FJATA
Fashion Jewelry & Accessories
Trade Association

March 2, 2011

By e-mail to: rules-comments@sec.gov

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

Re: Conflict Minerals, Rel. No. 34-63547; File No. S7-40-10

Ladies and Gentleman:

The following response is submitted on behalf of the undersigned trade associations ("Associations"), whose members are affected by the Securities and Exchange Commission's ("Commission") proposed rules to implement certain of the conflict minerals provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), as set forth in Section 1502(b)(adding new Section 13(p) to the Securities Exchange Act of 1934, as amended ("Exchange Act")).[1] These associations represent thousands of large, medium and small businesses from every sector and level of the precious metal and jewelry/watch trade, from refiners and manufacturers to retailers and hobbyists. Our collective members also include banks, accountants, insurance companies and lawyers that provide services to the precious metals and jewelry trade. Both U.S. and non-U.S. entities belong to our organizations, and many conduct business in this country and around the world. We appreciate the opportunity to comment on the Commission's proposed implementing rules, and hope that our input will be helpful to the Commission.

The businesses associated with the jewelry and watch industry use gold and tungsten, a derivative of wolframite that serves as a lower-cost substitute for gold or platinum. Although our comments focus almost exclusively on the applicability of the proposed rules to gold, due to the complexities of the highly fragmented supply chain for this mineral, some of the considerations we raise are of equal relevance to tungsten and the other minerals covered by Section 1502 and the Commission's proposed implementing rules.

[1] SEC Rel. No. 34-63547 (Dec. 15, 2010), 75 FR 80948 (Dec. 23, 2010)("SEC Proposing Release"), available at http://www.sec.gov/rules/proposed/34-63547.pdf.

Introduction and Summary

First and foremost, our Associations strongly support the vital human rights objective of Section 1502: to ameliorate, through several means outlined in the statute, "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo that 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."[2] Among the means identified in the statute of achieving this purpose is the U.S. State Department's development, and submission to Congress, of a "strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products," including "[a] plan to promote peace and security in the Democratic Republic of Congo by supporting efforts of the Government of the Democratic Republic of Congo, … adjoining countries, and the international community, in particular the United Nations Group of Experts on the Democratic Republic of Congo, …. to [among other items] develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the … [DRC] to reduce exploitation by armed groups and promote local and regional development."[3]

As the Commission considers the adoption of final rules under Exchange Act Section 13(p), we urge you to keep in mind that Congress – notwithstanding its sweeping definition of the term "conflict mineral" to encompass all gold, wolframite, columbite-tantalite and cassiterite, or their derivatives (*e.g.*, tungsten), whatever their origin[4] – intends to target illicit cross-border trade in these minerals originating in areas of the Democratic Republic of Congo ("DRC") and adjoining countries (together, "DRC Countries") "under the control of armed groups."[5] Moreover, Congress intends that the responsible arms of the U.S. Government – primarily the State Department – work with the legitimate governments of the DRC Countries, as part of a broader international coalition of governments, to encourage the growth of legitimate trade in these minerals for the benefit and protection of the innocent people of the region who are the primary victims of such armed groups.

We are very concerned that an unintended negative consequence of the Commission's proposed implementing rules, as currently drafted, will be to incentivize reputable members of the fine jewelry industry to source newly mined gold and tungsten directly from known, reliable sources outside of the African continent, that will be both able and willing to document the non-DRC origins of gold and tungsten. Corporate managements and boards may decide, as fiduciaries for their shareholders, that this is necessary to avoid the highly stigmatizing effects of having to provide a "Conflict Minerals Report" ("CMR") and to label gold and tungsten supplies as "not DRC conflict-free," simply because industry members are unable to determine with certainty the provenance of the gold and tungsten used in (or to manufacture) their products. Our industry is particularly sensitive to consumer demand for responsible precious metal sourcing, given the emotional context, discretionary nature and substantial expense of premium jewelry purchases, and already is suffering from the impact of a severe decline in consumer demand over

[2] Section 1502(a) of the Dodd-Frank Act.
[3] Section 1502(c)(1)(A) and (B)(i)(II) of the Dodd-Frank Act.
[4] *See* Section 1502(e)(4) of the Dodd-Frank Act.
[5] Section 1502(e)(5) of the Dodd-Frank Act.

the course of the recent recession. During the peak recessionary period of 2008-2009, many of our customers were more concerned about paying their mortgages and keeping food on the table than buying fine jewelry.[6] In our view, any embargo of minerals that might result from the industry's rational fears of a potential consumer boycott could undermine, if not ultimately defeat, an important component of the humanitarian goal Congress articulated in Section 1502.

Moreover, as discussed further below, a large proportion of the world's gold supply (approximately 40% in 2009[7]) is derived from recycled or scrap materials, including a proportion of the gold ingots and bars that many of our members obtain directly or indirectly from bullion banks. This means that the origin of minerals obtained from recycled or scrap materials is not determinable. Although we greatly appreciate the Commission's recognition of this reality in proposing to permit gold and other "conflict minerals" obtained from recycled and scrap materials to be described as "DRC conflict-free," we believe that any benefits associated with this more lenient treatment would be far outweighed by the additional burdens – particularly in the form of the enhanced risk of serious reputational damage – that we fear would result from publication of a document entitled "Conflict Minerals Report." We note in this regard that Section 13(p)(1)(A)(ii) reflects an apparent Congressional intent to require a CMR only for those products that "**are not DRC conflict free"** – a determination that the Commission itself acknowledges **cannot** be made with respect to recycled or scrap minerals.[8]

We have every expectation that private-sector compliance efforts currently underway on a variety of fronts eventually will have the desired effect of helping to break the link between trade in gold, wolframite and other statutorily-designated minerals, on the one hand and, on the other hand, the financing of armed conflict in the DRC Countries. This was certainly our

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[6] Our markets are slowly improving, as consumers cautiously resume spending. However, the fine jewelry and watch industry suffered significant harm during the recent recession, according to three key indicators of that recession's adverse impact on our industry: (a) although the net number of firms selling jewelry and watches declined annually during the recessionary period (roughly spanning 2008 and 2009), in line with the last decade's average (by - 2,467), the number of jewelry "doors" (stores) declined more sharply over this period (by -3,460); (b) annual sales of fine jewelry and watches declined substantially during the recession (roughly 2008 and 2009), and did not reach pre-recession levels in 2010, despite signs of recovery; and (c) recent dramatic increases in precious metal prices worldwide have caused a perceptible decline in margin trends. (Data supplied by the Jewelers Association of America).

[7] *See* Philip Olden, "OECD Due Diligence Guidance for Responsible Supply Chain Management of Minerals from Conflict-Affected and High Risk Areas: Implications for the Supply Chain of Gold and Other Precious Metals" (August 2010)("Olden Report"), at 3, available at http://www.oecd.org.

[8] SEC Proposing Release at 63 ("Given the difficulty of looking through the recycling or scrap process, we expect that issuers generally will not know the origins of their recycled or scrap minerals, so we believe it would be appropriate for our proposed rules to require that issuers using recycled or scrap conflict minerals furnish a Conflict Minerals Report subject to special rules."). As noted in the text above, we respectfully submit that the statute itself does not expressly support the Commission's conclusion that a CMR is necessary or appropriate in situations where, as in the case of recycled or scrap minerals, the issuer is simply not able to determine the origin of such minerals.

experience with the "Kimberley Process" (targeting "conflict" diamonds via implementation of the U.S. trade laws), and the other, largely successful multinational initiatives discussed in the Appendix (at pp. 3-5). However, these efforts required significant time and the cooperation of numerous links in the relevant supply chain. Equally important, these efforts demanded extensive diplomatic engagement on the part of the United States and other world governments to create the conditions "on the ground" that were vital determinants of success.

Just as we have in the past, the jewelry and watch industry will continue to work with other interested governmental and non-governmental constituencies to create a transparent and effective supply chain diligence system for gold and wolframite (tungsten), respectively. But in order to succeed, we must enlist the cooperation and support of the many individuals and entities around the world – most of whom are not covered by Section 1502 because they do not file reports with the Commission – that comprise important links in the fragmented, complex supply chains for gold and tungsten. Moreover, we will need the guidance and assistance of the State Department, the Government Accountability Office ("GAO"), the Commission itself and the U.S. Department of Commerce, all of which are contemplated under Section 1502. While we believe much can and will be accomplished in the next year, the diligence mechanisms that will be necessary to gather the prescribed supply-chain information and perform the testing and auditing functions associated with the preparation of an audited CMR, though now in progress, do not exist and cannot be completed in sufficient time to meet the Commission's proposed compliance deadline. As a result, for the reasons set forth in the next section of this letter, we ask that the Commission provide in the final rules for a more flexible implementation timetable that will satisfy Section 13(p)'s fundamental informational requirements without unnecessarily causing significant competitive harm to public companies subject to the statute.

Why a Limited Phase-in Period is Necessary and Appropriate in Furtherance of Section 1502's Humanitarian Goal

At least one of the Associations to which many jewelry industry participants belong, the Responsible Jewellery Council ("RJC"), along with such other gold trade organizations as the World Gold Council, began working on multiple fronts in furtherance of Section 1502's humanitarian objective before this and other provisions of the Dodd-Frank Act became law in July 2010. Such efforts include, but are not limited to, the active participation by some of our members in the ongoing efforts of the Organization of Economic Co-operation and Development ("OECD") to develop responsible supply chain due diligence standards for gold and other precious metals originating in the DRC and adjoining countries. In addition, we fully support the work of the UN Group of Experts on the Democratic Republic of Congo ("UN Group of Experts"), which in turn has endorsed the pending initiatives of the International Conference on the Great Lakes Region ("ICGLR"), a regional African governmental project aimed at supply chain transparency for gold and the "Three T's" (tin, tantalum and tungsten),[9] the Certified Trading Chains ("CTC") project led by the German Federal Institute for Geosciences and

[9] The ICGLR, which includes the DRC Countries and Kenya, has indicated in its comment letter to the Commission that it is "now fully committed to bringing a regional tracking and certification scheme into being." Letter from Eddy Mbona, Project Officer, Regional Initiative against the Illegal Exploitation of Natural Resources, Secretariat of the ICGLR, Jan. 31, 2011, at 4, available at http://www.sec.gov/comments/s7-40-10/s74010-54.pdf.

