outside the DRC region are "conflict minerals." The legislative history also

indicates that Congress was intensively focused on minerals sourced from the DRC region and their support of armed conflict there, such that there is no basis in the statute or the legislative history to apply stigmatizing labels to minerals that do not originate from the conflict areas in the DRC region.

Thus the final rule needs to take further steps to avoid confusing and misleading use of the label "conflict mineral." A true "conflict mineral" is one that actually supports armed groups. A mineral or derivative mined by a publicly-traded mining issuer from a mine in the DRC region is not, merely by virtue of its geographic source, a true "conflict mineral." By using the term "conflict mineral" too broadly, however, the Proposed Rule invites considerable confusion on this score. To avoid such confusion and to prevent the Conflict Minerals Provision from misleading investors, the final rule should allow mining issuers to use the "DRC conflict free" label for their products simply on the basis of securing their supply chain. That is, there should be a presumption that an integrated supply chain, traceable to a mine located outside a designated conflict area or identified as a secure/benevolent source within a designated conflict area, does not support armed conflict. To support such a presumption, manufacturers could obtain and/or issue a certification confirming that their supply chain is secure.

In taking this approach, the final rule should incorporate relevant information from the strategy that is to be developed by the Secretary of State regarding linkages between human rights abuses, armed groups, the mining of conflict minerals, and the manufacturing of commercial products under Section 1502, as well as the map identifying mineral-rich zones, trade routes, and areas under the control of armed groups in the DRC and adjoining countries. This would allow the term "conflict mineral" to apply only to those minerals which have been analyzed under the legislation to directly or indirectly finance or benefit armed groups in the designated areas, in accordance with the legislative intent.

In the alternative, should the SEC not adopt the approach mentioned above, certain provisions need to be included in the final rule to protect confidential information with respect to gold shipments. Due to the intrinsic value of gold, certain information regarding its location and movement has the potential to pose a security threat that could jeopardize the safety, health, and welfare of staff from the mines to the refineries and beyond. Protection mechanisms should also be established where certain price and cost information is needed during the voluntary reporting process. Specific suggestions regarding the redaction or additional protection of sensitive information are provided in the following responses to directed questions, and NMA encourages the inclusion of such suggestions in any final rule implementing Section 1502.

6. *Should we require that all individuals and entities, regardless of whether they are reporting issuers, private companies, or individuals who manufacture products for which conflict minerals are necessary to the functionality or production of the products, provide the conflict minerals disclosure and, if necessary, a Conflict Minerals Report? If so, how would we oversee such a broad reporting system?*

As explained in Section II above, reporting should only be required of those issuers that manufacture or contract to manufacture products containing the named minerals and their derivatives from a defined conflict area in the DRC or an adjoining country. Expanding the reporting requirements to also include extractors or processors of the named minerals is contrary to the intent and language of the Act. Furthermore, the SEC's cost-benefit analysis did not contemplate such an expansion. The SEC should clearly limit the role of mining companies with respect to Section 1502 to one of providing the necessary information to manufacturers to trace and secure supply chains of the named minerals.

7. *Would requiring compliance with our proposed rules only by issuers filing reports under the Exchange Act unfairly burden those issuers and place them at a significant competitive disadvantage compared to companies that do not file reports with us? If so, how can we lessen the impact.*

Based on the Commission's own cost-benefit analysis, there will be a considerable burden placed on those required to file reports as opposed to those who do not have to file. As such, it is imperative that the final rule and the implementation of the regulations do not require duplicative reporting by multiple entities along the same supply chain, and do not require reporting by issuers not using a named mineral or its derivatives from a defined conflict area of the DRC or an adjoining country. As noted above in Section II, it would be duplicative for mining companies to file their own Conflict Minerals Reports when such information will already be included in the reports of manufacturers, and mining issuers are not manufacturers for purposes of Section 1502.

