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The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission

Re: Conflict Minerals – Proposed Rule (File Number S7-40-10)

Dear Chairman Shapiro,

The International Precious Metals Institute is an association of producers, refiners, users and other persons with a special interest in precious metals. As in our previous comment in advance of the Commission's proposed rule, we want to assure you that we support the goal of Congress to deter the finance of armed groups in the Democratic Republic of the Congo (DRC) through commercial activity in gold.

The deterrence of finance of DRC conflict should guide every part of the new rule. And much of the Commission's proposed rule does advance that goal, by requiring informed transparency of the future use of DRC conflict metals. However we are seriously concerned with some aspects of the proposed rule. Without diminishing the humanitarian significance of the DRC conflict, we believe that the proposed rule will have adverse impacts well beyond the DRC, not only upon United States publicly-traded companies, but also upon values and market conditions for gold as a commodity, as an international currency, as a store of value for individuals and governments, and as a livelihood for people and their communities throughout the world. The Commission should be similarly concerned, because these adverse impacts not only fail to advance the goal of Congress, but will instead work against it.

A. Gold Is Different – Commission Questions 1, 51

We initially address the Commission's question if different measures should be prescribed for gold because of its unique characteristics. We believe that they should, and note first that others have said so in the specific context of conflict due diligence. The OECD has deferred full incorporation of gold into its conflict minerals guidance to prepare a unique discussion paper. In an OECD preparation meeting for that guidance, participants "highlighted that gold 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 the identification and management of risk extremely difficult."¹ The United Nations Group of Experts similarly found "the gold supply chain exhibiting characteristics different to those for tin, tantalum and tungsten."²

One of gold's characteristics that we believe is particularly significant to the new rule is that, unlike other conflict minerals, gold is mined in one hundred countries, and gold from the ten DRC countries constitutes only one per cent of annual world gold supply. Mine production in the DRC itself, where conflict occurs, is only 8 tonnes per year, or 0.2% of an annual supply of more than 4287 tonnes from mining and recycling: "in gold industry terms, it is very insignificant."³ So even before a formal inquiry into its origin, the likelihood that gold in an automobile or computer had its origin in the DRC is very, very low. There is instead a strong logical presumption that gold has not been obtained in the DRC. We do not say that such a logical presumption, without more, will suffice; Congress has placed a burden upon United States publicly-traded manufacturers to determine the origin of gold that they use, and the Commission has made it clear that a reasonable inquiry must be undertaken. But Congress certainly did not create a rebuttable presumption of DRC origin of gold. And where 99% of the annual world gold supply comes from outside of the DRC countries, and 99.8% comes from outside of the DRC itself, the Commission should reasonably take those circumstances into consideration in its formulation of a rule with worldwide impact.

And beyond its use in manufactured products, which is the only use that the Conflict Minerals Provision directly addresses, gold has unique meaning, application and significance far outside of the scope of the proposed rule, but not beyond its impact. The Commission should consider these unique characteristics, described in more detail below, and focus its final rule narrowly, to address the specific goal of Congress in a least disruptive way.

1 Summary Report, Expert meeting of the OECD hosted working group on draft due diligence guidance for responsible supply chain management of minerals from conflict-affected and high-risk areas, April 28, 2010

2 United Nations Group of Experts on the Democratic Republic of the Congo, Final Report, p. 89

3 Implications for the Supply Chain of Gold and Other Precious Metals, Philip Olden, report to OECD, August 2010. The estimate of 8 tonnes of gold production conforms well to the estimate of 10 tonnes by the U.S. Geological Survey. The USGS also estimates production of less than 40 tonnes from the nine adjoining countries. USGS 2008 Minerals Yearbook: Gold.