Natural Resources, and the DRC's Stabilization and Reconstruction ("STAREC") Plan. Some of our members also are engaged in parallel, private-sector initiatives to establish responsible supply-chain management standards and procedures that include independent third-party audits. For example, the RJC is expanding its fine jewelry supply chain project – which encompasses the entire spectrum of relevant activities, from mining to retail sales – to focus more intensively on establishing a DRC conflict-free supply chain system. RJC further is collaborating with leading firms in the electronics industry that use gold and tungsten in developing reliable supply-chain verification procedures, including but not limited to a global refinery certification mechanism for these minerals, under the auspices of the joint project of the Electronics Industry Citizenship Coalition ("EICC") and the Global e-Sustainability Initiative ("GeSI").[10] We anticipate that significant progress will be made when members of the jewelry and watch industry have the opportunity to compare notes and discuss next steps when businesses in the electronics industry and other interested parties meet at the upcoming EICC-GeSI conference, the "Conflict Free Gold Sourcing Summit," organized by Intel Corporation and RESOLVE Solutions Network, to be held on March 8, 2011, in Denver, Colorado.

Based on our collective experience with these semi-governmental and private-sector initiatives, the Associations believe that the diligence infrastructure essential to full compliance with the Commission's proposed rules does not yet exist – despite the commendable progress now being made by many constituencies around the world, as described above and in the attached Appendix (at p. 3). In our view, Section 1502's central humanitarian goal cannot and will not be achieved until such an infrastructure can be established through the combined efforts of the OECD, the UN and other international and national organizations, the industry itself and related industries (*e.g.*, mining, electronics), together with the State Department and other federal agencies charged with specific duties under this statute.

Among the formidable challenges we face in developing a reliable and effective supply chain for gold (and, in some instances, tungsten) are the following:

1. *Securing Support/Compliance by Numerous Supply-Chain Participants Not Covered by Section 1502 Will Take Considerable Time*: The jewelry and watch industry, together with the electronics and other affected industries, may have the commercial bargaining power to secure compliance by many of our direct and indirect suppliers of gold and tungsten. However, this has yet to e demonstrated and, in any event, will take considerable time. Refiners and smelters around the world – which we understand for the most part do not file periodic reports with the Commission and thus will not be motivated by legal compliance obligations under Section 13(p) – are a vital "choke-point" in the gold and tungsten supply chains, and therefore will have to be persuaded to change their business models to segregate and trace the

[10] *See* Olden Report at 20-22. On December 10, 2010, the EICC and GeSI jointly announced the launch of their Conflict-Free Smelter ("CFS") Program and completion of the first tantalum smelter assessment. As explained in the joint press release, the EICC-GeSI "CFS program aims to identify smelters [and refiners, in the case of gold] that can demonstrate through an independent third party assessment that the raw materials they procured did not originate from sources that contribute to conflict in the Democratic Republic of Congo", and to expand the program to cover tin, tungsten and gold in 2011. *See* Joint Press Release of EICC and GeSI, dated Dec. 10, 2010, available at http://www.eicc.info.

source of newly-mined and recycled/scrap-derived gold and tungsten "upstream" to the country of origin. Because few, if any, of our members acquire gold or tungsten stock directly from refiners, we are working with other affected industries – through the OECD and pursuant to several private-sector initiatives, including most notably the EICC-GeSI project spearheaded by members of the electronics industry in which some members of the jewelry industry are participating through RJC – to enlist the cooperation of refineries and smelters in developing an auditable certification process designed to provide reasonable assurance of reliable sourcing between refinery (or smelter) and the mine or dealer in recycled or scrap materials containing gold or tungsten.

2. *Securing the Support and Cooperation of Banks Participating in the Global Bullion Market Will Take Considerable Time:* Like refineries and smelters, the global bank bullion market is a critical link in the gold supply chain. Banks around the world are the major source of fabricated gold for our industry. From the perspective of these banks, gold is fungible and has many sources of demand beyond the jewelry industry (many of which may not be subject to Section 1502), including the world's central banks (currency), the investment community (gold coins and medallions), and other industries (automobile, consumer electronics, medical and dental devices). To our knowledge, most of the banks from which our members obtain gold (in the form of ingots and bars) currently do not collect and furnish information on gold's provenance, which the banks themselves may acquire from a vast array of possible sources, unless the gold is held in the "allocated" account of a customer for whom the product's chain of ownership and integrity are important.[11] We understand that much of bank-supplied gold is held in "unallocated" accounts for which little or no data are compiled other than with respect to the element's purity.[12] Banks should be in a position to help provide for gold tracing, at a substantial cost to us (subject to the inherent complexities of the gold supply chain, including the predominance of recycling), but we expect this will require considerable time and effort by organizations such as the London Bullion Market Association (known as the "LBMA"). According to an expert report commissioned by the OECD, the LBMA and bullion banks have not been represented thus far in the ongoing supply-chain initiatives and therefore will have to be engaged in the development of reliable gold supply-chain diligence systems. [13]

3. *U.S. Diplomatic Efforts are an Essential Prerequisite to Full Compliance by Companies Subject to Section 1502 that Use Industrially-Mined Gold:* Newly-mined gold comprised approximately 60% of the world gold supply in 2009.[14] China is the world's largest source of newly-mined gold based on 2009 data, as well as the world's second largest market for this mineral (just behind India),[15] and the business of mining in that country is heavily controlled by the Chinese government. Accordingly, the State Department, the Commerce Department and

[11] Olden Report at 8 (example of gold-based exchange-traded funds).
[12] *Id.* at 29.
[13] *Id*. at 22 ("The absence of bullion banks and the associations representing the gold industry in the financial markets (such as the LBMA) in supply chain initiatives such as RJC or EICC is a deficiency in establishing a stronger chain of custody and best practices in the gold supply chain. Outside of AML (anti-money laundering) and 'Know Your Customer' practices, the banking sector does not participate in the major supply chain initiatives in gold and precious metals.").
[14] *Id*. at 4.
[15] *Id.* at 12.

perhaps other branches of the U.S. government will play a vital role in securing the cooperation of this country's mining industry and refineries in the development of a reliable and effective supply-chain tracking mechanism for gold. Similar considerations will apply, to varying degrees depending on the level of governmental control of the country's mining facilities, to gold extracted from mines in Russia, South Africa, Australia, Canada and Latin America. We note in this connection that the DRC government suspended all efforts by members of the EICC-GeSI project and others during the past year to trace artisanal gold supplies in that country, a situation which we assume only U.S. diplomacy (alone or in conjunction with interested UN country-members) will be able to rectify.[16]

4. *It is Impossible to Trace the Country(ies) of Origin of Recycled/Scrap Minerals:* Gold derived from recycled and scrap materials, as noted, constituted approximately 40% of the world gold supply in 2009. As the Commission has recognized, the original geographic location of extraction cannot be determined for recycled gold since it is produced from old jewelry, or the scrap material captured during the refining or manufacturing processes. Nor can it be determined at this point by the banks, at least beyond the refinery (if an LBMA member). In addition, there are large inventories of existing gold stock now in the hands of refineries, manufacturers, banks and other links in the global supply chain that will be virtually impossible to trace. We believe, in any case, that these sources of gold are highly unlikely to be used effectively to finance armed conflict and terrorism in the DRC Countries.

5. *There is No Viable Mechanism for Tracking Gold from Artisanal Mining Sources:* To the best of our knowledge, there is no viable system yet in existence for tracking gold mined by artisans either in the DRC Countries or the rest of Africa.[17] There are many small, family-owned gold dealers and jewelers in North Africa, the Middle East and India with small workshops or other "refining resources" that are willing and able to refine such artisan gold, which then enters the global supply chain.[18]

Given these conditions, we believe that most public companies covered by Section 13(p) and the Commission's rules thereunder will be in a position on April 15, 2011, the effective date of the Commission's new rules, to report only that they are "unable to determine" the source of their gold and tungsten. We believe it will take at least two, if not three, years for jewelry and watch companies (and others in the relevant supply chains) to develop reliable, auditable diligence systems at the "reasonable assurance" level contemplated by the Commission. The adverse consequences of such "unable to determine" disclosure – the obligation to provide an

[16] It is possible that the DRC government will rescind this ban. *See* D. Doya, "Congo Mining Ban Fails to Break Conflict Links, Institute Says," Bloomberg Businessweek (March 2, 2011), available at http://www.businessweek.com/news/2011-03-01/congo-mining-ban-fails-to-break-conflict-links-institute-says.html

[17] A nascent "fair trade" tracking standard for artisanally-produced gold has been developed by the Fairtrade Labelling Organisation and the Alliance for Responsible Mining, but it does not appear to be focused on conflict-ridden areas in Africa. For more information on this initiative, *see* http://www.fairtrade.org.uk/press_office/press_releases_statements/march2010/flo_and_arm_create_historic_partnersip_for_gold.aspx.