Should mining issuers be included within the scope of Section 1502, while NMA does not take a specific position on whether the SEC should interpret the Conflict Minerals Provision to encompass a wide swath of persons not typically subject to SEC jurisdiction, NMA does recommend that an issuer subject to the reporting requirements be permitted to submit disclosures on a group or regional basis rather than providing reports for individual sites that are part of a larger operation. This approach would help lessen the burden on those issuers subject to the proposed regulations without running afoul of the legislative intent. Indeed, the Proposed Rule does not require that the Conflict Minerals Report include data broken out by mine (except for minerals that are not designated as "DRC conflict free"). *See also* answer to question 39 below.

9. *Should we define the term "manufacture?" If so, how should we define the term?*

As explained in detail in Section II, the term "manufacture" should be defined for purposes of Section 1502 as including those companies that produce consumer goods using or containing conflict minerals or their derivatives. For all of the aforementioned reasons, such a definition should explicitly exclude mining companies engaged in the extraction, beneficiation, or processing of the named minerals themselves. To do otherwise would be contrary to the legislative history and statutory text of Section 1502.

11. *Should we require a minimum level of influence, involvement, or control over the manufacturing process before an issuer must comply with our proposed rules? If so, how should we articulate the minimum amount? Should we require issuers to have nominal, minimal, substantial, total, or another level of control over the manufacturing process before those issuers become subject to our rules? How would those amounts be measured? Should we require that issuers must, at minimum, mandate that the product be manufactured according to particular specifications?*

While NMA strongly encourages the SEC to adopt the approach explained in Section II and elsewhere, should the Commission decide to include mining issuers within the scope of Section 1502, the final rule should specifically allow for mining issuers to rely on reasonable representations at non-managed sites, and a significant level of control should be included within the criteria for "contracting to manufacture." Otherwise, an issuer would be required to ensure a contracting party does supply chain due diligence, even though there is doubt as to whether the issuer has sufficient control to compel such diligence.

13. *Is it appropriate for our rules, as proposed, to consider reporting issuers that are mining companies as "persons described" under Section 1502? Does the extraction of conflict minerals from a mine constitute "manufacturing" or "contracting to manufacture" a "product" such that mining issuers should be subject to our rules.*

As described in Section II and elsewhere, the extraction, beneficiation, and processing of gold, tin, tantalum, tungsten, or any other mineral or substance from a mine does not constitute "manufacturing" or "contracting to manufacture" a "product" for which "conflict minerals are necessary to the functionality or production of." As such, mining issuers should not be subject to reporting under the proposed SEC rules. This approach is consistent with the legislative history and statutory language of Section 1502 and the plain meaning of the term "manufacturing."

14. *Alternatively, should a mining issuer not be viewed as manufacturing a product under our rules unless it engages in additional processes to refine and concentrate the extracted minerals into salable commodities or otherwise changes the basic composition of the extracted minerals?*

As explained in Section II, the legislative history and U.S. government practice clearly supports the conclusion that companies engaged in mining and mineral processing (extraction, beneficiation, concentrating, smelting, or refining) were not intended to be included as manufacturing persons for purposes of the Conflict Minerals Provision. Therefore, mining issuers, including those engaged in processing activities, should not be subject to reporting under the final rule.

15. *If so, what transformative processes, if any, should mining issuers be permitted to perform on conflict minerals before our proposed rules should consider them to be manufacturing products to which conflict minerals are necessary?*

Mining, beneficiating (e.g., crushing, screening, washing, flotation, etc.), transformation into bullion or dore bar, and the production of concentrates from other types of ore bodies (e.g., copper, zinc, nickel, and lead) containing gold should all be considered transformative processes that do not qualify as manufacturing. As described above, this approach is consistent with the NAICS definitions of mining and beneficiation. Furthermore, additional processing integral to the mining of the material should not be considered manufacturing for the reasons explained above in Section II (c).

