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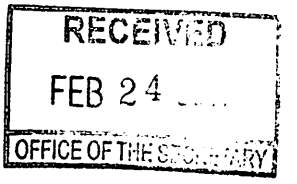

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Mrs. Elizabeth M. Murphy, Secretary

Re: File Number S7-40-10, Release Number 34-63547
Proposed Regulations Regarding Conflict Minerals

Dear Ms. Murphy:

I am the Senior Vice President, Secretary and General Counsel of Tiffany & Co. ("Tiffany"). I am writing to express Tiffany's comments and concerns regarding Securities and Exchange Commission Release Number 34-63547 (File No. S7-40-10), dated December 23, 2010, which details, and solicits public comment regarding, proposed regulations that would mandate certain disclosures concerning "conflict minerals" pursuant to Section 1502 of the Dodd-Frank Act (the "Statute").

In my previous letter to you, dated September 29, 2010, which I sent on behalf Tiffany before the Commission issued Release Number 34-63547, I stated two of Tiffany's principal concerns with the Statute:

- It would grant an unfair competitive advantage to impose "conflict minerals" disclosure requirements solely on reporting companies. We believe that the Statute requires that the Commission impose the statutory regime on all individuals and entities, regardless whether they are reporting issuers. (See, letter of September 29, 2010, page 3) Moreover, non-reporting entities would have little incentive to install monitoring procedures which would improve transparency throughout the entire supply chain.

- Including gold in the definition of "conflicts materials" is impractical and could lead to unintended burdens because (a) the Democratic Republic of the Congo (the "DRC") accounts for only a miniscule amount of the global gold supply (0.3% of the newly-mined gold on the market in 2009) and (b) refined gold bullion generally consists of gold from multiple sources that is smelted together, making it impossible to trace such gold back to any particular source unless the smelter employs single source batch input.

The proposed regulations raise a number of additional concerns which are discussed below.

The Proposed Regulations Would Violate the First Amendment

Perhaps the most fundamental concern is that the proposed regulations would compel speech in a manner that violates the First Amendment. Specifically, the proposed regulations would require companies which use gold and certain other minerals to state publicly that their products support human rights violations, even when there is no reason to believe that is true.

The right of free speech, which the First Amendment guarantees to individuals and companies alike, includes the right to refrain from speaking if one chooses not to do so. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781, 798-99 (1988); *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Laws that compel speech offend the First Amendment as much as laws that restrict speech and are "presumptively invalid." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, the Supreme Court has struck down as unconstitutional a number of laws that would compel companies to speak against their will. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-21 (1986). Here, the proposed regulations would compel speech by requiring companies to state that their products finance armed groups in the DRC or adjoining countries even if there is no evidence that the statement is true.

Many disclosure obligations imposed by the securities laws and regulations do not violate the First Amendment. However, these proposed regulations are quite different from, and are far more vulnerable to First Amendment challenges than, typical corporate disclosure laws.

First, it is clear that the Statute has little to do with the reasons for securities disclosure requirements. Comments made by Congress prior to its enactment show that

the main purpose of the Statute is to support U.S. foreign policy. For example, Senator Feingold, one of the sponsors of the Statute, stated: "the status quo in eastern Congo is unacceptable to the people there and it should be to us as well. We have put financial resources towards mitigating this crisis, but we need to get serious about addressing the underlying causes of conflict. The [Statute] is a significant, practical step toward doing that." 111 Cong. Rec. S3, 965 (May 19, 2010). That purpose is also evident from the Statute's preamble:

> It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b)

P.L. 111-203, § 1502(a) (2010). Commission Chairman Mary L. Schapiro, in a press release issued by the Commission about the proposed regulations, recognized the purpose of the Statute was to "help to curb the violence in the eastern Democratic Republic of the Congo," and disclaimed relevant expertise. *See* Press Release, Securities and Exchange Commission, SEC Proposes Specialized Disclosure of Use of Conflict Minerals Under Dodd-Frank Act (Dec. 15, 2010).

Whatever else the Statute and proposed regulations might arguably accomplish, they are not intended to protect investors from misleading statements or to prevent fraud. In fact, as discussed below, the proposed regulations would require companies to make disclosures that would frequently be incorrect, misleading or of no value whatsoever to investors. Therefore, the proposed regulations do not deserve the same deference as traditional disclosure regulations that are designed to prevent companies from defrauding the public. *Compare Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (upholding disclosure requirement "in order to dissipate the possibility of consumer confusion or deception") *with United Foods*, 533 U.S. at 408, 416 (applying strict scrutiny and striking down compelled speech requirement in part because it would not protect against consumer deception); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (state's interest in protecting consumers from commercial harm "is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech").