[18] Olden Report at 5.

audited CMR that in effect tells consumers of fine jewelry (and watches) that the products that they are purchasing are not "DRC conflict-free" (unless a recycled source can be pinpointed at a refinery, which presently cannot be done because refineries do not segregate newly-mined from scrap minerals) and therefore somehow contaminated by armed combat in the DRC – are severe and could cause lasting harm to affected companies' businesses without advancing the core humanitarian objective of Section 1502. More specifically, we are concerned that critics are likely to argue, based on such disclosure (and notwithstanding any mitigating language that might be added by way of explanation), that the particular company has not engaged in the requisite due diligence and is thus shirking its responsibilities under Section 13(p) – whereas in fact the basic elements of both a country of origin inquiry and a due diligence system do not exist. Accordingly, the Associations strongly recommend that the Commission provide for a limited transition period – the details of which are outlined in the next section of this letter – that would permit the completion of several efforts to create adequate diligence systems now underway, without unduly and unnecessarily penalizing those of our members (and their shareholders and other stakeholders) that would be subject to the new conflict minerals disclosure rules because they are required to file Exchange Act reports with the Commission.

Key Elements of Our Proposed Phase-in Approach

We urge the Commission to adopt a calibrated "phase-in" disclosure approach spanning the period from April 15, 2011 (the statutorily-prescribed effective date of the Commission's implementing rules) through at least early 2014, to afford all affected issuers a minimum two-year transition period before becoming obligated to furnish an audited CMR. Such an approach recognizes both the realities of the complex, highly fragmented gold supply chain, and the need for the affected industries to rely, for due diligence purposes, on the normative standards and other guidance that has yet to be produced by the promising, but still-pending multinational initiatives – especially those sponsored and/or endorsed by the OECD and the UN[19] – as well as such private-sector initiatives as that launched by the EICC and GeSI and the RJC, aimed at creating responsible, auditable tracking and tracing mechanisms that, if widely accepted and applied, may help prevent entry into the global stream of commerce of gold and other high-value minerals extracted from targeted conflict-ridden areas within the DRC Countries. This calibrated approach further takes into account the need for the statutorily-enumerated federal agencies to provide critical guidance – in accordance with Section 1502 – related to identification of conflict-tainted areas in the DRC Countries (via mapping), applicable auditing standards and other appropriate diligence mechanisms. Last but not least, this transition period would enable the State Department to pursue another stated policy objective of Section 1502 – to promote the peace and security in the DRC region necessary to fostering conflict-free minerals trade through constructive engagement with the legitimate governments of the DRC Countries and other interested countries.[20]

The Associations have identified the following, objective milestones to be achieved during the two- to three-year transition period we have proposed, some of which are clearly outside the control of affected issuers:

[19] *See* SEC Proposing Release at 56.
[20] *See* Section 1502(c) of the Dodd-Frank Act; *see also* footnote 3, above, and accompanying text.

1. State Department – the creation and submission to Congress of a map of mineral-rich conflict zones in the DRC Countries (Section 1502(c)(2)); the provision of "guidance to commercial entities seeking to exercise due diligence and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations" (Section 1502(c)(1)(B)(ii)); publication of a description of "punitive measures that could be taken against those individuals or entities whose commercial activities support armed groups and human rights violations " in the DRC (Section 1502(c)(1)(B)(III)); and engagement with the governments of the DRC Countries and the international community, in particular the UN Group of Experts on the DRC, to develop a plan to promote peace and security in the DRC (Section 1502(c)(1)(B)(i));

2. GAO – the publication of standards governing the conduct of independent third-party audits of CMRs, in accordance with Commission rules and in consultation with the State Department (Section 13(p)(1)(A)(i));

3. Commission – the publication of written guidance on the circumstances under which a third-party audit or other diligence mechanism will be deemed "unreliable" within the meaning of Exchange Act Section 13(p)(1)(C), and therefore in violation of the disclosure requirements of Section 13(p)(1)(A). We respectfully submit that such formal written guidance is essential, both to our compliance with Section 13(p)(1)(A) and the SEC's implementing rules thereunder, and the Commission's ability to enforce these provisions;

4. OECD – the publication of due diligence guidance for newly-mined gold in a supplement to the OECD's "Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" (December 2010)("OECD Report"), available at http://www.oecd.org/dataoecd/62/30/467087.pdf. We recently learned that publication of this supplement is not expected until 2012. The OECD initiative does not address the special problems of recycled and/or scrap conflict minerals, although these problems are discussed in an OECD-commissioned expert report;[21]

5. UN – further guidance from the UN on implementation of the November 2010 report and recommendations of the UN Group of Experts, which includes due diligence guidelines for minerals originating in the DRC[22] (this final report was published pursuant to UN Security Council Resolution 1896 (2009), S/RES/1896(2009), which is referenced in the Commission's proposing release[23]), and the outcome of the UN-endorsed ICGLR process (noted above);

6. EICC-GeSI – the development, in conjunction with NGOs, of reliable refinery (gold) and smelter (tungsten) certification systems for newly mined gold and tungsten, and segregation by refineries of newly mined and recycled/scrap gold and tungsten;

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[21] OECD Report at 6 n. 2; Olden Report at 26-27.
[22] *See* Due Diligence Appendix to Final Report of the UN Group of Experts, S/2010/596 (Nov. 29, 2010), available at http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf.
[23] *See* SEC Proposing Release at 56 n. 145.

7. RJC – expansion of ongoing chain of custody initiative to encompass conflict-related sourcing; participation in the EICC-GeSI chain of custody initiatives for gold and tungsten, and the OECD working group for the gold supplement to the OECD Report, expected to be published in 2012, as noted above;

8. Pilot programs modified or designed by private-sector participants in the jewelry, electronics and other affected industries (including but not limited to the EICC-GeSI coalition and RJC), taking into account the results of the above-noted initiatives; and

9. Individual companies and/or industry coalitions tailor guidance elements drawn from the foregoing initiatives and programs to their particular facts and circumstances, and retain independent third-party auditors who in turn will need time to perform audit field work and prepare reports.

During this phase-in period, there would be no delay in providing meaningful disclosure under the timetable fixed by the new implementing rules. Instead, our proposed approach would merely defer the deadline for compliance with the full panoply of requirements for a CMR and independent third-party audit until a minimally sufficient diligence infrastructure can be created to support the establishment of reliable country of origin and due diligence systems by the affected issuers. Specifically, during the transition period, jewelry companies and other affected companies that use gold and tungsten would provide certain disclosures without having to furnish audited CMRs or indicate that they are "unable to determine" the origin of these minerals based on their required country of origin inquiry, as follows:

- That the particular company's products either contain or were manufactured using minerals defined as "conflict minerals" under Section 1502(e)(4) and Commission rules implementing Section 13(p);

- That the systems necessary to perform the country of origin inquiry and due diligence required by the statute and Commission implementing rules do not yet exist, but are in development, with some reasonable description of what initiatives are underway;

- That the company is doing what its management believes is reasonably possible at this time (*i.e.* over the preceding fiscal year) to determine the source of its minerals; for example, acquiring reasonably reliable representations and warranties as to source in supplier contracts, using refiner certifications if such measures become effective during the phase-in period, etc.; and

- That the company is participating in and/or awaiting the outcome of various initiatives constituting the milestones identified by the Commission (delineated above).

In our view, these interim disclosures should be submitted to the Commission annually in a "furnished" document separate from, and outside the timetable for filing, the annual report on Form 10-K or 20-F. Conflict minerals-related information simply has no apparent relevance to the financial and non-financial information that now appears in Exchange Act reports. To the contrary, as the Commission observed, "[i]t appears that the nature and purpose of the Conflict Minerals Provision [Section 1502] is for the disclosure of certain information to help end the

emergency humanitarian situation in the eastern DRC that is financed by the exploitation and trade of conflict minerals originating in the DRC countries, **which 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**."[24] This submission also would be posted on the company's Internet web site, and could be "furnished" to the Commission under cover of a new, dedicated form or schedule, or a non-filed Form 8-K (domestic issuers) or Form 6-K (foreign private issuers). As a result, only antifraud liability would attach to these disclosures.

Our Recommendations for a Post Phase-in Disclosure Scheme

After the phase-in period has concluded, we believe it is reasonable for the Commission to assume that the necessary country of origin inquiry and diligence mechanisms will have become operative at the individual company level, and will be sufficient to enable companies in the various affected industries to comply in full with the new disclosure standards applicable to all enumerated "conflict minerals." As discussed below, however, we recommend some modifications to the Commission's proposed rules that would vary depending on whether the minerals of most concern to our Associations – gold and tungsten – were newly-mined or derived from recycled, scrap or existing stock on hand prior to the end of the recommended phase-in period (as noted above, at least early 2014). We express no view on the appropriate treatment of the other "conflict minerals" set forth in Section 1502(e)(4) of the Dodd-Frank Act.

Turning first to the statutory -- and proposed regulatory -- definition of the term "conflict mineral", we respectfully note that this definition effectively creates a presumption, at least with respect to gold, that is belied by available data indicating that only a small portion of the world's gold supply is potentially used to fund conflict in the DRC.[25] Accordingly, this presumption would appear somewhat strained. That said, we understand that the Commission has little if any latitude in implementing Section 13(p), given its prescriptive language. We suggest, therefore, that the Commission modify the relevant regulatory text – as set forth in proposed Item 104(c)(3) of Regulation S-K – to make clear that the definition of "conflict mineral" is limited to this particular line-item requirement, and otherwise has no broader meaning or application under the federal securities laws.