B. Recycled Gold - Commission Questions 63-68

We first address the status of recycled gold. The proposed rule simply places recycled gold, wherever its origin, into an undesirable category, an expensive category, a category that will be avoided. The proposed rule divides United States publicly-traded companies into three categories: (1) those that determine that they do not use DRC gold; (2) those that cannot determine the origin of their gold; and (3) those that actually use DRC gold. The first category is the prize, strongly desired, and manufacturers are working now to align their supply chains into it. The second category is considerably less desirable, not simply because of increased costs of investigation, auditing and reporting, but primarily because the category permits, and perhaps encourages, an adverse inference that gold of unknown origin has actually been obtained from DRC countries and has actually financed DRC conflict.

Users of recycled gold are placed into the second category, without exception or recourse, based upon an assumption that the origin of recyclable materials is unknown.⁴ And while the proposed rule then permits users of recycled gold to explain to the public that their products are, technically, DRC conflict free, that is their only option, and such an explanation is clearly not as desirable as the first category – a simple and unequivocal declaration that gold in a product is DRC conflict free because it does not originate in a DRC country.

Placement of recycled gold into the unfavorable second category does not – in any way – advance the goal of Congress to deter finance of DRC conflict. Financial transactions related to the recycling of gold do not, and in fact cannot, directly or indirectly finance or benefit armed groups in the DRC countries. After the original mine-to-refiner supply chain has been completed, after pure gold has been first produced, that gold is completely severed from its geographical, temporal and financial origins, and the original miners and supply chain participants do not obtain any further benefit. The subsequent recycling of the same gold, perhaps years or even centuries later, after it has become a part of manufacturing scrap, unwanted jewelry, computer circuit boards, polishing rags, bench and floor sweepings, etc. that have been collected around the world, does not retroactively benefit any of the original mining companies or supply chain participants, not in the slightest. And thus it cannot retroactively benefit DRC armed groups. The goal of Congress – to deter finance of DRC conflict – is not advanced by placing burdens upon recycling of gold.

Indeed, the opposite is true. The availability of gold from robust recycling, in level-playing-field competition with the output of mines, meets 40% of the world demand for gold, and thus holds down the world market price. This limits the financial benefit to DRC armed groups from newly-mined DRC gold, and thus advances the goal of Congress. Conversely, the Commission's proposed rule will depress demand for recycled gold. It has already become clear that United States publicly-traded companies are changing their supply chains in order to report simply and clearly that

⁴ “[W]e expect that issuers generally will not know the origins of their recycled or scrap conflict minerals.” 75 FR 80963)

they are in category one: they do not use conflict minerals with an origin in the DRC countries. But the proposed rule does not permit such a simple declaration by users of recycled gold; they must file an audited Conflict Minerals Report, with an explanation – that the gold in their products, although of unknown origin, is considered to be conflict free. The difference is significant, and it will result in an adverse market for recycled gold. And that will enhance the price of newly-mined gold, and thus enhance the benefit received by DRC armed groups from DRC mined gold

Nor is the Commission's assumption of unknown origin of recycled gold well-founded, particularly when proposed as an irrefutable assumption. It is true that the original mines may be unknown, if they should even still exist, but there is no reason to track the origins of recyclable materials back to the original mines, for the reasons set forth above: there is no logical or financial connection to the original mines. The actual origin of recycled gold is the point at which it arises as scrap, either at a manufacturing site that uses gold, or at a collector of used and/or discarded items. This has been the point of origin traditionally examined by buyers of recycled gold. It has also been the longstanding legal precedent of United States customs law, when it requires a country of origin determination: the country of origin of manufacturing scrap is the place of its generation in a production process, and the country of origin of used goods is the place of their collection.⁵ We urge the Commission to expressly follow this precedent in the final rule.

