

March 2, 2011

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

RE: Comments Regarding File Number S7-40-10 on Conflict Minerals

Dear Ms. Murphy,

As stated in our original letter dated November 17, 2010 ([link here](#)), we have come together as an informal and diverse set of stakeholders to arrive at a series of consensus recommendations to guide the development of the Conflict Minerals regulation. Reaching consensus among companies, non-governmental organizations, socially responsible and faith-based investors, and others is not always easy and that is why we were pleased to see several references to our original letter mentioned in the proposed rules on Conflict Minerals.

After extensive consultations, a set of diverse stakeholders submits the below comments and responses to some of the questions posed in the SEC proposal. Please note that we refer to this group of stakeholders as the “MSG” or “Multi-Stakeholder Group”. However, there are a few slight differences with the stakeholders who signed the first letter submitted in November and who signed this one.¹

We appreciate the opportunity to submit these comments, and we look forward to providing any additional information you may need for the rule-making process. Our informal coalition intends to contact SEC representatives to meet and discuss these matters further and to answer any questions that our comments may raise. Patricia Jurewicz (patricia@sourcingnetwork.org and 415.692.0724) is our point of contact.

Sincerely,

Co-chairs:

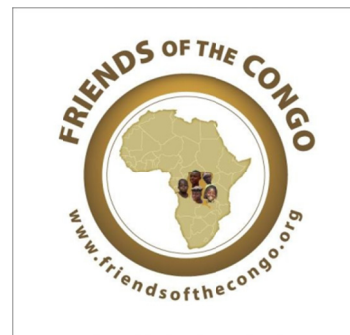
Darren Fenwick
Senior Government Affairs Manager
Enough Project

Tim Mohin
Director, Corporate Responsibility
Advanced Micro Devices

¹ Additional signatories: Falling Whistles, Free the Slaves, Medtronic, Inc., Missionary Oblates of Mary Immaculate, and Social Investment Forum. Due to timing or other circumstances, missing signatories are: Dell Inc. and EMC Corporation. As You Sow is now listed as the Responsible Sourcing Network, a project of As You Sow.

Confirmed signatures for the Multi-Stakeholder letter:

Advanced Micro Devices, Inc.
Africa Faith and Justice Network
Boston Common Asset Management, LLC
Calvert Asset Management Co., Inc.
Congo Global Action
Enough Project
Falling Whistles
Ford Motor Company
Free the Slaves
Friends of the Congo
Future 500
General Electric Company
Hewlett-Packard Company
Interfaith Center on Corporate Responsibility
Jantzi-Sustainalytics
Jesuit Conference
Jewish World Watch
Medtronic, Inc.
Microsoft Corporation
Missionary Oblates of Mary Immaculate - Justice, Peace and Integrity of Creation Office
Responsible Sourcing Network, a project of As You Sow
Social Investment Forum
Trillium Asset Management
Unity Minerals





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MSG Responses and Comments

Question 16. Should our rules define the phrase “necessary to the functionality or production of a product,” or is that phrase sufficiently clear without a definition? If our rules should define the phrase, how should it be defined?

MSG Comment: The rules should define the phrase “necessary to the functionality or production of a product.” Absent a definition in the rules, issuers will be uncertain in important respects about the scope of their reporting obligations and investors will find it difficult to compare the reports of issuers that may use differing definitions. The Multi-Stakeholder Group (MSG) continues to believe that the definition we suggested in the letter submitted by Patricia Jurewicz on November 18, 2010 (the “Multi-Stakeholder Group Letter”) is appropriate:

A conflict mineral is considered necessary to the functionality or production of a product when:

- a. The conflict mineral is intentionally added to the product; or
- b. The conflict mineral is used by the Person for the production of a product and such mineral is purchased in mineral form by the Person and used by the Person in the production of the final product but does not appear in the final product; and
- c. The conflict mineral is essential to the product’s use or purpose; or
- d. The conflict mineral is required for the marketability of the product

Question 19. Should we define the phrase to indicate that, as one letter suggested, a conflict mineral should be considered necessary when “[t]he conflict mineral is intentionally added to the product; or [t]he conflict mineral is used by the [issuer] for the production of a product and such mineral is purchased in mineral form by the [issuer] and used by the [issuer] in the production of the final product but does not appear in the final product; and [t]he conflict mineral is essential to the product’s use or purpose; or [t]he conflict mineral is required for the marketability of the product?”