Newly-Mined Gold and Tungsten

Companies that affirmatively determine, based on a reasonable country of origin inquiry, that their newly-mined gold or tungsten originated in one or more DRC Countries should be required to submit an audited CMR. Those companies that are unable to determine the country of origin for these "extracted" minerals likewise should be required to submit an audited CMR. For the reasons noted above and amplified in the Appendix (at p. 12), we believe that there

[24] *See id.* at 51 (footnotes omitted; emphasis added). *See also* Appendix at p. 12.
[25] *See, e.g.*, Olden Report at 24 (describing data from various sources, including "GFMS, the leading global authority on gold supply and demand;" GFMS estimated that the total mine supply of gold from the DRC in 2009 totaled 8 tons, which "constitutes around 0.3% of global mine production, and 0.2% of global demand including supply of 'scrap gold,' so in gold industry terms, it is very insignificant.").

should be only one annual disclosure document that includes the audited CMR and is simultaneously "furnished" to the Commission (either under cover of a "submitted" Form 8-K or Form 6-K, or a new, dedicated form) and posted on company websites. This should be a standalone document that is submitted and posted on a schedule that is de-coupled from the deadlines for filing Exchange Act reports, and is subject only to antifraud liability under the federal securities laws. We recommend that this disclosure obligation accrue later in a company's fiscal year, after the Form 10-K and proxy statement (U.S. companies) or the Form 20-F (non-U.S. companies) have been filed with the Commission, to avoid imposing unnecessary burdens on affected companies.

We ask the Commission to consider carefully the harmful implications, for those issuers "unable to determine" the origin of their newly-mined gold or tungsten – despite the exercise of "state-of-the-art" due diligence – of being forced to describe their fine jewelry products as "not DRC Conflict Free" (as proposed by the Commission). Nothing in Section 13(p) compels this result, which we believe is inconsistent with disclosure of the truth – that a given issuer cannot determine the country of origin of gold or tungsten used in the manufacture of its jewelry products. Issuers that find themselves in this unenviable position are sufficiently "punished" for any inability to source their minerals, by virtue of the statute's creation of what is tantamount to a presumption that their products may be tainted by DRC-related conflict minerals through assignment of the term "conflict mineral" to all gold and tungsten (in Section 1504(e)(4)), absent an affirmative determination that it was mined outside the DRC Countries.

With respect to any potential liability exposure an issuer may have under Exchange Act Section 13(a) or 15(d), the Commission has not indicated whether it intends to pursue a non-fraud enforcement action for any violation of Section 13(p)(1)(A)(CMR) or (B)(certification of the independent third-party audit of the CMR), except perhaps in the event of a company's failure to procure a "reliable" independent third-party audit of its CMR. Section 13(p)(1)(C) expressly confers on the Commission the power to determine whether "an independent private sector audit …, or other due diligence processes" are "unreliable", which power presumably should be exercised (to define the circumstances under which the Commission will consider an audit or any other due diligence measure to be "unreliable") before a particular company's CMR is deemed to violate Section 13(p)(1)(A) and/or (B). We urge the Commission to elucidate its position on enforcement in the adopting release, to facilitate compliance by affected issuers.

Recycled, Scrap and Existing Stocks of Gold and Tungsten

In our view, jewelers, watchmakers and other jewelry industry participants that use recycled gold or tungsten, which can be fabricated from scrap and other "manufacturing by-products", as well as discarded consumer jewelry and existing stocks of bullion bars or ingots, should not be required to submit audited CMRs. Even the application of "state-of-the-art" diligence mechanisms would not enable issuers to ascertain the original source of these minerals – it is simply impossible.[26] Accordingly, issuers using recycled or scrap minerals for jewelry products should not be required to submit (or post on their websites) an audited CMR, because the utility of that disclosure would be far outweighed by its prejudicial impact on such issuers. Moreover, as previously noted, the plain language of the statute neither compels nor supports this

[26] *See* footnote 8, above, and accompanying text.

result. In this connection, we commend to the Commission the recommendation by the International Precious Metals Institute ("IPMI"), as set forth in their comment letter submitted to the Commission on January 19, 2011 (at p. 4), that the final rules treat the country of origin of recycled and scrap material as the place of its generation in the refining (or smelting, in the case of tungsten), process consistent with the approach taken by U.S. Customs regulations.[27]

We are proposing that issuers using recycled/scrap-derived gold (and tungsten, to the extent there is a secondary market for this metal), in lieu of preparing and submitting an audited CMR, still would be required to "furnish" and post certain specified information that would be subject to antifraud liability under the federal securities laws, and undertake appropriate due diligence measures. Such measures would include an independent third-party audit of the relevant supply chain and such other procedures as are necessary or appropriate for recycled or scrap minerals in light of the Commission's rules or guidance, applicable auditing (or attestation) standards of the GAO, the requisite State Department guidance (under Section 1502(c)), and whatever additional standards or other guidance that may be published in the next two years by the OECD, the UN, and/or the other private-sector initiatives discussed in this letter and the attached Appendix.

Under our proposed approach, affected issuers would apply a "reasonable inquiry" standard and disclose the following:

1. The recycled or scrap minerals used in (or to make) their products are "DRC conflict free", as the Commission has proposed, although the particular issuer has been unable to determine their origin because of the nature of recycled/scrap minerals (and "grandfathered" existing stocks, as explained below) and the absence of any reasonable basis to believe that they may have originated in a DRC Country. We understand the Commission's concerns regarding "loopholes" and the potential for abuse in this area, and would have no objection to a "red-flag notice" standard that would compel an issuer with reason to believe that its recycled- and/or scrap-derived minerals (or "grandfathered" existing stocks, as outlined below) originated in a DRC Country to submit an audited CMR in accordance with new Item 104 of Regulation S-K;

2. Specified information regarding the source of the recycled or scrap minerals, or "grandfathered" existing stocks as discussed below (*e.g.*, Bullion Bank "X", which obtained it from Refinery "Y" or another bullion bank, "Z", which acquired it from Dealer "A", etc.);

3. An independent third-party audit or review of the relevant supply chain has been performed (*e.g.*, the auditor reviews refinery warranties, audit reports and certifications, along with other supplier representations and warranties, relating to recycled, scrap or "grandfathered" existing stocks of gold or tungsten); and

4. Any additional information that the Commission deems necessary or appropriate based, for example, on guidance published by the OECD (should it opt to expand its current initiative focused on newly-mined gold and other "conflict" minerals), the UN Group of Experts

[27] *Accord* Comment Letter from Larry Drummond, General Manager, Metalor Technologies USA, dated February 25, 2011, available at http://www.sec.gov/comments/s7-40-10/s74010.shmtl.

and/or the industry, with respect to relevant information that issuers in the jewelry and watch industry reasonably can and should provide with respect to these minerals.

As with newly-mined minerals, this disclosure for gold and tungsten derived from recycled and/or scrap materials (or "grandfathered" existing stocks) would be subject to antifraud liability under the federal securities laws. We hope that the Commission will provide further guidance regarding its position on non-fraud liability for such disclosure under the Exchange Act predicated, for example, on the issuer's reliance on an "unreliable" due diligence process. See the previous section.

For existing gold and tungsten stocks that pre-date the deadline set by the Commission in 2014 for our proposed phase-in period (or such other deadline as the Commission deems appropriate), we recommend a modified "grandfathering" approach. Under this approach, the Commission would allow issuers that use existing stocks of gold and tungsten pre-dating a prescribed deadline to treat those minerals as recycled/scrap for disclosure purposes. All newly mined or recycled/scrap minerals acquired after that deadline would be treated accordingly.

Retailers and the Meaning of "Contract to Manufacture" and "Manufacture"

The Commission has proposed to sweep retailers that contract for the manufacture of products within the scope of the conflict minerals disclosure requirements, regardless of the degree of influence or control that those retailers might be able to exercise over the manufacturing process. However, we appreciate that the Commission has requested comment on whether it should instead "require a minimum level of control over … [that] process before [such an] issuer must comply with our proposed rules."[28] Given the practical realities of the multi-level and highly complex supply chain for gold, we recommend that the Commission fix the minimum degree of retailer control of manufacturing as "substantial." To lend further meaning to the term "substantial," we urge the Commission to consider the NRF's proposed definition: "direct, close and active involvement in the sourcing of materials, parts, and components to be included in that product that may contain metals smelted from conflict minerals." [29]

Applying this definition, a retail issuer that contracts with another party (including but not limited to a "manufacturer", wholesaler, trading entity, bank or other supplier) for a specific weight, karat or other indicator of quality that is well-accepted within the industry, should not be covered by the new rules. Whether or not the end-product is sold under that retailer's own brand name should be irrelevant to this analysis.

Nor should certain assembly and repair functions commonly performed by jewelry retailers be defined as "manufacturing" for purposes of the new rules. For example, inserting a jewel into a gold or tungsten ring setting, or mechanically attaching a clasp, or a jewel or other decorative object, to a simple gold or tungsten chain to create a more elaborate necklace or bracelet, is not tantamount to the "manufacture" of the predicate gold or tungsten ring base or

[28] SEC Proposing Release at 20 (Request for Comment No. 11).
[29] Comment Letter from Erik O. Auter, Vice President, Int'l Trade Counsel, National Retail Federation, dated March 2, 2011, at 5, available at http://www.sec.gov/comments/s7-40-10/s74010.shtml.

chain. Similarly, repairing already-fabricated jewelry without altering its fundamental appearance or chemical composition should not constitute manufacturing.

* * *

In conclusion, the Associations thank the Commission for considering our suggestions and comments as set forth in this letter and the attached Appendix. We look forward to working with the Commission to make it possible to achieve the goals of Section 1502 of the Dodd-Frank Act, without imposing undue burdens on affected public companies and their shareholders.