Finally with regard to recycled gold, we note that recycled materials have been expressly excluded from the international guidance on conflict due diligence recently issued by the Organisation for Economic Cooperation and Development (OECD).⁶ This new OECD guidance has now been endorsed in recommendations of the United Nations Group of Experts for the Democratic Republic of the Congo,⁷ which in turn have been adopted by the United Nations Security Council.⁸ We recognize that Congress did not make such an exclusion for recyclable materials in the Conflict Minerals Provision, and that the Commission is therefore unable to do so in its rule. However we strongly urge the Commission to take such a directly relevant international development – in a matter of international scope and importance – into consideration, and to avoid causing unnecessary harm to markets for recyclable materials. We urge the Commission to put United States publicly-traded users of recycled gold into the first category, on the same regulatory and commercial footing as users of newly-mined gold, in which there is no

5 19 U.S.C. Part 102 Rules of Origin, §102.1(g): "A good 'wholly obtained or produced' in a country means:(9) Waste and scrap derived from:(i) Production in a country, or (ii) Used goods collected in that country provided such goods are fit only for the recovery of raw materials." See also NAFTA, Chapter 4, Article 415; NAFTA Implementation Act, section 202; 19 U.S.C. §3332. The condition that used goods must be suitable only for recovery of raw materials is applicable here, because that is in fact the outcome of the recycled gold supply chain.

6 "Metals reasonably assumed to be recycled are excluded from the scope of this Guidance." Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2010), page 6, fn2

7 Final report (S/2010/596), part IX

8 Resolution 1952, 29 November 2010

irrefutable assumption of unknown origin, and in which such users are charged to reasonably determine the country of origin in which their recyclable gold arose.

C. Existing Stocks of Gold – Commission Question 61

The Commission requests comments regarding the applicability of the rule to existing stocks of conflict minerals. As presently written, the rule's applicability is tied only to the date of possession of a conflict mineral by a reporting company. Applicability is not tied to the time of origin of the conflict mineral.

This is very problematic for gold. More than the other conflict minerals, large stocks of gold exist, and have been held for very long periods, often long pre-dating the DRC conflict. The origin of the gold in these existing stocks will be unknown, or will be exceedingly difficult to retroactively trace. Current estimates, however, would put gold of DRC origin at perhaps one tenth of one percent of existing stocks; 99.9% would be of other origin.⁹ These stocks may be in a manufacturer's current working inventory, but they are also held by secure repositories and banks, and they are periodically drawn upon for manufacturing, and thus will be used in new products. The timing proposed by the Commission would make the rule applicable to the use of such existing gold, without regard to the actual time or place of its origin, or the likelihood that it financed DRC conflict. So under the proposed rule, for example, a new computer, manufactured during a current reporting year, containing gold that had been mined many years ago and is now of unknown origin, would not be DRC conflict free.

We believe that this does not conform to either the intent or the words of Congress. Congress made the applicability of the Conflict Minerals Provision relate not to the date of a product's manufacture, but to the date of origin of the conflict minerals contained in that product. It requires United States publicly-traded companies "to disclose .. whether conflict minerals.., in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country." These words directly address the reason for the law – current and future finance of DRC conflict through mineral extraction in the DRC; they are forward-looking, and do not express a retroactive and punitive application to past DRC conflict, or to past finance of that conflict. Use of existing stocks of gold for new manufacturing does not and cannot finance new conflict; the financial transactions that led to possession of existing stocks have already occurred, perhaps many years ago. No current or future benefit to DRC armed groups, direct or indirect, can arise.

It is also important, on a much broader level, that existing stocks of gold not be stigmatized, and that their marketability not be reduced by the rule. If products using these stocks cannot be labeled as DRC conflict free, this will immediately devalue not only the working inventories of United States publicly-traded manufacturers, but also gold held by banks, by private individuals and exchange traded funds, by the

⁹ An estimate provided recently to the OECD is that reserves and stocks of gold total 165,600 tonnes, compared to annual DRC production of 8 tonnes. Implications for the Supply Chain of Gold and Other Precious Metals, Philip Olden, report to OECD, August 2010