16-21. *"Necessary to the functionality or production of a product" comments.*

Please see Section II above. Furthermore, when a named mineral or derivative is produced as a by-product of the primary mining of other minerals or derivatives, the classification of the primary mineral should not be affected. For example, nothing in these sections should be construed to require a mining issuer to file a Conflict Minerals Report merely because gold is a byproduct from mining and processing other ores such as copper, nickel, zinc, or others. Gold and copper naturally occur together in some deposits, with neither being intentionally added. *See also* Proposing Release at p. 24 (suggesting the SEC intends the rule to focus on products that intentionally include covered minerals and derivatives). The gold, therefore, is a by-product that is not necessary to the functionality of the copper concentrate and vice versa. Other primary metals such as copper are not designated by the statute as "conflict minerals" because Congress did not associate them with the risk of supplying armed groups in the DRC region. Thus it should be clarified that gold content in copper or other concentrates is not included within the scope of the rule so as to not exceed the statutory authority granted under Section 1502. This clarification will not undermine the statute, as manufacturers who use gold that was produced as a byproduct by a copper mining issuer still would be subject to 1502 reporting. Thus the consumers and investors would still be informed as to whether such gold was supporting armed groups in the DRC region.

22-25. *Required information comments.*

NMA agrees with the SEC's approach to allow disclosures under Section 1502 to be furnished rather than filed with the SEC. As an extension of this, the Commission should not require the contents of Conflict Minerals Reports or any related disclosure to be included in an issuer's annual report. Instead, issuers should be permitted to include the disclosures in a separate form to be furnished annually on EDGAR rather than as part of the annual report on Form 10-K, 20-F or 40-F, or at their option include a brief disclosure in the body of the existing annual report. The Commission also should clarify that the representation as to whether listed minerals originate from the DRC region – currently proposed to be included in the body of the annual report – is still furnished and not filed.

Foreign private issuers should be entitled to furnish their Conflict Minerals Reports and related disclosure on Form 6-K, domestic issuers on Form 8-K. The type of disclosure required pursuant to Section 1502, particularly the disclosure contained in the Conflict Minerals Report and audit report, does not belong alongside the information typically contained in an annual

report. This point is particularly important to foreign private issuers due to the fact that they often use one report to meet the obligations of the disclosure regimes of multiple countries. They should therefore be permitted to keep conflict minerals disclosures on a separate form. Such an approach is consistent with the SEC's view expressed in the Proposing Release that the conflicts minerals disclosure is "qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act."[38]

Keeping this type of information in a separate submission on EDGAR would also help prevent any confusion with respect to whether information is incorporated by reference into registration statements. Subject to very few exceptions, all information in annual reports submitted to the SEC is deemed to be filed, not furnished, and is automatically incorporated by reference into other filings if the annual report as a whole is incorporated by reference. Investors typically assume that all information in an annual report is incorporated by reference into an issuer's registration statement. The SEC should not adopt a departure from this principle without first having considered such departure in light of the potential consequences for the broader SEC disclosure regime, including those outside of the context of the specific requirements of Section 1502.

Furthermore, provisions regarding the protection and redaction of confidential business information should be included in the final rule. As noted above in the response to Question #1, Conflict Minerals Reports have the potential to expose sensitive information regarding transportation routes, storage locations, transfer stations, and other shipping details for valuable commodities such as gold, which could jeopardize the security, health, and safety of staff involved. Protective measures should therefore be included in the SEC's regulatory scheme implementing Section 1502.

26. *Should issuers with necessary conflict minerals that did not originate in the DRC countries be required to disclose any information other than as proposed? For example, should we require such an issuer to disclose the countries from which its conflict minerals originated?*

Companies required to report under the new rules should not have to identify the source countries for identified minerals outside the DRC or adjoining countries. Such a requirement would go well beyond the scope of the Act, and would have the potential to cause confusion to investors. Furthermore, the cost-benefit analysis in the Proposed Rule did not expressly evaluate the implications of the inclusion of such a requirement.

27. *Should we, as proposed, require issuers to describe the reasonable country of origin inquiry they used in making their determination that their conflict minerals did not originate in the DRC countries? Is a separately captioned section in the body of the annual report the appropriate place for this disclosure?*

[38] Proposing Release at footnote 128.

If an issuer has concluded based on a "reasonable country of origin inquiry" that its relevant minerals did not originate from the DRC region, the company should not be required to disclose additional information to the SEC. However, if additional information is required, a brief description of the "reasonable country of origin inquiry" should be permitted to be furnished in a separate form with the SEC, rather than filed in the annual report. If a company wishes to include such information in its disclosures, it could do so in a separately captioned section pertaining to conflict minerals so as to ease investor understanding.