Sincerely yours,

Cecilia L. Gardner, Esq.
President, CEO and General Counsel
Jewelers Vigilance Committee

Ruth Batson
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American Gem Society

David W. Cochran
President & CEO
Manufacturing Jewelers & Suppliers of America

Matthew A. Runci
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Executive Director
Fashion Jewelry and Accessories Trade Association

cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
Paula Dubberly, Deputy Director, Division of Corporation Finance
Felicia Kung, Chief, Office of Rulemaking, Division of Corporation Finance
John Fieldsend, Special Counsel, Office of Rulemaking, Division of Corporation Finance

APPENDIX

The Associations provide this Appendix to our comment letter for three purposes: (1) to supplement our discussion in that letter of important facts and challenges the jewelry and watch industry, along with many other industries affected by Section 1502 of the Dodd-Frank Act, will be facing in the development, testing and implementation of due diligence mechanisms that provide reasonable assurance with respect to the source and supply chain for gold and tungsten; (2) to offer some insight into our industry's prior experience in developing responsible supply chain mechanisms that collectively form the basis for the recommendations made earlier in this letter; and (3) to respond to specific requests for comment posed by the Commission.

All capitalized terms in this Appendix have the same defined meanings as set forth in our accompanying comment letter and, as we do there, we focus primarily here on gold because of the special problems associated with tracing the global gold supply chain. We hope that the following information and analyses are helpful to the Commission's consideration of final rules implementing new Section 13(p) of the Exchange Act (added by Section 1502(b)).

The Gold Supply Chain – Challenges in the Jewelry Industry

The Associations strongly believe that improvements to infrastructure and governmental control systems in the DRC Countries are vital to establishing country of origin and due diligence systems essential to supply chain integrity. However, these conditions are not yet present in the region covered by Section 1502. Because gold production in the DRC Countries, especially in the DRC itself, is largely informal and artisanal, challenges to the development of control systems by industry alone are very real. For example, work by members of the electronics industry to develop "track-and-trace" verification systems covering some or all of the enumerated "conflict minerals" in the DRC was delayed last year by a government-imposed ban on mining.[1] At the same time, small-scale and artisanal mining continues, with this extracted material reportedly being smuggled out of the country. The methods used by local miners to bring their extracted minerals to market are informal and largely unknown to our members, as are the methods used to integrate this production into the supply chain. These challenges are exacerbated by unstable governments and dangerous conditions extant in the DRC Countries.

To summarize, as stated in an April 2010 OECD report, the "gold supply [in the DRC] presents special challenges for supply chain due diligence because very little is exported legally [from the DRC] and there is hardly any paper trail, making identification and management of risk extremely difficult."[2] The following illustrative factors – just a

[1] *See* accompanying comment letter at footnote 16 and accompanying text.

[2] OECD Pilot Project in the Mining and Minerals Sector, "Draft due diligence for responsible supply chain management of minerals from conflict-affected and high-risk areas, Expert meeting of the OECD hosted working group, Summary Report", April 28, 2010, at page 8. This report can be accessed on the OECD website at www.oecd.org.

few of many – underscore the complexity of the gold supply chain. Even a system to track newly-mined gold back to a conflict-free mining site outside of the DRC Countries cannot be launched until the gold (and tungsten) refiner/smelter certification initiative now in development and led by the EICC-GeSI coalition – in which the RJC is participating – is in place and can be tested and subjected to an independent third-party audit. The EICC-GeSI coalition has indicated that it intends to initiate audits of gold refiners and tungsten smelters at the beginning of the third quarter of 2011, with the goal of publishing a list of certified refiners/smelters by the end of that quarter. Suppliers simply cannot begin to track the country of origin of their gold and tungsten production "inputs" without the starting point that a reliable refiner/smelter certification system would provide.

World gold production from the original source is sent as ore, gold concentrate or grain to refiners/smelters located in such far-flung regions of the world as India, China South Africa, North America, Australia and Switzerland.[3] Some refiners are independent organizations, while others are owned by the mines and are located at the mining sites. Many refiners receive their product from diverse international sources and combine those gold supplies during the refining process.[4] Emirates Refinery in Dubai is a major refiner of scrap gold from the Middle East and India. Refiners process the combined gold sources into usable bars, coin blanks or wire, depending on the demand of their particular customers. These refiners (as in every stage of the supply chain) often combine recycled gold into the product, either from recyclable gold that they have purchased or from the "spill-off" that they produce during the refining process. No gold is wasted. Furthermore, the customers of these smelter/refiners are a wide array of gold users, including banks, automobile and electronics companies, to name just a few.

The gold acquired by manufacturers is derived from many sources in addition to smelter/refiners, including directly from the mine, as well as from banks, "street-level" refiners,[5] gold dealers and precious metal companies, which range from large, multi-national entities to small businesses. Gold is used for multiple purposes – as global currency, in the manufacture of automobiles and electronics, for dental and medical devices and as a commodity traded not only on exchanges, but in small villages around the world. Once out of the ground, gold does not spoil, nor is it expended in the manufacturing process. All the gold that enters the supply chain is still theoretically in the supply chain and can be exchanged for value at any point.

Gold used for jewelry manufacturing is 40% recycled, according to the most recent data available to us.[6] The original geographic location of extraction, as the Commission appropriately recognizes, cannot be determined for recycled gold as it is produced from old scrap jewelry or captured during the refining or manufacturing

[3] Olden Report at 7.
[4] Information about gold production and supply chain is sourced, unless otherwise identified, from the World Gold Council web site at www.gold.org.
[5] There are local "retail" refining businesses that buy and sell gold that they themselves have melted into more usable forms for jewelers, such as beads (also known as "shot"), wire or small bars.
[6] Olden Report at 3.

process. Of the remaining 60% used for manufacturing, it is currently impossible to determine the geographic source without systems that segregate and identify sources for gold at the production/refining stage in the supply chain. Accordingly, much additional work is required to establish a viable chain of custody system for gold.

We believe that we are closer to achieving that goal with tungsten than with gold, because of the detailed due diligence standards for tungsten already published by the OECD,[7] which presently are being tested by such major stakeholders in that supply chain as the EICC-GeSI coalition. Moreover, members of the jewelry industry are joining with the electronics industry in accelerating the EICC-GeSI's gold initiative in anticipation of the OECD's publication of a Gold Supplement to its Due Diligence Guidance that we recently learned is not expected to be finalized until 2012.[8] Key suppliers are being identified and enlisted as willing partners in our collective efforts to develop reliable due diligence mechanisms for both gold and tungsten. Intel Corporation, a leading member of the EICC-GeSI coalition, is co-sponsoring a summit meeting in Denver, Colorado on March 8, 2011, to finalize plans for joint EICC-GeSI conflict-free gold and tungsten pilots consisting (among other elements) of the above-described refiner/smelter certification system and draft conflict-free sourcing requirements for other suppliers. RJC and other jewelry industry participants will be attending and actively participating in this meeting.

Relevant Supply-Chain Integrity Experience of the Jewelry Industry

Once again, the Associations appreciate that the Commission has elected not to impose prescriptive standards for the country of origin and due diligence measures that must be established under the new rules. As the Commission observed, this flexibility will allow our members and other affected industries to tailor due diligence standards that are appropriate to their particular business models while providing a predicate for the necessary reasonable assurance that "conflict minerals" are not derived from "DRC conflict-ridden" sources. We are confident that, given sufficient time and further guidance from the State Department, the GAO and other federal agencies identified in Section 1502, as well as the OECD and the UN, we will fulfill the Commission's expectations.

The Associations have substantial experience with creating supply chain systems "from scratch" based on reliable representations about origin provided for the products supplied. For example, a System of Warranties, designed and implemented by the World Diamond Council (to which many of our Associations' members belong), is applied around the world to verify the "conflict-free" genesis of polished diamonds based on the certification of the rough diamonds through the Kimberley Process Certification Scheme ("KPCS").[9] It should be noted that the basic international supply chain certification

[7] OECD Report, Tungsten Supplement.
[8] *Cf. id* at 6 n.1 ("Gold supplement to be issued in 2011."); s*ee* accompanying comment letter at p. 9.
[9] The Clean Diamond Trade Act, Pub. L. 108-19, April 25, 2003, 19 USC 3901 *et seq*., implements the Kimberley Process Certification Scheme in the United States.

system of the KPCS was formulated via international stakeholder negotiations during what was considered the unusually rapid time frame of 2.5 years. Since its initial inception in 2003, 75 countries have enacted national legislation implementing the KPCS requirements, which have operated essentially to diminish the trade in conflict diamonds to less than 0.1% of the world's supply.

Another example is the industry's successful implementation of the JADE Act, where exporter and importer certifications and representations regarding the source of non-Burmese "covered goods" (rubies or jadeite, or jewelry made from these products) are relied upon to comply with the U.S. trade ban on rubies and jadeite from Burma.[10] Since this trade ban was enacted, rubies originating from Burma have stopped entering the US market.

Also relevant is the trade in irradiated gemstones, which is subject to regulation by the Nuclear Regulatory Commission ("NRC") Suppliers are now required to warrant to their customers that these gemstones have been imported and traded consistently with the licensing provisions required by the NRC.[11] These warranty systems are subject to the law applicable to express warranties, which expose the maker of the warranty to liability if the warranty is found to be negligently made, false or fraudulent. Further, the documentation that permits the supplier to make these representations is subject to private or governmental audits. Customers will not accept these products from suppliers without these warranties.