International Monetary Fund (3005 metric tonnes), and by governments, such as, for example, the United States (8134 tonnes), Germany (3,408 tonnes), Bangladesh (13.5 tonnes), El Salvador (7.3 tonnes), etc., etc., etc. Government gold reserves, now worth over one trillion dollars, support global economic stability, and while they are not often traded, their value is founded upon full liquidity at current world market prices. Gold that cannot be classified as DRC conflict free will not have that liquidity, and will be diminished in value. Worldwide diminishment of the value of existing stocks of gold will not advance the goal of Congress to deter the finance of DRC conflict, but it will instead increase the demand for and price of newly-mined gold, and thus may enhance the benefit that DRC armed groups receive from newly-mined DRC gold. The Commission rule should therefore set a date of applicability to existing stocks of gold of no earlier than July 1, 2011, the most likely earliest beginning date of a reporting company's next fiscal year. That will permit existing stocks to be beneficially used and/or positively dated and identified as DRC conflict free.

D. Reasonable Inquiry Standard – Commission Questions 33-36

The Commission has proposed that an initial country of origin determination would be made upon a reasonable inquiry, and has asked for comment if this is an appropriate standard. We believe that a reasonable inquiry standard is appropriate, that it conforms to the direction of Congress, and that it is a workable and effective standard. It implicitly requires senior management of United States publicly-traded companies, which are strongly motivated to protect their reputations and brand names, and of participants in their gold supply chains, which are strongly motivated to meet their buying customers' needs, to use their knowledge, expertise and judgment to pursue the determination of origin. We note that the Commission has made reference, in the preamble to the proposed rule, to its past use of such a standard (71 FR 77635, December 27, 2006) where the subject matter, as in this case, involved variable and complex circumstances:

“Management must bring its own experience and informed judgment to bear in order to design an evaluation process that meets the needs of its company and that provides reasonable assurance for its assessment.” (71 FR 77636)

Here too, we believe that the best approach will be as proposed, to require the exercise of senior management experience and informed judgment to provide ‘reasonable assurances’ and ‘reasonable detail’ by publicly-traded companies and by their supply chain participants.

This is also the approach that has been taken by the United States Treasury in requiring that participants in United States gold supply chains examine their transactions and sources¹⁰:

10 31 CFR § 103.140 Anti-money laundering programs for dealers in precious metals, precious stones, or jewels.

"Dealers must use the expertise that they possess about their industry, their particular business, and their particular customers and suppliers." (70 FR 33709, June 9, 2005)

And it is the guidance of the inter-governmental Financial Action Task Force, directing dealers in precious metals, in their efforts to stop terrorist finance through supply chain transactions, to

"exercise reasonable business and professional judgment with respect to customers and counterparties."¹¹

A reasonable inquiry standard permits flexibility in such an exercise of judgment, and that flexibility is appropriate and necessary because gold supply chains are so variable. For example, an inquiry into gold that has been produced by a copper smelter (one that is not located in the DRC countries) as a byproduct from the refining of mined copper might simply stop at that point, without further inquiry into the origin of its copper ores, because copper is not a conflict mineral. Similarly an inquiry into gold produced from scrap computer circuit boards need not go further. An inquiry into gold that has been produced from used jewelry should extend past the gold refinery to the collectors of that jewelry, but it need not extend to every person who pawned or sold that jewelry. When mined gold has been refined, an inquiry that identifies a country of origin such as Chile would be appropriate and sufficient to determine non-DRC origin. A reasonable inquiry can thus vary, while still providing an assurance of the location and the legitimacy of mines, collectors and manufacturers, and of non-DRC country origin.