28. *Should we require, as proposed, that an issuer maintain reviewable business records if it determines that its conflict minerals did not originate in the DRC countries? Are there other means of verifying an issuer's determination that its minerals did not originate in the DRC countries? Should we specify for how long issuers would be required to maintain these records? For example, should we require issuers to maintain records for one year, five years, 10 years, or another period of time?*

A one year record retention period for information pertaining to the "reasonable country of origin inquiry" is appropriate. The SEC could also include a provision in the rules allowing for an extension of this time period in the event of a formal inquiry or investigation.

29. *Should we require the disclosure in an issuer's annual report to be provided in an interactive data format?*

NMA does not believe disclosure should be required in the annual report. In respect to any required disclosure, an interactive data format should not be required, but should be permitted at the discretion of each reporting company. As stated in Section II and elsewhere, however, mining companies should not be required to report under Section 1502.

30. *Should we require issuers to briefly disclose in the body of their annual reports the contents of the Conflict Minerals Report? If so, how much of the information in the Conflict Minerals Report should we require issuers to disclose?*

NMA's view is that conflict minerals disclosure, including Conflicts Minerals Reports, should not be required to be included in annual reports but instead be permitted to be included in a separate form to be furnished annually on EDGAR. If it is determined that some information should be required to be included in an annual report, it should be no more than a declaration, where appropriate, that a company has concluded based on its "reasonable country of origin inquiry" that the relevant minerals did not originate from the DRC region as defined under Section 1502.

31. *Should we require an issuer to post its audit report on its Internet website, as proposed?*

The certified audit report should not be required to be posted on the Internet website or elsewhere. Rather, an issuer should only publish a certification statement by the auditor on a website and furnish it to the SEC. The certification statement could identify the name and location of the company and a summary of the approach used, information reviewed, and the

findings. The certified audit report could then be available for inspection by the SEC during normal business hours, and retained for a period of one year.

Should the certified audit report have to be publically disclosed, provisions for protecting and redacting confidential business information must be expressly provided in the rules. As noted in response to Question #1, certified audit reports have the potential to expose sensitive information, and as such should be afforded confidentiality protections.

32. *Should we require, as proposed, that an issuer post its Conflict Minerals Report and its audit report on its Internet website at least until it files its subsequent annual report? If not, how long should an issuer keep this information posted on its Internet website?*

Provided that the SEC requires information to be posted on a company's website, a summary of the Conflict Minerals Report or the full report with confidential business information redacted or removed would be the most appropriate information for such posting. An issuer should not have to post a certified audit report on the company website.

33-34. *Reasonable country of origin inquiry comments.*

A "reasonable country of origin inquiry" is an appropriate standard where the requirement for a Conflict Minerals Report is not triggered. No additional guidance is needed beyond the language contained in the Proposed Rule and Act. According to the Proposed Rule, a "reasonable country of origin inquiry could be less exhaustive than the due diligence [process]."[39] Section 1502(p)(1)(E) of the Act requires "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such [conflict] minerals…" The Paperwork Reduction Act section of the Proposed Rule indicates that the reasonable country of origin inquiry may vary among companies, but would generally have to be a relatively thorough investigation to meet this standard. Such guidance allows for an appropriate level of flexibility, and no additional guidance is needed. Existing business auditing protocols such as ISO 19011 and International Council on Metals and Minerals (ICMM's) third party assurance procedures could be included as examples of what type of inquiry or due diligence would be acceptable.

35. *Should issuers be able to rely on reasonably reliable representations from their processing facilities, either directly or indirectly through their suppliers, to satisfy the reasonable country of origin inquiry standard? If so, should we provide additional guidance regarding what would constitute reasonably reliable representations and what type of guidance should we provide? If not, what would be a more appropriate requirement?*

Issuers should be permitted to rely on "reasonably reliable representations" from processing facilities or other suppliers to satisfy the "reasonable country of origin inquiry" provided that appropriate supporting information and documentation is made available from the associated investigation. Furthermore, because manufacturers already will be relying on

[39] 75 Fed. Reg. at 80957.

such representations from mining firms in developing *their* disclosures, there is no need to require duplicative reporting by mining firms.