MSG Comment: The rules should include in their definition of “necessary to functionality or production of a product” the elements set out in Question 19. Where conflict minerals are not intentionally added to a product, they are not necessary to its functionality and issuers may not be in a position to monitor their presence in products or trace their origins. Where conflict minerals are purchased in mineral form by the issuer and used in the production of a product, they should be covered by the rule even if they do not appear in the finished product. In this case, the issuer is responsible for the use of the mineral and the mineral should be subject to the issuer’s reasonable inquiry and due diligence processes. However, when conflict minerals are present in tooling or other production machinery, they should not be considered to be necessary to production of the product. In the case of minerals present in tooling and production machinery, the ore from which the minerals derive often was mined many years ago, prior to the development of any process to identify their origin. Even in the case of newly-acquired machinery containing conflict minerals, their origin may not be known. Because tooling and production machinery has a long useful life, deeming minerals contained in them to be necessary

to production of an issuer's product would result in large categories of products being designated as being associated with minerals of unknown origin for many years, regardless of the origin of newly-mined minerals contained in them. This would significantly dilute the usefulness of conflict minerals report to investors without in any way advancing the objectives of the statute.

Question 27. Should we, as proposed, require issuers to describe the reasonable country of origin inquiry they used in making their determination that their conflict minerals did not originate in the DRC countries?

MSG Comment: Issuers should be required to report the means by which they have determined that minerals contributing to conflict do not appear in their products. The essence of the conflict minerals provision is to provide for full disclosure of the steps taken by issuers to avoid practices that contribute to financing the conflict in the DRC. In turn, these disclosures will be evaluated by investors and other interested stakeholders who wish to make investment decisions based on the degree of care taken by the issuer to avoid contributing indirectly to the conflict. Allowing issuers to “opt out” of the reporting requirement by declaring the absence of minerals contributing to conflict without describing the steps they have taken to make their determination would undercut the essential purpose of the statute. The rule should make clear that such reporting must be sufficiently detailed to inform investors of the steps an issuer has taken to determine whether the minerals the issuer purchases come from the DRC or an adjoining country.

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

MSG Comment: For the reasons stated in response to Question 27, the rule should require issuers to maintain reviewable records to describe their reasonable country of origin inquiry. Moreover, the rule should require that those records be maintained for five years, consistent with the recommendations of the [*OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas*](#) (“*OECD Guidance*”). This will allow sufficient time for investors to understand and evaluate whether the issuer is making progress in continually improving its processes to ensure that conflict minerals do not appear in its products. As the Commission recognized, “the steps necessary to constitute a reasonable country of origin inquiry will depend on the available infrastructure at a given point in time.” P.38. By requiring the maintenance of records demonstrating reasonable country of origin inquiry for a period of time, both investors and the Commission will be able to evaluate compliance with an evolving standard of reasonableness. The scope and reliability of issuers' programs to trace the “downstream” flows of metal from smelter to product can be expected to improve over time and such improvement should be reflected in an issuer's reviewable records.

Question 33. Is a reasonable country of origin inquiry standard an appropriate standard for determining whether an issuer's conflict minerals originated in the DRC countries for purposes of our rules implementing the Conflict Minerals Provision? Should we provide additional

guidance about what would constitute a reasonable country of origin inquiry in determining whether conflict minerals originated in the DRC countries?

MSG Comment: The “reasonable country of origin inquiry standard” is appropriate. In order to be considered reasonable, the inquiry must include processes that allow an issuer to make a determination of the country of origin for the conflict minerals in its products. This is particularly important because an issuer’s failure to undertake a thorough inquiry to determine the country of origin could cause issuers not to file a conflict minerals report, when indeed they should. Such a result would undermine the intent of the law which seeks to create a transparent supply chain for conflict minerals sourced from the DRC and adjoining countries.