E. International Harmonization – Commission Question 55

A reasonable inquiry standard will also facilitate harmonization and effective international cooperation at all levels, private as well as governmental. Although the Commission's request for comment is related to the Conflict Minerals Report, it makes references to international efforts that are currently being undertaken in parallel to its proposed rule, with regard to the determination of origin inquiry,¹² and we add a comment because of the importance of this subject. Conflict in the DRC is obviously an international problem, as is its finance, and the supply chains through which DRC conflict minerals might find their way into products manufactured by United States publicly-traded companies are obviously international. And so international effort is necessary; it does nothing for people in the DRC if gold is simply diverted from United States publicly-traded companies into other markets. International harmonization of efforts to deter finance of DRC conflict will greatly assist all concerned participants, by adding industry-wide specialized expertise, by leveling competitive pressures, and by easing administrative burdens. A reasonable inquiry standard in the Commission's final rule will greatly assist that harmonization, by facilitating the efforts of the OECD, as well as international industry associations such as the Responsible Jewelry Council, the

11 FATF RBA Guidance for Dealers in Precious Metal and Stones, June 17, 2008, Para 23

12 A source of metal might be reasonably vetted "under recognized national or international standards" 75 FR 80957

World Gold Council and the Electronic Industries Community Coalition-Global eSustainability Initiative, which are developing and collaborating upon compatible guidance. The new rule should promote such guidance, through a flexible approach, rather than conflict with it through unnecessary prescription.

The OECD's new international standard for an initial inquiry is a specific point where harmonization will be particularly advantageous, while conforming well to the direction of Congress for a reasonable country of origin inquiry. Like Congress, the OECD advocates an initial determination of origin inquiry: "Companies should preliminarily review their mineral or metal sourcing practices to determine if the Guidance applies to them." The OECD directs this initial inquiry toward five points of concern, or red flags:

The minerals originate from or have been transported via a conflict-affected or high-risk area.

The minerals are claimed to originate from a country that has limited known reserves, likely resources or expected production levels of the mineral in question (i.e. the declared volumes of mineral from that country are out of keeping with its known reserves or expected production levels).

The minerals are claimed to originate from a country in which minerals from conflict-affected and high-risk areas are known to transit.

The company's suppliers or other known upstream companies have shareholder or other interests in companies that supply minerals from or operate in one of the above-mentioned red flag locations of mineral origin and transit.

The company's suppliers or other known upstream companies are known to have sourced minerals from a red flag location of mineral origin and transit in the last 12 months.

We believe that these questions are appropriate, and should form the basis of a reasonable initial inquiry by United States publicly-traded companies to determine origin under the final rule. These questions need not be expressly prescribed by the Commission, but neither should the final rule contain contrary prescription; a reasonable inquiry standard in the final rule can therefore encompass the OECD international standard for determination of origin.

F. Supply Chain Representations of Origin – Commission Questions 35, 52

The Commission asks if United States publicly-traded companies should accept "reasonably reliable representations" from participants in their supply chains in their country of origin inquiries. We believe that they should. Specialized expertise and judgment is regularly exercised by participants in gold supply chains in evaluation of counterparties and proposals, specifically including evaluation of representations

regarding the origin of gold.¹³ Participants in gold supply chains often have years of experience, indeed sometimes generations, by which to evaluate such representations in the context of the counterparties and surrounding circumstances. For purposes of the rule, we believe that such representations should be made in writing, with sufficient detail and identification to be further verified where appropriate and necessary, and should not, by themselves, outweigh other contrary evidence. But with those conditions, we believe that representations of origin that are deemed to be reliable by the other supply chain participants to whom they are made should be acceptable evidence of origin for compliance with the rule.

G. De Minimis Exception – Commission Questions 37, 62

The Commission asks if there should be a *de minimis* threshold for use of a conflict metal in a product. We believe that there should not be such a threshold. The direction of Congress that the amount used must be necessary to functionality is the appropriate limit, however small that amount might be. However we do believe that a *de minimis* threshold should be set for gold of unknown origin, with regard to a reasonable determination of origin inquiry, particularly during a transition period when supply chains are adapting to the rule. The proposed rule provides that any amount of a conflict mineral of unknown origin requires that a product be classified as not DRC conflict free.¹⁴ We believe that if reasonable inquiry has been made, and if no evidence of DRC country origin has arisen, and if the origin of only a small amount of gold were still unknown, a manufacturer should be allowed to declare that its gold is not from the DRC countries and is DRC conflict free. For example, if a manufacturer of a computer circuit board, after reasonable inquiry with no red flags, has determined that, say, 95% of the gold in a product is not from DRC countries, but that the specific origin of the remaining 5% of gold in that product is still unknown, that manufacturer should be able to say that the product does not contain DRC country gold.