36. *Should any qualifying or explanatory language be allowed in addition to or instead of the reasonable country of origin inquiry standard, as proposed, regarding whether issuers' conflict minerals originated in the DRC countries?*

The inclusion of qualifying or explanatory statements such as "to the best of their knowledge" or "they are not aware" in the "reasonable country of origin inquiry" should be permitted, so long as the appropriate supporting information and documentation is available from the associated investigation.

37. *Should our rules, as proposed, require issuers that are unable to determine the origin of their conflict minerals to label their products that contain such minerals as not "DRC conflict free?"*

As stated in Section III above, NMA endorses an overall approach to Section 1502 that would allow for greater certainty among supply chains and greater specificity regarding the labeling of minerals as "DRC conflict free." Such an approach would alleviate the need for additional classifications such as "not DRC conflict free."

38. *Should our rules, as proposed, permit issuers to describe their products that contain conflict minerals that do not qualify as being DRC conflict free or that may not qualify as being DRC conflict free based on their individual facts and circumstances?*

Issuers should be allowed the flexibility to use individual facts and circumstances to describe products containing minerals that do not qualify as DRC conflict free, as opposed to more complicated or elaborate systems that would increase expenditures and could result in the reporting of an overwhelming amount of information.

39. *Should our rules, as proposed, require issuers to disclose the facilities, countries of origin, and efforts to find the mine or location of origin only for its conflict minerals that do not qualify as DRC conflict free, and not for all of its conflict minerals?*

Disclosure of information relating to facilities, countries of origin, and mine or location of origin should only be required for those minerals that do not qualify as DRC conflict free, and should be performed in such a manner so as to protect the safety, health, and welfare of all workers involved. This approach is consistent with the general tenor of the Proposed Rule as well as the legislative intent of the Dodd-Frank Act. Any alternative approach would be unduly burdensome.

40. *Should our rules require issuers to disclose the mine or location of origin of their conflict minerals with the greatest possible specificity in addition to requiring issuers, as proposed, to describe the efforts to determine the mine or location of origin with the greatest possible specificity?*

Disclosure of the mine or location of origin for minerals that are not DRC conflict free should be referenced according to the approximate geographic location within a country, province, or district. This information should serve as the definition of the location with the "greatest possible specificity," rather than the actual coordinates of the mine, or location of origin, or any other information that may not be as meaningful to investors. The disclosure of exact coordinates or similar information may also pose a security threat in the case of valuable commodities such as gold, and should therefore not be required.

41. *As suggested in a submission, should our rules require issuers to include information on the capacity of each mine they source from along with the weights and dates of individual mineral shipments?*

NMA fails to see the significance of disclosing mining-related details such as mine capacity and weights and dates of individual shipments in a certified audit report or Conflict Minerals Report. Such disclosure would be unduly burdensome and could expose sensitive details which could be used to determine transportation routes, storage locations, transfer stations, and other shipping details of valuable minerals. Such disclosure therefore poses a risk to the security, health, safety, and welfare of all staff involved in the transport of minerals from a mine to a refinery and beyond. The SEC should not require disclosure of the type of information referenced in this question. By highlighting areas where gold could be intercepted, such disclosures could exacerbate the very armed conflict the statute is designed to prevent.

42. *We are proposing that an issuer "certify the audit" by certifying that it obtained such an audit. Should we further specify the nature of the certification?*

As explained in the response to Question #31, a certification statement identifying the company name and location as well as a summary of the approach used, information reviewed, and findings should be furnished rather than a certified audit report. No liability should be assigned to the individual signing the certification unless the situation involves a knowing and willful intent to mislead. Thus the conflict minerals disclosures should be specifically exempted from Sarbanes-Oxley Act certifications, which would be consistent with their furnished status.

