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March 2, 2011

Re: **Release No. 34-63547, Conflict Minerals**

File Number: S7-40-10

VIA E-MAIL: rule-comments@sec.gov

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

Dear Ms. Murphy:

Thank you for the opportunity to comment on the above-referenced release.

We understand that the Securities and Exchange Commission (the "Commission") is required to implement the provisions of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and therefore the Commission's discretion here is limited. However, we believe the proposed rules extend beyond the statutory mandate in several important regards and will significantly increase the burden on reporting companies in ways that we believe can be ameliorated consistent with the statutory mandates of the Dodd-Frank Act. Specifically, we recommend that the proposed rules be modified as follows:

1. The Commission should not expand the statutory language. The rules should only apply to a company for which conflict minerals are "necessary to the functionality or production of a product manufactured by such person."

2. The Commission should construe "manufactured" to exclude issuers who merely assemble products from off-the-shelf components**.**

3. The Commission should not impose burdensome deadlines on issuers that are not required by the statute. The conflict minerals disclosure and report should be furnished on a different timetable from the annual report and should not affect Form S-3 or F-3 eligibility.

4. The rules should exempt companies from the new reporting requirements for at least one full annual reporting period following adoption.

5. The rules should not apply to conflict minerals extracted prior to the adoption of the rules or during the period in which a company is exempt from the rules.

6. The rules should contain a *de minimis* threshold based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise.

We discuss each of these points in more detail below.

1. The Commission should not expand the statutory language. The rules should only apply to a company for which conflict minerals are "necessary to the functionality or production of a product manufactured by such person."

Section 1502 of the Dodd-Frank Act adds Section 13(p)(2) to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), *Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of Congo*, which provides that a person is described in the paragraph, and therefore subject to the conflict mineral disclosure obligations, if:

> (A) the person is required to file reports with the Commission pursuant to paragraph (1)(A) [which prescribes the conflict mineral reporting requirements] and
>
> (B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

Despite the plain intent of the provision to apply only to manufacturing companies, new Item 104 of Regulation S-K would also extend conflict mineral disclosure requirements to companies that "contracted to manufacture" goods for which conflict minerals are necessary. While the proposed rules do not define "contracted to manufacture," the proposing release suggests that this could encompass retailers or other companies that do not manufacture their own goods but (1) have "influence regarding the manufacturing of those products" or (2) "[sell] generic products under their own brand name or a separate brand name that they have established, regardless of whether those issuers have any influence over the manufacturing specifications of those products, as long as the issuer has contracted with another party to have the product manufactured specifically for that issuer." (Proposing release at pages 19-20). This extends the scope of the rules well beyond manufacturing companies and creates a confusing and costly threshold inquiry that nearly all companies will be required to undertake. It is not unusual for retailers that distribute products or other companies that purchase packaging or other items from third parties to have some input into the specification of these purchased inventories and supplies. Under the currently proposed rules, these companies could be required to incur costs at the outset to determine whether their sometimes minimal specifications for these purchased products amount to a "contract to manufacture" the product and could potentially be subject to the exacting conflict mineral disclosure and reporting requirements. This is not required by the statutory language of Section 13(p)(2) which only applies to those for which "conflict minerals are necessary to the functionality or production of a product *manufactured* by such person" (emphasis added).

The Commission recognizes in the proposing release that Section 13(p)(2) only refers to companies that "manufacture" conflict minerals and not those that "contract to manufacture," but suggests that the application of the rules to those companies that also "contract to manufacture" goods is necessary to harmonize an apparent inconsistency in Section 13(p)(1)(A)(ii) which requires companies subject to the rules to include information about products "manufactured or contracted to be manufactured" in their conflict minerals disclosures and report. (Proposing release at pages 18-19). We do not believe that the Dodd-Frank Act contains this inconsistency.