For example, it is widely recognized that the processing facility [smelter] is the key choke point in the minerals supply chain, and it therefore is important that the reasonable country of origin inquiry be tied to a process for determining the origin of ores used at the smelter level. Companies that have direct business relationships with processing facilities could review information from these suppliers, such as purchasing documentation and bills of lading, which will allow them to determine the country of origin for the minerals in their products.

Alternatively, reasonable country of origin inquiry could include reliance on an industry wide process that deems smelters “conflict free” provided this industry wide process meets standards comparable to the *OECD Guidance*. In all cases the issuer must have a reliable basis for determining the origin of ores used at the smelters in its supply chain. Such processes and transparency requirements, and a description of the steps the issuer is undertaking to ensure its suppliers are sourcing from “conflict free” smelters (see next paragraph) should be described in the issuer’s annual disclosure or conflict minerals report as applicable. In addition, reasonable country of origin inquiry would be the disclosure of the smelters for the conflict minerals in the issuer’s products, in its annual disclosure or conflict minerals report as applicable. Therefore investors and other interested stakeholders would be able to compare the smelter to a list of approved conflict free smelters from an appropriate industry wide process or smelters identified by the Department of Commerce as sourcing conflict minerals from the DRC or adjoining countries, and they can determine what steps a filer took to deem their processing facilities conflict free.

As processing facilities are deemed conflict free based on OECD (or comparable) due diligence guidance, issuers can, for example, contractually obligate their suppliers to source from processing facilities deemed conflict free. In this instance, an issuer should include in its disclosure to the SEC the processing facilities it has obligated its suppliers to source from and a description of the steps it has taken to ensure compliance, such as spot checks or procurement audits through a risk management approach. If a processing facility is deemed conflict free and the processing facility sources from the DRC or adjoining countries, issuers should be required to disclose, in addition to the name of the processing facility, the country of origin of the conflict minerals and efforts to determine mine of origin or location with greatest specificity for the minerals in its products, and a summary of the results of the independent 3rd party smelter audit detailing the points described in the MSG Comment to Question 50 (with due regard taken of business confidentiality and other competitiveness concerns). In this way, investors and other stakeholders can assess how the determination was made that the conflict minerals sourced from

the DRC or adjoining countries did not directly or indirectly finance or benefit armed groups in the DRC or adjoining countries.

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

MSG Comment: As stated in the Multi-Stakeholder Group Letter, issuers should be able to rely on reasonable representation from their suppliers. The Letter stated:

A supplier declaration approach is preferable in place of a product-based or materials declarations approach. The supplier declaration approach would consist of having direct and component suppliers and others in the supply chain take reasonable means to assure that all the tin, tantalum, tungsten, and/or gold in their materials/products are sourced from a compliant smelter.

In addition, as outlined in the reasonable country of origin inquiry, the representations must be such that an issuer is able to determine that the minerals were not sourced from the DRC countries or did not benefit directly or indirectly conflict in the DRC countries. Moreover, issuers should be required to describe and provide the results of the steps they have taken to ensure their suppliers are sourcing from compliant smelters (conflict free smelters). Such standards and transparency requirements should be described in the issuer's annual disclosure or conflict minerals report as applicable.

A "compliant smelter" is one that has a process in place that allows an independent third party auditor to: 1) verify the origin of its input streams (i.e. including but not limited to raw materials recycled material, k-salts, tin slag etc.); 2) verify whether any of its input streams directly or indirectly financed or benefited armed groups in the DRC; and 3) discloses the due diligence processes it uses in conformance to the *OECD Guidance* or a comparable process.

Question 36. Should any qualifying or explanatory language be allowed in addition to or instead of the reasonable country of origin inquiry standard, as proposed, regarding whether issuers' conflict minerals originated in the DRC countries? For example, should issuers be able to state that none of their conflict minerals originated in the DRC countries "to the best of their knowledge" or that "they are not aware" that any conflict minerals originated in the DRC countries?

MSG Comment: The essence of the statute is to provide for disclosure of efforts by issuers to identify and eliminate from their products conflict minerals from conflict mines. Issuers' disclosures under the regulations should allow investors and other interested stakeholders to determine the origin of conflict minerals, regardless of how the declaration is characterized.