Second, although the securities laws and regulations have imposed numerous disclosure requirements on reporting companies, unlike those requirements, the proposed regulations are not speaker-neutral or content-neutral. The proposed regulations target only one specific group of possible filers -- users of gold and other potential "conflict minerals." And the proposed regulations require the targeted group to make specific, statements designed to further the government's foreign policy objectives unrelated to the securities laws or to the Commission. Moreover, the statement that the proposed regulations require -- that the filer's products support human rights violations -- would almost certainly subject the filer to stigma and commercial harm based on its content.

Third, the proposed regulations do not regulate mere "commercial speech." The disclosures at issue do not propose a commercial transaction, they do not relate solely to the economic interests of the speaker or audience, they are not advertisements, would not necessarily refer to a specific product and are not economically motivated. In short, the mandated statements do not meet any of the definitions of "commercial speech" used by the Supreme Court. *See United Foods*, 533 U.S. at 409; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983); *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

Because the proposed regulations differ so significantly from typical corporate disclosure laws, it is highly likely that a court would subject the proposed regulations to strict scrutiny (*see, e.g., United Foods*, 533 U.S. at 410-13; *Riley*, 487 U.S. at 795-801; *Pacific Gas*, 475 U.S. at 8-21; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974)), a scrutiny which would find these proposed regulations wanting. Among other things, the proposed regulations are not narrowly tailored to meet the government's interest in fostering peace in the DRC and surrounding countries because they would impose onerous investigative and reporting obligations on companies who have no connection whatsoever to activities in those countries.

In fact, the proposed regulations would fail regardless of which standard was applied -- including the most forgiving standard of "rational basis." *See Zauderer*, 471 U.S. at 651. The principal source of the irrationality is that the proposed regulations would compel disclosures by companies (like Tiffany) which have no reason to believe they use minerals originating in the DRC or adjoining countries. Many of these companies likely do not, in fact, use such minerals. Nonetheless, under the proposed

regulations, they would be required to state publicly that they do.[1] This is not only irrational; it is a forced, false confession that should be anathema in our democratic political system.

Forcing a company to associate itself publicly with groups engaged in human rights violations would undoubtedly stigmatize the company and harm its business. The theory underlying the Statute and proposed regulations is that a consumer backlash will force the company to cease using minerals that finance terrorist groups and others who commit human rights violations. These disclosures could also lead to lawsuits under one or another imaginative theory alleging that the company was aiding and abetting the activities being conducted in, or financed from, the DRC. However, if there is no evidence that the company actually uses minerals from the DRC, there is no justification for inflicting such harm on the company. Punishing companies merely because they lack complete visibility into their mineral supply chains will not curb human rights violations in the DRC. In fact, by forcing such companies to make the same representations as those who knowingly use minerals from the DRC, the proposed regulations dilute the effect of such representations and draw the focus away from the limited group of companies whose products might actually finance armed groups.

The Commission has asked (*see* Request for Comment Thirty-seven) whether permitting qualifying language to be added to the disclosure would ameliorate the problem described above. The particular suggestion is that the statement that the minerals used by the company were not "DRC Conflict Free" could be accompanied by an additional statement that the company did not actually know where the minerals came from or whether they actually financed armed groups in the DRC. In other words, the company would first be required to confess but then be allowed to accompany the confession with a (sort of) retraction. Such a statement, as long as it included the confession, would still subject the company to unjustified stigma and would also lead to confusion on the part of many or most readers.

A better way to address this issue would be to impose the obligation to submit a conflict minerals report on only those companies that actually have a reason to believe

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[1] Request for Comment 37 and proposed Item 16 (b) (1) (iii), would require a registrant who is unable to determine that its gold did not originate in the [DRC] to describe its products as not "DRC conflict free" meaning, under the Statute, that such products are made from gold that finances an armed group that has perpetrated "serious human rights abuses."

that they use gold (or some other "conflict mineral") that does, in fact, originate in the DRC or surrounding countries (the "reason-to-believe approach"). Companies that cannot identify the source of their minerals would have to state as much in their 10-K, but would not be forced to submit a conflict minerals report or state that their products are "not DRC Conflict Free."

This is, in fact, the approach taken by the Statute itself. Under the Statute, a company must state whether "conflict minerals that are necessary . . . did originate in the Democratic Republic of Congo or an adjoining country." P.L. 111-203, § 1502(b) (1) (A). However, it is only "in cases in which such conflict minerals *did originate* in any such country" that the company must submit a conflict minerals report and identify which of its products are not "DRC Conflict Free." *Id.* (emphasis added). Moreover, under the Statute, a reporting person must describe a product as "not DRC conflict fee" only if it contains minerals that directly or indirectly benefit armed groups. P.L. 111-203, § 1502(b) (1) (A) (ii).