Finally, we in the jewelry industry believe that the risk-based diligence mechanisms created by dealers in precious metals, stones and jewels to assure compliance with the anti-money laundering provisions of the USA PATRIOT Act ("AML") may serve as a useful template.[12] Under this risk-based approach, companies must assess their vulnerabilities to money-laundering and terrorist financing and create their own AML programs that operate to meet the statutory goal of preventing their businesses from being used as a vehicle for commission of these crimes. Generally speaking, dealers must institute adequate diligence standards that permit them to identify the parties with which they conduct business, to monitor their transactions for AML compliance, and to take such other steps as needed to ensure that their employees are both aware of the individual dealer's compliance policies and procedures, and act to implement such policies and procedures. In establishing this risk-based approach to the detection and prevention of instances of money laundering and terrorist financing, the U.S. Treasury Department (FINCen) acknowledged the diversity of business models in the jewelry industry – and set standards with which dealers must comply, while allowing dealers to design implementation plans and due diligence systems that best fit their particular business model. This approach has been an effective tool in encouraging widespread adoption of AML compliance mechanisms, which has made identification of business partners and close transaction monitoring standard business practices within the jewelry industry.

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[10] Pub. Law No. 110-286, July 29, 2008, 50 USC 1701 Note.
[11] *See* www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1556/v8/
[12] Pub. Law No. 107-56, 31 USC 5318(h); *see* 31 CFR Part 103, Section 130.

Achieving the successes we have described here required our constructive engagement with governments both in the United States and abroad, with civil society, and with industry representatives. As it did with diamonds, Burmese goods, irradiated gemstones, and AML requirements, the jewelry industry is fully capable of creating a supply chain system for each of gold and tungsten that will facilitate compliance with Section 1502 and the implementing regulations, including those adopted by the Commission. Coordinated global efforts by governmental authorities and international organizations, such as the UN and the OECD, are underway. We are currently engaged in these initiatives, along with various other impacted industries and stakeholders, including retailers, manufacturers, mining companies and non-governmental organizations ("NGO's"). While the complex global supply chain for gold presents special challenges, we believe that these multinational initiatives – if given sufficient time – will achieve the central goals of Section 1502.

Responses to Specific Commission Requests for Comment

Question 1 – Equal reporting standards for all "conflict minerals"

Although we understand that it might be tempting, from a regulatory perspective, to adopt "one-size-fits-all" rules for the four "conflict minerals" enumerated in Section 1502, we submit that there are certain unique qualities of the global gold supply chain that should be reflected in the final rules. There are thousands of gold refining operations, ranging from the reputable members of the LBMA to small, family-operated workshops that perform certain refining functions on a highly informal (if not irregular) basis. Given the extremely high value of this mineral, in no small part due to its use as global currency, it is aggressively recaptured and routinely combined throughout the supply chain with recycled and scrap gold. The largest manufacturing centers for gold jewelry are India, China, Turkey and Italy.[13] We will not repeat the information set forth in our accompanying comment letter (at pp. 2-8) in support of our argument; suffice it to say that the gold supply chain is so highly fragmented and idiosyncratic, by comparison with the "3 T's", that it may warrant different regulatory treatment.

The unique character of the fragmented gold supply chain has led other organizations to evaluate it separately from the other minerals that originate in high-risk conflict regions. As previously discussed, for example, the OECD has published due diligence standards and guidance for management systems involving tungsten, tin and tantalum, but is only now grappling with the complexities of gold.

For all these reasons, we urge the Commission to employ a different approach for the gold supply chain as described more fully above, in the accompanying letter.

Questions 2-7 – Application of the Proposed Rules

We agree with the Commission's reading of Section 13(p) to limit application of the proposed implementing rules to all domestic and foreign companies, regardless of size, that file periodic reports with the Commission under Section 13(a) or Section 15(d)

[13] Olden Report at 9.

of the Exchange Act. Because of the global nature of the affected industries and the multinational nature of various ongoing efforts to address the DRC humanitarian crisis, there is no basis for disparate treatment of registrants depending on their country of origin. With respect to smaller reporting companies, it is reasonable to assume that the costs of compliance may disproportionately harm them by comparison with any concomitant benefit in achieving the statutory goals, since these companies lack the leverage to pressure suppliers and smelters to certify regarding the source of a particular conflict mineral. Just as we are requesting that the Commission provide a reasonable phase-in period for larger reporting companies that is tied to progress made in the State Department's mapping initiative and the various industry efforts now underway within and outside the framework of the OECD and UN projects, we believe it would be appropriate to allow smaller reporting companies even more time in which to adapt the results of these broader global initiatives to their individual facts and circumstances.

While limiting application of the proposed new requirements to U.S. and non-U.S. registrants could well place them at a significant competitive disadvantage vis-à-vis non-reporting entities engaged in the same lines of business, we do not believe the statute contemplates an immediate expansion of the Commission's regulatory jurisdiction to cover non-registrants. Presumably Congress intended to defer this decision pending consideration of the Comptroller General's report due within two years of enactment.[14]

We respectfully request clarification of whether the Commission intends to cover those issuers that continue to file periodic reports on a voluntary basis – due, for example, to indenture covenants – even though they no longer are "required" technically to file such reports in order to comply with the federal securities laws. In this connection, we note that the statutory obligation would seem to apply to persons required to report under new Section 13(p)(1)(A), but not more broadly under Section 13(a) or Section 15(d).

Finally, in response to the Commission's question, we do not believe that Section 13(p) reporting obligations should be extended to issuers exempt from Exchange Act reporting under Rule 12g3-2(b). We do not object, however, to a Commission interpretation of current Rule 12g3-2(b) indicating that issuers relying on this exemptive rule should consider carefully the need to make English-language website postings of any conflict mineral disclosures required or permitted by home-country law, rule, listing standard or custom, as a condition to continued reliance on Rule 12g3-2(b).

Questions 9-12 – "Manufacture" and "Contract to Manufacture"

The Commission has judged that the best reading of both the plain language and the purpose of Section 1502 is that it should apply to non-manufacturers (such as retailers) that contract with third parties for the manufacture of products or components if the retailer has "any influence regarding the manufacturing of those products, including generic products marketed under the retailer's name, or a separate brand name…as long as they are manufactured specifically for that issuer." As we have explained in the accompanying comment letter (at p. 14), specific guidelines for both terms should be

[14] *See* Section 1502(d).

developed that expressly define the level of retailer's influence, involvement or control over the manufacturing process that will be sufficient to trigger a retail company's disclosure obligation.

Questions 22-25, 29, 30, 31, 32 – Location and liabilities associated with disclosures and Conflict Mineral Reports

While we greatly appreciate the Commission's effort to minimize liability consequences by according "furnished" rather than "filed" treatment to conflict mineral information subject to disclosure, we urge the Commission to reconsider the proposed vehicle for disclosure in light of both the plain language and underlying purpose of the statute.

First, Section 13(p)(1)(A) of the Exchange Act calls only for annual disclosure of whether "necessary" conflict minerals (as described in Section 13(p)(2)(B)) originated in the DRC or the enumerated adjoining countries – if the answer is no, that is all that is required under the statute, but if the answer is yes (or, under the Commission's proposal, if the company is unable to determine whether the answer is yes or no), a report containing specified information must be submitted to the Commission. The statute is otherwise silent with respect to the location of the requisite disclosure and report in respect of any Commission filing or submission, although we recognize that Congress's express requirement that this information be made available on issuer websites signals a clear intent that it be made publicly available.

Second, a key purpose of Section 13(p) is, ultimately, to contribute to the efforts of the State and Commerce Departments to sever the established linkage between the conflict minerals trade originating in the enumerated countries and the financing of armed conflict in DRC Countries. As the Commission itself observed, "[i]t appears that the nature and purpose of the Conflict Minerals Provision is for the disclosure of certain information to help end the emergency humanitarian situation in the eastern DRC that is financed by the exploitation and trade of conflict minerals originating in the DRC countries, which 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."[15] Nothing in the statute itself suggests that the "reasonable" investor would find this information to be important in deciding whether to buy or sell an affected company's securities – the touchstone of materiality under the federal securities laws – although we readily acknowledge that socially conscious investors might well factor this information into an investment decision.

Accordingly, we urge the Commission to exercise the latitude afforded by Congress to keep the prescribed information out of the periodic reports, which are already sufficiently lengthy and complex, and enable companies to post all required information on their Internet websites in accordance with Section 13(p)(1)(E). This information could be "disclosed" to the Commission pursuant to a "new, separate form furnished

[15] SEC Proposing Release at 51 (footnotes omitted).

annually on EDGAR," as suggested by one of the Commission's comment requests[16] and, as the Commission has proposed, maintained on issuer websites until the next annual posting of conflict minerals disclosures is made. However, there should be no additional requirement with respect to formatting that would impose unnecessary costs on affected companies and their shareholders – specifically, we do not think it is reasonable or appropriate to require presentation of this information in XBRL format, which is not suited to disclosure of the type of non-financial, largely descriptive information called for by Section 13(p) and the Commission's implementing rules.

In sum, we believe that our recommended approach would satisfy in full the statutory publicity requirement, while at the same time avoid the imposition of an unnecessary burden on affected companies. Exchange Act annual reports are subject to strict filing deadlines that may not coincide with a given company's purchasing and/or manufacturing cycles. As before, companies in preparing their annual and quarterly reports under the Exchange Act still would have to identify and weigh the materiality of the risks and uncertainties of conducting business involving the use of conflict minerals, particularly in connection with preparation of the Risk Factor and Management's Discussion and Analysis ("MD&A") sections of periodic reports.[17] Members of the public who wish to review these disclosures will have ample notice of when and where they are posted by monitoring the EDGAR and issuer websites. An issuer that concludes that this information should be disseminated by additional means would be free to submit a report to the Commission on Form 8-K (for example, under Item 7.01) and/or issue a press release advising the public that the annual conflict minerals disclosures are available on the company's website at a given URL.