Comments on labeling (Does not answer specific SEC Questions)

The MSG recommends that the rule make clear that issuers are not required by anything in the statute or the rule to physically label their products in any way with regard to the presence or absence of conflict minerals.

However, if companies do wish to label their products, the MSG requests that the Commission expressly reserve the use of a “DRC conflict free” label as an advertising claim for products that contain minerals sourced within the DRC region that are conflict free. The MSG recommends that the SEC affirm that any such claims or labels are subject to Federal Trade Commission (FTC) regulations and guidance in regards to substantiation and to guard against deceptive claims that a product is “DRC conflict free” under Section 5 of the Federal Trade Commission Act (FTCA). This approach would provide incentive for those companies that meet the FTC substantiation regulations to source conflict free minerals from the region and reward those that encourage legitimate minerals trade that does not directly or indirectly finance or benefit armed groups in the DRC or adjoining countries.

Absent further guidance or direction from the SEC, this provision in the statute (Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”) Section 1502(b)(1)(D)), could be interpreted to permit a company to label a product “DRC conflict free” if the product contains conflict minerals sourced only from areas outside of the DRC or its adjoining countries. Companies that currently source conflict minerals from outside of the DRC region would have no incentive to begin sourcing responsibly from the DRC region, since presumably they could benefit from use of the “DRC conflict free” label even without changing their sourcing patterns or behavior. Allowing companies to use the “DRC conflict free” label in these circumstances would undermine U.S. policy and development goals in the DRC, since companies could reap the benefits of the “DRC conflict free” label while completely avoiding any activities that would affirmatively benefit the region.

In addition, we believe that, in order for companies to label products as “DRC conflict free,” more substantiation is required beyond the due diligence contemplated by the Dodd-Frank Act. Those companies wishing to use a “DRC conflict free” label should include in their reporting, information on the actual mine of origin and transport routes of their source minerals along with any other information that is part of the basis of their claim that the minerals did not directly or indirectly finance or benefit armed groups in the DRC or adjoining countries. This information should be made available to the public in the same way that they make public other information related their use of conflict minerals (through the SEC and on the company’s website). A claim such as ‘DRC free’ could be made for those companies who can substantiate they source conflict minerals from countries outside of the DRC and adjoining countries.

Labeling a product as “DRC conflict free” is an advertising claim subject to FTC regulations and guidance pursuant to Section 5 of the FTCA.² Although the Dodd-Frank Act refers permissively

² 15 U.S.C. § 41.

to the ability of companies to apply a DRC conflict free label, there is nothing in that statute to suggest that Congress intended to modify the basic requirements of the FTCA for such claims. Like all advertising claims, claims that a product is “DRC conflict free” must be properly qualified and substantiated and must not be misleading or deceptive.

The MSG accordingly requests that the Commission (1) clarify that nothing in the rule requires products to be labeled, (2) labeling products “DRC conflict free” be reserved for products that include some conflict free minerals sourced from the DRC or adjoining countries, (3) recognize that the FTC has enforcement jurisdiction over DRC conflict free labeling claims, and (4) make robust substantiation a requirement if products are labeled “DRC conflict free”.

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

MSG Comment: The MSG recommends that the country of origin, names of facilities, and information to identify mine or location of origin of ores with greatest specificity should be disclosed for all conflict minerals that originate in the DRC or adjoining countries. Conflict minerals that do not originate in the DRC or adjoining countries should be subject to the reporting required under the reasonable country of origin inquiry process (see response to Question 33). When possible, issuers should directly correlate disclosed locations with the map of the region maintained by the U.S. government.