The Statute imposes a two-step inquiry before a reporting person must label a product as "not DRC conflict free." First, the Statute imposes the obligation to submit a conflict minerals report only when the threshold question -- whether the minerals actually came from the DRC or a surrounding country -- is answered in the affirmative. Second, the Statute imposes the obligation to describe a product as "not DRC conflict free" only when the minerals used in the product actually support armed groups. There is no presumption in the Statute that compels the conclusion that because a specific mineral has been sourced from the [DRC] that it supports armed groups. There is most assuredly no presumption in the Statute that because the reporting person cannot identify the source of his gold it must be presumed to support armed groups. In short, nothing in the Statute supports the presumption incorporated in the proposed regulations. That presumption is found only in the proposed regulation.

The reason-to-believe approach makes sense in that it would (a) avoid the First Amendment issues discussed above; (b) properly focus the regulations on entities whose products actually finance armed groups in the Congo; and (c) avoid the confusion that would be generated from statements that are qualified, non-factual and sometimes false.

The Commission's Proposed Regulations Exceed the Authority Specified in the Statute

In addition to violating the First Amendment, the proposed regulations are broader than the Statute on which they are based in a number of respects; they therefore,

exceed the authority specified in the Statute. The Supreme Court has held that, in promulgating regulations, an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Agency regulations will be invalidated if they are "manifestly contrary to the statute." *Id.* at 844.

Here, the Commission has recognized that the Statute raises issues which are beyond the Commission's expertise. The Commission's authority to promulgate the proposed regulations therefore does not rest upon authority that the Commission might have elsewhere to require public company disclosure for the protection of investors. Rather, the rulemaking authority derives specifically from the Statute. In the Commission's press release, Chairman Schapiro stated:

> "In adopting this statute, Congress expressed its hope that the reporting requirements of the securities laws will help to curb the violence in the eastern Democratic Republic of the Congo. . . . Because expertise about these events does not reside within the SEC, we have drafted these proposed rules carefully to follow the direction of Congress and look forward to the additional insights and perspective from public comments." *Press Release, Securities and Exchange Commission, SEC Proposes Specialized Disclosure of Use of Conflict Minerals Under Dodd-Frank Act (Dec. 15, 2010).*

Despite Chairman Schapiro's commitment to follow the direction of Congress, the proposed regulations would impose obligations that the Statute does not.

1. Most notably, as discussed above, under the proposed regulations an entity must state that its products are "not DRC Conflict Free" even if it could not determine the source of the minerals used in those products. Under the Statute, however, it is only *after* a filer determines that its conflict minerals, in fact, "*did originate*" in the DRC (or an adjoining country) that the filer must submit a conflict minerals report stating, *inter alia*, whether any of its products are not "DRC Conflict Free." P.L. 111-203, § 1502(b) (1) (A) (emphasis added).

2. Nor does the Statute suggest that an entity must also submit such a report solely because its conflict minerals came from recycled or scrap sources, as the regulation proposes. Why should a reporting person who acquires all or some

> portion of its mineral requirements from recycled or scrap sources be tasked with the cost of providing such a report? If the reporting person has made a reasonable country of origin inquiry and determined that the recycled or scrap materials employed did not originate in the {DRC] that should suffice.

If Congress had intended such expansive reporting requirements, it certainly could have included additional language similar to what is contained in the proposed regulations, which would require a company to submit a conflict minerals report if it was "unable to determine that such conflict minerals did not originate in the [DRC] or an adjoining country, or if such conflict minerals came from recycled or scrap sources." In the absence of such language, the Commission cannot infer that Congress intended to impose a reporting requirement in those circumstances. Thus, the Statute's plain language clearly reflects Congress' intent to require that a company submit a conflict minerals report only if the company first determines that the minerals it uses come from the DRC or an adjoining country.

That intent is further evidenced by the Statute's legislative history:

- On May 17, 2010, Senator Durbin described the Statute as "a requirement that if a company registered in the United States uses any of a small list of key minerals *from the Congo-minerals known to be involved in the conflict areas*-then such usage must be disclosed in that company's SEC disclosure." 111 Cong. Rec. S3,801 (May 17, 2010) (emphasis added)

- On April 23, 2009, in discussing the bill on which the Statute is based, Senator Brownback explained: "The bill will require U.S.-registered companies . . . to annually disclose to the Securities and Exchange Commission the country of origin of those minerals. *If the country of origin is the Democratic Republic of Congo or neighboring countries*, the company would need to disclose the mine of origin." __ Cong. Rec. S891 (April 23, 2009) (emphasis added)

In light of these comments, it is unreasonable to assume that Congress intended to compel detailed disclosures from companies that have no reason to believe that their minerals came from the DRC or surrounding countries.