The clear purpose of Section 13(p)(2) is to set out the threshold inquiry as to who should be subject to the statute—those for whom conflict minerals are necessary to the functionality or production of a product *manufactured* by such person. Congress could have expanded this key threshold inquiry to include those who "contract to manufacture" or otherwise provide input into the products that they purchase, but did not. Then, once a person is subject to the statutory scheme, it must report about products it manufactures as well as those for which it contracts to manufacture. A plain reading of the statute is that Congress concluded that persons subject to reporting should have to report all activities, even indirect activities through other persons. Congress did not impose such requirements on all persons—only on those who already manufacture such products. (*See Hartford Underwriters Insurance Co. v. Union Planters Bank N.A.*, 530 U.S. 1 (2000); "We have stated time and again that courts must presume that Congress says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992).)

Other statutes have similar constructs: there is a high threshold to come within a statute and then persons subject to the statute are required to make disclosures not imposed upon those not subject to the statute. For example, Exchange Act reporting obligations under Sections 13 and 15(d) apply only to issuers specified within those sections rather than all issuers of securities. Likewise, the beneficial ownership reporting requirements set out in Section 16 apply only to certain types of shareholders specified within the statute. Once subject to the statute, however, extensive reporting requirements apply and these obligations are further differentiated. The Commission itself has also employed similar drafting conventions in its rules. For example, issuers are not generally required to report consultation with another auditor. Yet, if an auditor is dismissed, then Item 304(a) of Regulation S-K does require disclosure of such consultation. To assert that Congress must have intended that Section 13(p)(2) apply to those that contract to manufacture, because those who manufacture must disclose any contracts to manufacture, would be equivalent to a view that Item 304 of Regulation S-K requires all issuers who consult with other auditors to disclose such information.

We see no reason for the Commission to take a more expansive view of who is subject to the statute than is required, particularly when expanding Section 13(p)(2) to also apply to those that "contract to manufacture" in this manner could lead to an overly broad application of the statute and cause non-manufacturing companies to incur potentially significant costs to merely determine whether they are subject to the statutory requirement and/or comply with the disclosure and reporting requirements.

2. The Commission should construe "manufactured" to exclude issuers who merely assemble products from off-the-shelf components.

The conflict minerals provision applies to any person for whom conflict minerals are necessary to the functionality or production of a product "manufactured" by that person. While we generally agree with the Commission's decision not to further define the term "manufactured" since it is generally understood (proposing release at page 17), we believe that the Commission should clarify that it will construe the term "manufactured" to exclude issuers who merely assemble products from off-the-shelf components. Without such clarification, the term "manufactured" could be construed so broadly that many issuers that have no influence over the use of conflict minerals could be brought into the disclosure regime. In fact, the Commission noted one non-governmental entity's expansive definition of "manufacturing" that would include "production, preparation, assembling, combination, compounding, or processing of ingredients, materials, and/or processes such that the final product has a name, character, and use, distinct from the original ingredients, materials, and/or processes." (Proposing release at page 18). Under such an expansive definition, a systems integration consulting firm that, on behalf of its clients, purchases and connects off-the-shelf computers and off-the-shelf routers or mass storage units could be deemed to be a "manufacturer" of the resulting computer system. Since tin, tantalum, gold and tungsten are frequently incorporated into off-the-shelf electronic components, such a systems integrator, as well as other assemblers of off-the-shelf electronic components, could be brought within the conflict mineral disclosure regime, even though they have no ability whatsoever to influence the sourcing of the tin solder or other electrical components. In order to avoid such a result, we urge the Commission to clarify that it will construe the definition of manufactured to exclude issuers who merely assemble products from off-the-shelf components.

3. The Commission should not impose burdensome deadlines on issuers that are not required by the statute. The conflict minerals disclosure and report should be furnished on a different timetable from the annual report and should not affect Form S-3 or F-3 eligibility.

The Commission has proposed that companies provide the conflict mineral disclosures in the body of their annual report on Form 10-K, 20-F or 40-F and, when required, furnish the conflict mineral report as an exhibit to this annual report. In the proposing release, the Commission states that this would enable anyone accessing the Commission's EDGAR system to determine quickly whether an issuer has filed the required conflict minerals disclosure and report. We believe the conflict minerals disclosure and report should instead be provided on a separate form, due at a separate time from a company's annual report. This would mitigate the strain on companies' reporting resources during their annual reporting and proxy season yet still make the conflict mineral information simple to locate for those interested in it.