43. *Should our rules, as proposed, require an issuer to furnish its independent private sector audit report as part of its Conflict Minerals Report?*

As indicated in the responses to Questions #31 and 42, a certification statement should be furnished, rather than a certified audit report. Should mining issuers be subject to the requirements of the Conflict Minerals Provision, there are a number of certification programs and protocols in use in the mining industry that could be used by an issuer, and any internationally or generally accepted audit or assurance process should suffice for this purpose. Such certification programs meet the requirements of the statute, and imposing additional liability provisions is unnecessary and could potentially bar third parties from being willing to undertake these audits.

44. *Should our rules provide that, as proposed, the independent private sector audit report furnished as an exhibit to an issuer's annual report not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates it by reference? Is this audit report qualitatively different from other expert's reports for which consent is required under our rules?*

A certification statement rather than the certified audit report should be furnished and should not need to be incorporated by reference into any filing under the Securities Act or Exchange Act. The type of disclosure contained in such a statement, or in the alternative in the audit report, is qualitatively different than others required by U.S. securities legislation and serves different policy objectives.

45. *Are there other ways we should treat the audit report under our rules to balance the interests of receiving a high quality audit and not unnecessarily increasing potential liability and costs?*

As previously indicated, the certified audit report should not be submitted to the SEC or published on a company website. Instead, it should be made available for inspection by the SEC during normal business hours. A certification statement and the associated Conflict Minerals Report should be all that is furnished, with sensitive confidential information redacted or removed.

46-47. *Conflict Minerals Report comments.*

The Conflict Minerals Report should be furnished rather than filed by "manufacturers" and those that "contract to manufacture" products of the type described in Section 1502. As previously indicated in Section II of these comments and elsewhere, mining issuers should not be considered to be persons manufacturing or contracting to manufacture products for purposes of Section 1502. Also see the response to Question #22.

48. *Exchange Act Section 18 comments*

NMA agrees with the approach to Section 18 liability taken in the Proposed Rule. NMA supports the Commission's proposal that the Conflict Minerals Report would not be "filed" for purposes of §18 of the Exchange Act unless the issuer states explicitly otherwise. NMA also notes that it is appropriate not to subject the Conflict Minerals Report to §18 liability even if the elements of §18 liability can be established because, as the Commission has stated, the nature and purpose of the conflict minerals disclosure requirements, as set forth in §1502(a) of the Dodd-Frank Act, is not for the protection of investors. If any of the information subject to disclosure pursuant to §13(p) of the Exchange Act is material to a reasonable investor's decision to invest in the issuer's securities, disclosure typically would otherwise be included in the issuer's registration statements filed under the Securities Act and, in many cases, in its periodic reports filed under the Exchange Act.

NMA believes that the same principles apply to the disclosure which, under the Proposed Rule, is required to be included in the body of the annual report. Accordingly, an issuer should have the option to make that disclosure in a separate form that would be furnished, not filed, with the SEC, which could be Form 6-K for foreign private issuers and Form 8-K for domestic issuers.

50. *Should our rules, as proposed, require an issuer to use due diligence in its supply chain determinations and the other information required in a Conflict Minerals Report? If so, should those rules prescribe the type of due diligence required and, if so, what due diligence measures should our rules prescribe? Alternatively, should we require only that persons describe whatever due diligence they used, if any, in making their supply chain determinations and their other conclusions in their Conflict Minerals Report?*

The approach taken by the SEC not to impose a particular due diligence standard is appropriate in light of different or changing circumstances in supply chains, as well as the potential for various due diligence approaches to develop over time. Section 1502 already addresses due diligence and requires that a description of the measures taken be given. Specific due diligence types and measures do not need to be prescribed by the rules. At most, a standard such as "appropriate under the circumstances" would be warranted. However, should the SEC decide to provide more direction or to highlight certain due diligence guidance criteria such as the OECD Due Diligence guidance, at most it should do so as interpretative guidance rather than as part of its final rule.

51. *Should different due diligence measures be prescribed for gold because of any unique characteristics of the gold supply chain? If so, what should those measures entail?*

The confidentiality of certain aspects of the gold supply chain such as transportation routes, storage locations, transfer stations, and other shipping details must be protected to ensure security and worker safety, health, and welfare. Therefore, provisions regarding confidentiality or redaction of information should be expressly provided in the final rule.