Finally, the reporting requirements that the proposed regulations would require are, themselves, broader than what is required under the Statute. The Statute requires a

filer who uses "conflict minerals" to disclose whether those minerals originated in the DRC on the filer's *website*. P.L. 111-203, § 1502(b) (1) (E). Conversely, the proposed regulations would require such a disclosure on both the filer's website *and* the annual reports that must be filed with the Commission under Sections 13(a) or 15(d). *See* SEC Release No. 34-63547 at 6. Moreover, while the Statute merely requires filers to disclose whether their minerals come from the DRC, the proposed regulations would *also* require filers that determine their minerals did not come from the DRC to both: (a) describe the "reasonable country of origin inquiry process it used" and (b) "maintain records demonstrating that its conflict minerals did not originate in the DRC countries." *Id.*

The Proposed Regulations are Too Vague to Satisfy the Due Process Clause

Finally, the proposed regulations would be unconstitutional because they do not provide sufficient guidance as to which entities are covered by the regulations and what is required to satisfy them. The Due Process Clause of the Fifth Amendment requires a regulation to give those subject to the regulation clear notice of what is required. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

> Vague laws may trap the innocent by not providing fair warning. [Also], if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (citations omitted); *see also Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993).

These concerns are especially heightened where "a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms.'" *Grayned*, 408 U.S. at 109. Here, as discussed above, the proposed regulations would abridge companies' First Amendment right to refrain from speaking, triggering the heightened concerns identified in *Grayned*.

The proposed regulations are impermissibly vague because they do not clearly identify which entities must make the requisite disclosures. They would impose disclosure requirements when conflict minerals are "necessary to the functionality or

production of a product manufactured or contracted to be manufactured by the registrant", yet provide no guidance as to what is meant by the phrases

- "product",
- "necessary to the functionality or production of a product" or
- "contracted to be manufactured."

Moreover, the regulations could, and perhaps are intended to, be read to apply to financial products that are backed by gold or other mineral commodities. For examples, is a futures contract for gold bullion a "product"? Is a share in a mutual fund that invests in gold mining stocks a "product"? Is a vault services provider that offers gold bullion storage offering a "product"?

Thus, the regulations ask the entity (and ultimately judges and juries) to guess whether the entity is, or was, required to submit conflict minerals disclosures.

The Proposed Regulations Should Not Attempt to Define What Constitutes a Reasonable Country of Origin Inquiry.

There are significant differences in the respective world-wide supply chains supporting each of the conflict minerals. Likewise, reporting persons will differ in terms of what constitutes a reasonable inquiry given their industry, the characteristics of their own supply chains and the conflict mineral at issue.

Paragraph (1) (A) (i) of the Statute provides the Commission with authority to compel "a description of the measure taken to exercise due diligence" but imposes no requirement that any particular due diligence must be undertaken. Therefore it is consistent with the Statute's mandate to make no inquiry.

There may well be circumstances where the source of the conflict mineral at issue can be known without inquiry or in which the DRC countries may be excluded as the source without inquiry. Such a result seems consistent with the Commission's statement that, "[i]n general, undertaking due diligence involves performing the investigative measures that a reasonably prudent person would perform in the management of his or her own property."

The Commission should not mandate the type or extent of inquiry that should be made. We do believe, however, that it would be acceptable for the Commission to

require that a reporting person who makes a negative affirmation, *i.e.*, that none of the conflict minerals necessary to its products originated in the DRC countries, state the basis for that conclusion.

* * *

As discussed above, Tiffany has a number of serious concerns with respect to the proposed regulations. Tiffany appreciates this opportunity to relate those concerns to the Commission, and respectfully urges the Commission to take the following steps:

- Expand the definition of "person" to include both reporting and non-reporting persons;

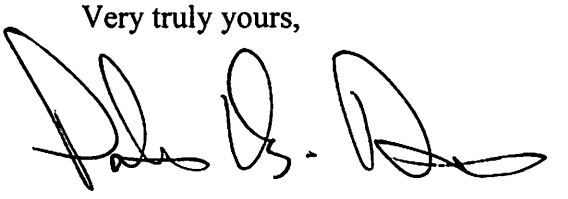
- Remove the language requiring a person to file a conflict minerals report merely because the person uses minerals in its products that came from recycled or scrap sources;

- Remove the language requiring a person to file a conflict minerals report if the person is unable to determine that such minerals used in its products originated in the DRC or adjoining countries;

- Remove the language requiring a person to state that its products are "not DRC conflict free" if the company is unable to determine that minerals used in its products originated in the DRC or adjoining countries;

- Clarify, to the greatest extent possible, that a person is not required to label its products as "not DRC conflict free" or otherwise associate its products with armed groups perpetrating human rights abuses unless that is in fact true.

Very truly yours,



Patrick B. Dorsey