Section 1502 requires those persons subject to the section to annually provide certain conflict mineral disclosures and, in some cases, a conflict mineral report, but does not specify when or how the conflict mineral disclosures or report should be provided to the Commission. Congress could have specified that the conflict minerals disclosures and report be provided in a company's "periodic report" or "an annual report" as it did with the disclosures required by Section 1503, *Reporting Requirements Regarding Coal or Other Mine Safety*, and Section 1504, *Disclosure of Payments by Resource Extraction Issuers*, respectively, but did not. As the Commission acknowledges in the proposing release, "the nature and purpose of the Conflict Minerals Provision . . . 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." Section 1502 was added to further an important public policy relating to the tragic events occurring in the Congo, rather than to further investor protection. (*See* Senator Feingold's remarks, "the status quo in eastern Congo is unacceptable to the people there and it should be to us as well. We have put financial resources toward mitigating this crisis, but we need to get serious about addressing the underlying causes of conflict. The [conflict minerals provision] is a significant, practical step toward doing that." 156 *Cong. Rec*. S3976 (2010).) As a result, we do not see the interest in investor protection of including this information in a registrant's annual report and there is nothing to suggest that this is what Congress intended.

Many companies' internal reporting resources are already strained in the few months following their fiscal year-end due to accelerated annual reporting deadlines and increased disclosure requirements applicable to Exchange Act reports on Form 10-K, 20-F or 40-F. This strain is amplified for companies whose annual reporting season coincides with or is immediately followed by their annual proxy season, particularly in light of the increase in executive compensation and other disclosure requirements currently applicable to proxy statements and an increase in shareholder activism surrounding annual meetings. The implementation of Commission's rules allowing for proxy access, if upheld, and other Dodd-Frank reporting requirements will further encumber company resources during this period. Making the conflict mineral disclosure and reporting requirements part of the annual report on Form 10-K, 20-F or 40-F will add significantly to companies' reporting obligations and is unnecessary given the statutory leeway provided in the Dodd-Frank Act as to the timing and manner of providing the required conflict mineral disclosures and its distinct purpose.

Reporting companies would be better able to allocate their internal resources to preparation and review of the required conflict mineral disclosure and report if they are provided (1) separately from the company's Exchange Act reports and (2) on a different timeframe from the company's annual reporting deadline, for example, within six months after the annual report deadline. We therefore urge the Commission to create a new form, which would be due at a date later than the registrant's annual report, solely for the conflict mineral disclosure and report. This would alleviate the strains on internal resources and make this information easy to find for those interested in reading it.

We also recommend that the final rules make it clear that failure to furnish the conflict mineral disclosure or report on a timely basis will not impact a company's Form S-3 or F-3 eligibility, since, as noted above, the purpose of the conflict mineral reporting is not investor protection.

4. The rules should exempt companies from the new reporting requirements for at least one full annual reporting period following adoption.

Section 1502 states that the conflict mineral disclosure and report should be provided "annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations." Section 36(a) of the Exchange Act, however, allows the Commission to exempt any person or class of persons from any provision or provisions of the Exchange Act if necessary or appropriate in the public interest and consistent with the protection of investors. Given the significant burden the conflict mineral reporting requirements will impose on public companies and the lack of infrastructure currently in place to determine and certify the origin of these conflict minerals, we believe it would be in the public interest to exempt companies from these provisions for at least their first full annual reporting period subsequent to the Commission's adoption of the rules. Allowing companies this minimal amount of time to put reliable tracing and third-party audit and certification procedures in place will ultimately result in their provision of more complete and accurate information which is in the public interest. In addition, as we discuss above, Section 1502 was predominantly adopted to address the underlying causes of the conflict in eastern Congo rather than to further investor protection. As such, exempting companies from the conflict mineral reporting requirements for at least one annual reporting period will not interfere with the protection of investors.