52. *Should our rules state that an issuer is permitted to rely on the reasonable representations of its smelters or any other actor in the supply chain, provided there is a reasonable basis to believe the representations of the smelters or other parties?*

As explained in Section II, mining companies, including those engaged in smelting and refining processes, should not be subject to the Conflict Minerals Provision reporting requirements. However, should mining issuers be included in Section 1502, "reasonable representations" from smelters, refiners, and traders should be acceptable so long as the appropriate supporting information and documentation are available from the associated due diligence investigation.

Furthermore, should mining companies be included in the final rule, clarification should also be included that mining issuers are only responsible for conducting due diligence and reporting on minerals through their transfer to independent refiners or smelters. In many cases, once

minerals are delivered to outside refiners or smelters, the eventual "product" credited to a mining issuer's account is not necessarily tied to the minerals it delivers, similar to the way in which money deposited in a bank account is unlikely to be the exact money withdrawn at a later date. Therefore, in most cases mining companies cease to control the minerals at the point of transfer to the outside refiners or smelters, and in such circumstances it does not make sense from a practical or policy standpoint to hold mining companies responsible for any portion of the supply chain thereafter.

53. *Is our approach to issuers that are unable to determine that their products did not originate in the DRC countries appropriate?*

Requiring due diligence after a "reasonable country of origin inquiry" is unable to determine whether minerals originated from the DRC or adjoining countries is appropriate.

54. *Should our rules prescribe any particular due diligence standards or guidance?*

As described above, no particular due diligence standards or guidance should be prescribed by the Commission's final rule. Flexibility is needed to assure that differences in the supply chains for gold, tin, tantalum, and tungsten can be properly accounted for.

55. *Should our rules require that an issuer use specific national or international due diligence standards or guidance, such as standards developed by the OECD, the United Nations Group of Experts for the DRC, or another such organization?*

Specific national or international due diligence standards or guidance should not be required. A non-exclusive listing of available due diligence standards or guidance could be helpful to covered issuers.

56. *Should our rules, as proposed, require that a complete fiscal year begin and end before issuers are required to provide their initial disclosure or Conflict Minerals Report regarding their conflict minerals?*

It will take time for issuers to implement appropriate systems and protocols to meet the new reporting requirements. At a minimum, a complete fiscal year should begin and end before an issuer is required to make an initial disclosure or furnish a Conflict Minerals Report pursuant to the new rule.

59. *Is "possession" the proper determining factor as to when issuers should provide the required disclosure or a Conflict Minerals Report regarding a necessary conflict mineral? If not, what would be a more appropriate test and why?*

While possession or ownership could be relevant factors as to when issuers should provide a requisite disclosure or Conflict Minerals Report, these might not be determining and might not be relevant factors. The rules should permit the issuer flexibility as long as the approach applied is disclosed.

60. *Should our rules allow individual issuers to establish their own criteria for determining which reporting period to include any required conflict minerals disclosure or Conflict Minerals Report, provided that the issuers are consistent and clear with their criteria from year-to-year?*

The final rule should allow individual companies to choose the appropriate criteria for determining the reporting period in which conflict minerals disclosures are made provided that their methodology is clear.

61. *Stockpile disclosure comments.*

Depending on the point in the supply chain, conducting due diligence on the source of existing stockpiles or inventories of conflict minerals could be challenging. The final rule should therefore either exempt existing stockpiles from reporting requirements, or allow for flexibility in regard to this type of disclosure. Furthermore, stockpiles of minerals that pre-date the effective date of the new rules should be exempt from the requirements. However, a manufacturer or company contracting to manufacture a product should have the ability to voluntarily include stockpiled minerals and derivatives in the initial disclosure or Conflict Minerals Report.

62. *Should there be a de minimis threshold in our rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise? If so, what would be a proper threshold amount? Would this be consistent with the Conflict Minerals Provision?*

As stated in Section II and elsewhere, the reporting of sludges, slimes, flue dust, carbon fines, slag, and other by-products derived from mining, beneficiation, or smelting and certain refining should not be included within the reporting requirements of the rule. *See also* answers to questions 16-21 above (discussing why gold contained in copper ore should not trigger Section 1502 reporting requirements). However, should they not be excluded for the reasons previously suggested, these by-products should be included in a de minimis exemption precluding reporting.