Question 26 – "Non-conflict minerals" reports

If an issuer uses conflict minerals that it is able to establish did not originate in the DRC Countries, it should not be required to disclose any further information beyond what the Commission has proposed. Accordingly, the Commission should not require that such an issuer identify the non-DRC countries from which its conflict minerals originated. Under our suggestion (outlined in the accompanying comment letter at pp. 12-14), recycled, scrap and "grandfathered" existing stock containing gold and tungsten would receive essentially the same treatment under the final rules (at least during the recommended phase-in period).

Questions 27 and 28 – Reviewable business records

With respect to the content of the proposed "threshold" disclosure, we believe that the Commission's requirement of a description of the "reasonable country of origin inquiry" is appropriate. We also believe that the Commission's proposal that an issuer maintain "reviewable business records" for non-DRC conflict minerals is reasonable, but respectfully request that the Commission clarify the following: (1) the meaning of the

[16] *Id.* at 31.

[17] *Cf.* Commission Guidance Regarding Climate Change Disclosure, SEC Rel. No. 33-9106 (Feb. 2, 2010), 75 FR 6290 (Feb. 8, 2010)(focusing on, *inter alia*, "material" risks and known trends, events and uncertainties).

term "reviewable" (*e.g.*, by whom); (2) whether the Commission takes the position that the collection and preservation of such information are covered by an affected company's disclosure controls and procedures and/or internal control over financial reporting obligations; and (3) what the Commission would consider an appropriate period for retention of such records, which may turn on the Commission's response to the immediately preceding question. It may not be necessary to impose a separate record-keeping obligation on reporting companies, depending on the Commission's answers.

Questions 33-36 – Standard for "reasonable country of origin inquiry"

The Commission appropriately has not specifically defined what constitutes a "reasonable country of origin inquiry." Instead, the Commission has stated that the reliability of any such inquiry would be based primarily on whether the inquiry methodology employed provides a reasonable basis for an issuer to be able to trace the origin of the targeted minerals or to not be able to make this determination.

We support this approach. During the requested phase-in period, the steps necessary to constitute a reasonable country of origin inquiry will depend on the available diligence infrastructure at a given point in time. This inquiry would include reliable representations about origin obtained directly from a facility where gold is processed, or indirectly from an issuer's supplier who in turn received such a reliable representation from its supplier. Of course, as systems improve and the phase-in ends, these representations may no longer be sufficient and may be jettisoned entirely or incorporated into broader, more effective diligence mechanisms that would include refinery (or smelter) certifications.

Questions 37-45 – Conflict Minerals Report Contents and Due Diligence

As we have already described, work is currently being conducted on a variety of fronts to develop reliable country of origin inquiry and due diligence systems. We concur with the Commission's approach of not providing specific standards or guidance regarding country of origin and due diligence measures.[18] Each issuer needs the flexibility to develop a process that is appropriate for its supply chain and products in light of all available relevant guidance.

Questions 37 and 38 address the issue of whether the rules should require affected issuers unable to determine the origin of their gold (currently most, if not all issuers since no reliable due diligence or country of origin systems are in place at this time) to label their products as not "DRC conflict free" in the CMR. As described in our accompanying comment letter (at pp. 2-3) we anticipate very real and serious harm to our industry from the likely prevalence of "not DRC conflict-free" disclosure, based on the fact that an issuer is "unable to determine" the origin of its gold due to the realities of this complex supply chain.

[18] SEC Proposing Release at 53.

Once the country of origin and due diligence mechanisms are in place, as discussed above,[19] the danger of a predominance of "unable to determine" disclosures is reduced, and the concomitant negative implications of such a disclosure also would be reduced. However, we do not believe that any Congressional goal would be served by requiring companies that perform the necessary due diligence to apply the highly pejorative label "not DRC conflict-free", to the otherwise accurate disclosure that they are "unable to determine" whether their gold was or was not extracted in a conflict-ridden zone within the DRC Countries, despite the exercise of fully disclosed country of origin and due diligence mechanisms that comply with internationally recognized "best practices." Nor does the statute compel this result, as we argue in the accompanying letter at p. 8.

The proposed rules also fail to take into account the number of individual products that jewelry manufacturers produce – thousands of different items of jewelry are produced by the larger manufacturers. Would these issuers be obligated to describe each one in the CMR, and trace its provenance all the way back to the point of extraction which, in the case of recycled or scrap minerals, would be impossible to determine? Clearly no legislative purpose is achieved by such detailed and individual labeling – this provision instead should require issuers to describe generally the types of products they manufacture (or contract to manufacture) that include gold, without specifying each and every individual product.

Questions 39, 40 and 41 address the proposed requirement to disclose in the CMR all countries of origin, facilities and efforts to find the mine or location of origin for the products that do not qualify as "DRC conflict-free," even though the Commission acknowledges that issuers who are unable to determine whether or not their products contain DRC conflict minerals would not be able to provide the country of origin (or, presumably the mine or location of origin) at least under current circumstances.[20] Such a requirement for issuers unable (despite their best efforts) to develop reliable country of origin and diligence mechanisms, would be excessive during our proposed phase-in period, given the plain language and goals of the Section 1502. Even when reliable tracking systems are in place, at the conclusion of our suggested phase-in period, it is difficult to see how an issuer that is unable to track the source of its gold to a particular country could then go on to describe the location of any mine (whether industrial or informal and artisanal), along with the weights of individual shipments. Such requirements are not consistent with the circumstances and realities of much of the gold production in the DRC and adjoining countries.

Questions 42 - 45 – Certification and Location of the Audit Report

We do not believe that issuers should have the audit certification signed by an individual at this preliminary stage, given that we don't yet know with certainty what standards will govern the audit process and the parameters of the issuer's relationship

[19] Accompanying comment letter at pp. 11-13.
[20] SEC Proposing Release at 44 n. 109.

with the independent third-party auditor. We have no objection, however, to a corporate official signing the certification in his or her official capacity.

More to the point, to focus on the question of which corporate official should sign the audit certification would seem to put the proverbial cart before the horse. First, it is not even clear what audit standards will apply, and what level and type of expertise will be required to qualify to conduct the audit. To the best of our knowledge, the GAO has not yet specified which audit or attestation standards will apply to these audit engagements. Nor has the State Department yet published guidance for the benefit of "commercial entities" as to what "due diligence" mechanisms – including but not limited to the prescribed independent private-sector audit – will be considered compliant. Absent some Commission guidance on the circumstances under which a particular audit might be deemed "unreliable" for purposes of Section 13(p)(1)(c), moreover, it is impossible for us to know whether any private sector entity would be prepared to perform this function (much less what that entity's responsibilities and attendant liability should be). The responsible agencies have not yet formulated the requisite guidance which should cover, at a minimum, what specific governmental auditing standards would apply, what the standard of care would be for auditors of the CMR and how that standard would be enforced, and what the Commission itself would consider to be an "unreliable" audit, which presumably would help define a threshold for what sort of audit might be "reliable" and would satisfy the "reasonable assurance" criterion the Commission has proposed.

Due to these uncertainties, we are unable at this time to offer an informed view as to whether an official of the issuer should sign the audit certification in any capacity other than his or her official capacity, and what liability that person should assume in the event of an "unreliable" audit. We respectfully submit that the Commission therefore should defer these determinations, as discussed more fully above, to enable the appropriate due diligence mechanisms to be developed and implemented by the private sector, and the responsible agencies to formulate more detailed guidance on their expectations regarding both compliance and liability for non-compliance. We believe the responsible agencies' collective and individual judgments with respect to these difficult issues would benefit greatly by allowing more time for the knowledgeable constituencies now engaged in a dialogue – the affected companies, non-governmental organizations, and socially conscious investors – to reach a workable consensus on what diligence is due within the broader framework of the various ongoing international and national initiatives, including but not limited to the OECD.

It would be appropriate, in our view, that an issuer to furnish its independent private sector audit report as part of the proposed CMR.

*Questions 46 - 49 – Location and Furnishing of the Conflict Minerals Repor*t

For the reasons outlined above, the Commission should not require the CMR to be furnished or filed as an exhibit to the issuer's annual report, but rather should allow this document to be posted on the issuer's website as Congress mandated, and furnished to the Commission via EDGAR under cover of a new form devoted solely to conflict

minerals disclosure. We do not believe that the Commission should create a mandatory reporting obligation under Form 8-K or Form 6-K, as the case may be, although an issuer should be permitted voluntarily to use these disclosure vehicles to supplement that issuer's Internet website posting and new EDGAR submission we have recommended for purposes of complying with Section 13(p). As with any other issuer website posting, as well as a domestic issuer's glossy report to shareholders (furnished on EDGAR and delivered to shareholders under Exchange Act Rule 14a-3(b)) and/or an issuer's submissions pursuant to Form 8-K (*e.g.*, Item 7.01) or Form 6-K (furnishing information to the Commission and U.S. investors that has been provided to home-country investors under applicable laws, rules, listing standards and other provisions), the issuer would be liable for any materially false or misleading statements made in the posted/furnished conflict minerals disclosures under the antifraud provisions of the federal securities laws – most notably, Section 10(b) of the Exchange Act and Rule 10b-5 there under. Moreover, as the Commission points out in the Proposing Release, "failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence 'unreliable' and, therefore, the Conflict Minerals Report 'shall not satisfy' … [the] proposed rules,]" – meaning that the issuer "would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable."[21] That degree of liability exposure should be sufficient to deter abuse, in our view, although as noted above, we recommend that the Commission specify what audit or other diligence measures might be deemed "unreliable."

We oppose using reports on Form 8-K and 6-K as the mandatory disclosure vehicles for conflict minerals disclosure because we do not believe that either the statute itself or the current rulemaking record supports a conclusion that the conflict minerals disclosures will be either significant or material to investors, by contrast with the other informational items now disclosed in these reports. While the conflict minerals disclosures are undoubtedly important from a public policy perspective, particularly now that Congress has acted, their essential purpose would not necessarily be consistent with the central, investor-centric disclosure purpose of each of these Exchange Act reports.