Efforts are currently underway to enable companies to verify and audit the supply chain for conflict minerals, but this exercise is currently very difficult and in some cases impossible, particularly for companies that use trace or *de minimis* amounts of these minerals. This difficulty is exacerbated by the fact that the State Department has yet to issue the statutorily mandated Conflict Minerals Map or guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and by suppliers. Companies that are forced to provide information under the proposed rules immediately without this guidance risk reporting inaccurate or incomplete information. Not only does this place an undue and costly burden on those companies subject to the requirements, it undermines the reliability of the information provided to the public, which is clearly contrary to public interest. In addition, if final rules require the conflict mineral disclosure and report to be provided as part of a company's annual report as proposed, companies could delay their annual report filing if the conflict mineral information is not yet available, which will deprive investors of the other essential information contained in the company's annual report. These concerns are particularly acute for companies with May 31 or June 30 fiscal year-ends. Assuming final rules are adopted by the SEC in April 2011 as anticipated, these companies will have only a month or two to determine whether they are subject to the requirements and, if so, to put effective procedures in place to trace the source of these conflict minerals acquired on or after the first day of their next fiscal year. We therefore urge the Commission to exempt companies from compliance with the new rules for at least their first full annual reporting period subsequent to the adoption of the rules.

5. The rules should not apply to conflict minerals extracted prior to the adoption of the rules or during the period in which a company is exempt from the rules.

The conflict minerals provision requires companies to disclose whether their necessary conflict minerals originated in the Democratic Republic of Congo and the adjoining countries (the "DRC countries") "in the year for which such reporting is required." The Commission states in the proposing release that it believes "the date that the issuer takes possession of a conflict mineral would determine which reporting year an issuer would have to provide the required disclosure or Conflict Minerals Report" (proposing release at page 60) but does not clarify this in the proposed rules or address the treatment of conflict minerals that were extracted prior to the date that the company becomes subject to the rules. As we mention above, although efforts are currently underway to enable companies to verify and audit the supply chain for conflict minerals, the required infrastructure is far from established and this remains a difficult inquiry. Because procedures to verify and audit the country of origin for these minerals have not been required to be in place historically, companies should not be required to disclose information about or provide a conflict minerals report on minerals extracted or obtained by the company prior to the first day of the first fiscal year in which the company is required to provide the conflict mineral disclosure or report.

6. The rules should include a *de minimis* threshold based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise.

The Commission has asked whether its rules should include a *de minimis* threshold based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise. The answer to this question is a resounding yes. As the Commission acknowledges in the release, companies subject to the conflict mineral disclosure requirements will incur potentially significant time and expense collecting the required information, preparing and reviewing the disclosure, filing documents, and retaining records. Independent private sector audit and certification fees, if necessary, will significantly increase these compliance costs. The complexity of the supply chain tracing required by the provisions is likely to further increase when only obscure amounts of conflict minerals are involved, making it even more difficult and costly to determine the origin of these minerals with certainty. It is not hard to imagine a scenario in which a company that only uses a minute amount of conflict minerals undertakes a complex and costly analysis to determine the origin of these trace minerals yet is ultimately unable to do so with certainty. Under the rules as proposed, such a company would be required to report and obtain an independent audit and certification of these findings, yet the company's inconclusive disclosure would have little impact on the dire situation in the DRC countries. In such a circumstance, it is hard to see how the benefit of such reporting outweighs the burden. On the contrary, inconsequential reporting by numerous companies that use only *de minimis* amounts of conflict minerals may distract attention from those companies that do use considerable amounts of conflict minerals originating in the DRC countries in their products. We therefore urge the Commission to include a *de minimis* threshold in the rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise.

One way for the Commission to do so would be to define "necessary to the functionality or production of a product" to exclude trace or *de minimis* amounts of conflict minerals or those that fall below a specified threshold. Congress directed the Commission to promulgate regulations requiring disclosures from Exchange Act reporting companies for which conflict minerals are "necessary to the functionality or production of a product" but did not expressly define this term. For the reasons stated above, we believe that defining "necessary to the functionality or production" to exclude amounts below a *de minimis* threshold would be consistent with this directive and the provisions of Section 1502 as a whole.

* * *

We would be pleased to discuss our comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Richard J. Sandler, Richard D. Truesdell, Jr., Joseph A. Hall, Michael Kaplan or Janice Brunner at 212-450-4000; Bruce K. Dallas at 650-752-2000; or Theodore A. Paradise at 011-81-3-5561-4421.

Very truly yours,

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