63. *Should our rules, as proposed, include an alternative approach for conflict minerals from recycled or scrap sources as proposed?*

Classifying conflict minerals obtained from a recycled or scrap source as DRC conflict free is appropriate. The recycling of minerals should generally be encouraged and is already practiced with respect to gold. However, due to the impossibility of determining the original source of recycled and scrap minerals, a "reasonable country of origin inquiry" should be conducted, not for the original source of the mineral but rather for the point at which the mineral re-entered the supply chain when the mineral was recycled. For example, when recycling gold from a pile of used cell phones, the chain of inquiry should end at the time the gold was extracted from the cell phones for re-use rather than at the original source of the gold contained in each individual cell phone, as such a determination would be impossible to make. A Conflict Minerals Report and certified independent private sector audit may then be required, but again the focus of such an inquiry should be the "recycled source/origin," or point at which the conflict mineral

reentered the supply chain after being recycled, not the point at which the recycled conflict mineral was originally mined.

64. *Instead, should our rules require issuers with recycled or scrapped conflict minerals to undertake a reasonable inquiry to determine they are recycled or scrapped and to disclose the basis for their belief that their minerals are, in fact, from these sources?*

Please see the response to Question #63. A "reasonable country of origin inquiry" should be conducted first to determine the point of re-entry of recycled and scrap minerals. In the event that the point cannot be determined, or is suspected to be from the DRC or an adjoining country, due diligence and a Conflict Minerals Report should be required.

65. *Should our rules, as proposed, require that issuers use due diligence in determining whether their conflict minerals are from recycled or scrap sources as proposed and file a Conflict Minerals Report including an independent private sector audit of that report?*

Please see the response to Question #63. Furthermore, all gold bars in storage at the central banks on the effective date of the new SEC rule should be grandfathered. Similarly, all bars marked with the London Bullion Marketers Association (LBMA) stamp on or before the effective date of the new SEC rule should be classified as DRC conflict free. All gold coins issued by governments or other entities prior to the effective date of the new SEC rule should be grandfathered. A definition of recycled and scrap gold is needed to grandfather gold bars, LBMA bars, and gold coins produced before the effective date of the new SEC rules as well as to specifically exclude sludges, slimes, flue dust, carbon fines, slag, and other by-products from consideration as conflict minerals.

67. *Is our alternative approach to recycled and scrap minerals appropriate? Is there a significant risk that conflict minerals that are not "DRC conflict free" may be inappropriately processed and "recycled" so as to take advantage of this alternate approach?*

The classification of conflict minerals obtained from a recycled or scrap source as DRC conflict free is appropriate. However, a "reasonable country of origin inquiry" should be conducted before a Conflict Minerals Report and certified independent private sector audit are required, as outlined in response to Question #63.

70. *We request comment on whether the proposed rules, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view, if possible.*

It is crucial that the SEC make every effort to formulate a final rule that does not dampen economic engagement with the DRC and adjoining countries. One of the best ways to address this serious problem is to increase investment and economic engagement with the DRC and adjoining countries. It is also imperative that the United States Government clearly and widely publicize the key points of the final rule, which should rely as much as is practicable on existing

internationally-accepted certification programs and protocols in use. Such clarity will help to ensure that SEC-listed mining companies that are already responsibly investing and operating in the DRC or adjoining countries are not unintentionally and negatively impacted by confusion or misinformation. Such a result could be devastating for legitimate investment projects in the DRC and adjoining countries and for the economic prospects of the countries going forward.

71. *We request comment on whether our proposals would be a "major rule" for purposes of Small Business Regulatory Fairness Act (SBREFA).*

These rules are unduly burdensome. Extensive efforts and costs would have to be extended to comply with the rules as currently proposed. If the final rule continues to treat mining companies as "manufacturers," this will result in a major increase in costs for the mining industry, and also will place NMA members who are issuers at a competitive disadvantage vis-à-vis those companies who are not. *See* SBREFA § 804.