Question 50, 51 and 54 – Due Diligence Standard in the Conflict Minerals Report

A reasonable due diligence system would include certain common basic elements established via national or international consensus (the various initiatives described above), but would allow each company establishing its own system to implement those elements in a manner that works best depending on the sector of the supply chain in which it operates and its particular business model. In the case of the gold supply chain, there are numerous levels and each has a different business model. Given the complexities and unique characteristics of the gold supply chain, we believe that it would be counterproductive to set detailed due diligence measures for each participant to fulfill, without regard to the fact that different participants perform different functions and have varying levels of influence over supply chain "choke-points" such as mines and refineries.

[21] SEC Proposing Release at 51 (footnotes omitted).

The Associations agree with the Commission's judgment that recycled and scrap gold should be characterized as "DRC conflict-free." A similar approach should be taken for above-ground stocks that are available as of the date of the earliest CMR submission required under the final rules, or at least prior to the end of the proposed phase-in period. Any additional requirements would be complicated by the constant recapture and high volume use of recycled gold.[22]

Question 52 – Reliance on Reasonable Representations

Reliance on the reasonable representations of refiners or other participants in the supply chain (along with a report on progress towards achieving milestones) presents an initial alternative means to achieve the goals of the legislation, at least until such time as reliable smelter/refiner certification and due diligence systems can be implemented. In other supply chain systems in the jewelry industry, for example, these systems have worked well to ensure that the rubies and jadeite supplied are non-Burmese, that the diamonds supplied have been traded in accordance with the requirements of the Kimberley Process, and that the irradiated gemstones supplied have been imported, possessed and traded in compliance with the licensing provision of the NRC. These reasonable representations are subject to audit, can be tested by legal challenge, and are fully enforceable. They are working well in the trade to regulate these products to ensure consumer confidence, and to meet regulatory goals. Such a warranty system could be used at the early stages in implementing this rule (*i.e*. during our recommended phase-in), and may also form an important element of a full-fledged diligence mechanism that relies in major part on a refiner/smelter verification system, as discussed above.[23]

Question 53 – "Unable to Determine" Disclosures

Until reliable country of origin inquiry systems and due diligence standards can be established and implemented, the predominant use of the "unable to determine" disclosure by issuers is inevitable. The negative implications both in terms of accomplishing the goals of the legislation and for the issuer of such a report have already been described.[24] Therefore, we ask the Commission to allow issuers during the suggested phase-in period to forego making "unable to determine" disclosures pending the completion of the various initiatives underway with respect to gold. The Commission should allow affected issuers, other federal agencies, the OECD, the UN and various private sector coalitions sufficient time to develop the widely accepted, reliable standards that we believe are necessary to support any reasonable determination of the source of gold and whether it was used to fund conflict or human rights violations.

After the phase-in period, we believe that "unable to determine" disclosures would be appropriate in an audited CMR but, in the case of newly-mined gold and tungsten, should not include the descriptive phrase "not DRC conflict-free." Issuers that use gold or tungsten derived from recycled or scrap materials, or "grandfathered" existing stocks, should not be required to submit (or post) audited CMRs; rather, as explained in

[22] *See* our accompanying letter at pp. 8-10.
[23] *Id.* at pp. 9-10.
[24] *Id.* at pp. 2-3.

our letter at pages 12-13, an alternate approach to "furnished" disclosure would be appropriate.

Question 55 - Specific National or International Due Diligence Standards

Constructive engagement by the Associations in the development of national and international due diligence standards is ongoing. Progress has been made on tin, tantalum and tungsten, to the point where due diligence standards for those minerals have been published by the OECD. Similar efforts are now being made with respect to the gold supply chain, and we anticipate an OECD supplement for gold will be published in 2012. These publications are and will be very useful to private-sector companies in creating their own systems that will enable full compliance with the Commission's rules. The Commission should not specify a particular system, but instead should set policy objectives and list acceptable due diligence criteria or standards, with the understanding that these systems must be adapted for each company's particular business model. Flexibility is important in the implementation of these systems, which we again commend the Commission for recognizing.

Questions 56-58- Furnishing Initial Disclosure and the Conflict Minerals Report

At a minimum, we agree with the Commission that a complete fiscal year should begin and end before covered issuers are required to provide their first annual report on conflict minerals. Pursuant to our recommended phase-in for gold (and tungsten), however, we believe that in the first annual reporting cycle, initial disclosures that gold is used in (or in the manufacture of a product), identifying the source of the gold if at all feasible (including whether it contains recycled and above-ground stocks) and the progress made towards completing reasonable, risk-based country of origin inquiry and due diligence systems, should be sufficient. In the next reporting year, an issuer would again report progress, and if able, provide additional, more detailed information as global standards are developed and its own diligence system comes "online."

If the Commission were to require issuers to comply with their new conflict minerals disclosure obligations in their Exchange Act annual reports (which, as discussed above, we do not support), we urge the Commission to afford companies the flexibility to furnish the conflict minerals information by amendment to the annual report within a specified period of time after the due date of that report. Based on the realities of the gold (and tungsten) supply chain as we currently understand them, we suggest a deadline of nine months after the close of the issuer's fiscal year. Smaller issuing companies may require more time, and this should be accorded to these issuers.

Question 61 – Above Ground Stockpiles

Given the enormous volume of existing above-ground gold stockpiles, the Associations greatly appreciate the opportunity to comment on this issue. Jewelry industry experts estimate that all the gold ever produced – approximately 165,600 tons as of the close of 2009 – is still in existence, and reasonably accessible. This represents approximately 40 years' supply at 2010 rates of consumption. About 17% of this supply,

or almost seven-year's worth, is held by central banks, the largest holders of accessible gold.[25] The rest is in the form of currency or jewelry, or in other devices or products that use gold. As is the case with recycled and scrap gold, issuers will not know the origins of minerals acquired from these large existing stockpiles. Moreover, these stockpiles have often been held for decades (*e.g.*, by banks), and therefore reasonably cannot have financed the current conflicts in the DRC.

In discussing recycled and scrap conflict minerals, the Commission noted that "issuers purchasing [these] conflict minerals would not implicate the concerns of the [Conflict Minerals] provision."[26] As a result, the SEC proposed an alternative approach for these minerals, including the nature of the initial disclosure: a claim of "recycled or scrap" could be made, accompanied by the description "DRC conflict-free," as opposed to "unable to determine" and "not DRC conflict free."[27] We recommend that the Commission adopt a similar, alternative "grandfathering" approach to existing stockpiles of conflict minerals as well – at least for those stockpiles in existence prior to a date in 2014 to be selected by the Commission.

Questions 63-67 – Recycled Minerals

The Associations wholeheartedly support the SEC's proposal to provide an alternative approach for disclosure relating to the enumerated minerals obtained from recycled or scrap sources, including a designation that recycled minerals are "DRC conflict free." No legislative purpose is served, however, by requiring issuers using these materials to furnish a CMR as is currently proposed by the Commission.[28] Instead, as previously discussed, these issuers should be required only to make an initial disclosure of the presence of recycled or scrap gold in their products and then provide details on the reasonable inquiry undertaken to demonstrate the basis for the disclosure that these minerals are recycled or scrap.

Proposed Item 104 of Regulation S-K (and proposed Item 16 of Form 20-F) not only would create an added burden for issuers that use recycled or scrap minerals if a CMR obligation were to be imposed, but also could have the unintended, and undesirable, consequence of discouraging the use of recycled minerals. By providing an incentive not to use recycled or scrap minerals, the proposed rule not only discourages an environmentally-friendly trade practice, but also arguably undermines the legislative goal of diminishing armed conflict in DRC Countries by increasing demand for newly-mined minerals sourced outside of this region – thereby allowing companies to avoid Item 104 disclosure entirely.

[25] Olden Report at 3-6.
[26] SEC Proposing Release at 63.
[27] As explained more fully above in our comment letter (at pp. 12-14), while the Associations enthusiastically support an alternative approach for issuers using recycled and scrap conflict minerals, we differ with some of the details proposed by the SEC, notably the requirement that these issuers file a CMR.
[28] SEC Proposing Release at 62-65

The risk that non-conflict free minerals might be inappropriately processed and "recycled," addressed in Commission question 67,[29] has been acknowledged by the industry and is the subject of several initiatives now underway, including the EICC-GeSI CFS project. We believe that the due diligence guidance that emerges from these international efforts, likely to be risk-based, will provide a means to control for this, as well as the many other, uncertainties that are part of the gold supply chain.

For purposes of disclosing the country of origin of recycled or scrap minerals, the Associations encourage the SEC to consider the approach taken by the North American Free Trade Agreement (NAFTA), and other U.S. trade regulations.[30] In that Agreement, the origin of "manufacturing scrap" is determined by the place of production, or the place of collection, provided that the collected goods are fit only for the recovery of raw materials.[31] This approach would place recycled and scrap-derived minerals squarely in the category of minerals that do not originate in DRC Countries, consistent with the label the Commission has proposed to assign them – as "DRC conflict-free."

We agree with the Commission that it should defer consideration of the process for deciding to revise, temporarily waive or terminate the final conflict minerals disclosure rules until the President takes any of the triggering actions envisaged by the statute. It is sufficient, in our view, for the Commission to state now that it plans to act in accordance with the statute should the need arise.

[29] *Id.* at 66.
[30] *See* our accompanying letter at p. 12.
[31] NAFTA, Part Two, Chapter Four, Article 415, Definitions of "goods wholly obtained or produced entirely in the territory of one or more of the Parties." 19 USC Section 3332(p)(6)(l).