Congress did not create a presumption of DRC country origin in the Conflict Minerals Provision, and the Commission need not create such a presumption, especially for gold of unknown origin. As set forth above, the DRC countries provide only 1% of the world's annual gold supply, and much less comes from the DRC itself. An unknown origin does not imply an evil origin. Gold is mined in one hundred countries, very often by artisan miners in remote areas, sometimes informally. Many intermediate traders and suppliers bring their products into larger markets, and these complex supply chains provide a livelihood for millions of persons. Precise origin in such circumstances may be uncertain, but that uncertainty need not be punished. A *de minimis* amount of gold of unknown origin, where a reasonable inquiry has raised no red flags, is unlikely to finance DRC conflict, because it is unlikely to be of DRC origin. A *de minimis* threshold will not encourage planned or executed inquiries, and will be particularly useful in a period of transition, while the formal gold market is changing from a practice in which

¹³ Dealers in many countries, not least the United States, must make inquiries into the origin of gold under anti-money laundering laws.

¹⁴ 75 FR 80958, fn 108

gold from all sources has traditionally been mixed, to one in which strict segregation, and rejection of some sources, will be increasingly necessary.

H. Public Disclosure – Commission Questions 26-28, 39-41

The Commission refers to third party audits of supply chains in the course of two steps: first during the reasonable country of origin inquiry, and then, if gold from the DRC countries has been used in a product, as a mandatory component of a Conflict Minerals Report. We recognize that the Conflict Minerals Provision may require significant disclosure of supply chain information for gold that has its origin in the DRC countries, and that such information may be made available for public review. However for the other 99% of the world supply of gold, Congress made no requirement of such detailed public disclosure, and the Commission should neither require nor encourage it.

Dealers in gold have traditionally maintained a high level of secrecy of their supply chains, for legitimate competitive and security reasons. With regard to reasons of competition, gold refiners compete in international markets, in every country, upstream and downstream. World refining capacity is twice the level of world supply, and thus there is a “highly competitive market with very low operating margins.”¹⁵ A public revelation of supply chains, with identification of specific sources, quantities and transit routes, will adversely impact competition within the industry, and should not be required without good reason. Outside of the DRC countries, there is no such reason.

The reasons for secrecy related to security are more important. Gold in every country is a target of criminals, and not only pure gold but gold at every stage of a supply chain, upstream and downstream. The gold industry, even in safe, secure countries, has experienced attacks by well-armed gangs, kidnapping of hostages, and violence. Every industry that uses gold is threatened. Public revelation of specific sources, specific users, quantities and transit routes will increase the threat of violence, and undoubtedly the reality as well.

This is not to say that we object to audits in reasonable circumstances, provided that confidentiality is assured. Nor do we object to the maintenance of reviewable business records, and support such a requirement, provided, however, that suppliers of gold should be notified in advance if their business records and supply chains are to be reviewed, so that auditors can be properly vetted through industry security systems, and can be bound to appropriate confidentiality standards.

I. Conclusion

In conclusion, for the reasons set forth above, we urge the Commission to issue a final rule that directly, and with appropriate focus, meets the requirements and goals of the Conflict Mineral Provision to deter finance of DRC conflict, through reasonable actions, reasonable burdens, and continued fair competition on a worldwide basis.

¹⁵ Philip Olden, report to OECD, see fn 3

Please let us know if you have questions or would like to have additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Larry Manziek', with a long horizontal flourish extending to the right.

Larry Manziek, PhD
Executive Director