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

MSG Comment: The rule should state, as did the original Multi-Stakeholder letter (point #8, p. 5), that an issuer’s conflict minerals report would be presumed to be reliable if it meets the criteria below. Please note that the elements listed below vary slightly from the original elements recommended in the Multi-Stakeholder letter so they align with the recently approved *OECD Guidance* (Annex I, p. 10):

Whether through an independent or industry wide process, a due diligence process for minerals sourced in the DRC and/or adjoining countries containing the following elements and demonstrating a good faith and reasonable standard of care, should be presumed to be reliable if the issuer’s disclosure to the SEC includes:

- a. A conflict minerals policy;
- b. A supply chain risk assessment procedure that includes “upstream” and “downstream” due diligence, which includes a description of efforts made and the result of efforts to

obtain information outlined in [its upstream and downstream due diligence process] (which includes everything (in points a and b) below);

c. A description of the policies and procedures to remediate instances of non-conformance with the policy;

d. An independent third party audit of the Person's due diligence report, which includes a review of the management systems and processes; and

e. The results of the independent 3rd party smelter audit detailing (8)(b)i-x [see below]; or the inclusion of a link to the published smelter audit reports made available via the Person's website or publicly available website detailing (8)(b)i-x [see below]; with due regard taken of [designated] business confidentiality and other competitiveness concerns.³

When tin, tungsten, tantalum or gold mineral ore originates in the DRC or adjoining countries, due diligence of "upstream" suppliers is presumed reliable if the following elements are performed to a reasonable standard of care:

a. Smelter auditing protocol performed by an independent 3rd party.

b. When it is determined that incoming minerals originate from DRC or neighboring countries, the 3rd party audit in (8)(a) would additionally include the following information (which has been edited to be aligned with the *OECD Guidance*, p. 22, 26 & 37):

- i. an on-the-ground risk assessment which addresses the points outlined in the *OECD's Guidance* Step 2 and Appendix;
- ii. all taxes, fees or royalties paid to government for the purposes of extraction, trade, transport and export of minerals;
- iii. any other payments made to governmental officials for the purposes of extraction, trade, transport and export of minerals;
- iv. all taxes and any other payments made to public or private security forces or other armed groups at all points in the supply chain from extraction onwards;
- v. the ownership (including beneficial ownership) and corporate structure of the exporter, including the names of corporate officers and directors; the business, government, political or military affiliations of the company and officers.
- vi. the mine of mineral origin;
- vii. quantity, dates and method of extraction (artisanal and small-scale or large-scale mining);
- viii. locations where minerals are consolidated, traded, processed or upgraded;
- ix. the identification of all upstream intermediaries, consolidators or other actors in the upstream supply chain;
- x. transportation routes.

³ Business confidentiality and other competitive concerns means price information and supplier relationships subject to evolving interpretation.

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

MSG Comment: We recommend the rules make reference to specific due diligence guidelines that are or are comparable with the *OECD Guidance* and the [United Nations Group of Experts due diligence guidelines](#). They should be, as described above, in the context of describing steps that would give rise to a presumption that the due diligence process was reliable.

Question 65. Should our rules, as proposed, require that issuers use due diligence in determining whether their conflict minerals are from recycled or scrap sources as proposed and file a Conflict Minerals Report including an independent private sector audit of that report? If so, should our rules prescribe the due diligence required? If our rules should not require due diligence, should our rules require any alternative standard or guidance? If so, what standard or guidance? Should our rules define what constitutes recycled or scrap conflict minerals? If so, what would be an appropriate definition?

MSG Comment: Recycled metal that is reclaimed from end-user or post-consumer products or scrap metals should be exempt from this rule where the issuer has a reliable process for determining the metals are from recycled sources. The proposed rule acknowledges that issuers purchasing conflict minerals from recycled or scrap sources would not implicate the concerns of the provision.⁴ This is consistent with the OECD Guidance which provides, “Metals reasonably assumed to be recycled are excluded from the scope of this Guidance”.⁵ The final rule should adopt the provision of the proposal that recycled and scrap material may be designated as DRC Conflict Free because, as the SEC notes, issuers could misbrand their products as recycled. Below is a definition of “recycled” we believe the Commission should adopt and include in the rules. It is consistent with the original comments by the MSG and edited slightly to align with the definition in the *OECD Guidance*.⁶

Recycled metals are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Recycled metal includes excess, obsolete, defective, and scrap metal materials which contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold. Minerals partially processed, unprocessed or a bi-product from another ore are not recycled metals.

⁴ Securities and Exchange Commission, Conflict Minerals proposed rule, page 63 and footnote 157.

⁵ OECD Due Diligence Guidance, page 6, footnote 2.

⁶ Ibid.