global witness

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By E-mail
Chairman Mary L. Schapiro
Commissioner Luis Aguilar
Commissioner Elisse Walter
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Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Chairman and Commissioners,

The International Corporate Accountability Roundtable ("ICAR") and Global Witness submit this comment to address issues pertaining to the rulemaking for Section 1502 that were raised in the Roundtable, held on October 18th, 2011, and to reiterate certain key points from our previous submissions.

At the outset, we urge the Securities and Exchange Commission (Commission) to issue final rules no later than December 2011 as Congress intended for this law to immediately address the urgent humanitarian situation in the eastern Democratic Republic of Congo (DRC) by curbing the trade in conflict minerals. We also reiterate our call that final rules allow no phase-ins or delays in implementation. We believe any further delays, including delays in reporting requirements, frustrate the intent of the law, will slow down progress towards putting the necessary due diligence processes in place to establish a trade in clean minerals in eastern Congo and will enable continued financing to the armed groups that prey upon the local population.

No Phase-ins or Delays

We believe the Commission should not introduce any phase-ins or delays in the rules. We understand that there is concern on the part of companies about not having adequate systems in place to know with full certainty whether minerals are from mines in conflict-affected areas. However, we note that Section 1502 does not require the establishment of particular systems, but rather calls for disclosure of the due diligence that issuers have undertaken on their supply chains. We understand that due diligence processes like this are iterative in nature, and that the

quality of the information generated and the effectiveness of the measures taken by reporting companies will improve over time. We are looking for best efforts and not perfection. What is essential, however, is that due diligence efforts by companies commence without further delay in order to break the links between the minerals trade and armed violence in eastern Congo.

We note, moreover, that while a number of companies have stated publicly, and in private discussions with us, that they are seeking delays or phase-ins to the law, none have offered any assurances that such delays will result in them increasing their efforts to source minerals from eastern DRC in line with international due diligence standards. There is a perception in some quarters that a delay in implementation of the law will boost exports of minerals from the Kivus. We see no evidence that this is the case. Conversely, we believe that a delay will simply sap the momentum from the existing efforts to establish systems for tracking and carrying out risk assessments in the region; this will postpone the increase in clean minerals exports from eastern DRC that everyone wishes to see.

Due Diligence

In the interests of clarity, predictability, and uniformity, we submit that the Commission should adopt a firm and clear due diligence standard for the review of an issuer's conflict minerals supply chain. We appreciate the challenges this presents to the Commission, but permitting differing due diligence standards will necessarily result in varying levels of quality, accuracy, consistency, and reliability in the required Conflict Minerals Reports.

Moreover, allowing issuers to choose from an undefined group of general international due diligence standards will yield uneven results, and at worst, would allow issuers to engage in a type of "forum shopping" for the most lenient due diligence standard in light of its particular circumstances. Furthermore, we believe that it is imprudent for the Commission to leave the door open for industry groups to adopt and champion their own due diligence standards, which are unlikely to be as rigorous as existing international standards or to be vetted by independent third parties.

We urge the SEC to adopt the guidance developed by the OECD as Dodd Frank 1502's definition of due diligence. This OECD guidance was published in December 2010 and was formally endorsed by the U.S. Secretary of State and ministers from other OECD countries in May 2011. The guidance mirrors the due diligence guidelines developed by the UN Group of Experts on the Democratic Republic of Congo and endorsed by the UN Security Council in November 2010. The OECD standards have also been endorsed by the governments of the International Conference on the Great Lakes Region, which represents 11 states in the African Great Lakes region and by the U.S. State Department. In a significant recent development, the Government of DRC has passed a legal directive requiring companies operating in the minerals sector to implement the OECD standards.

The main elements of the OECD due diligence guidance are as follows:

1. Establish strong company management systems;

2. Identify and assess risks in the supply chain;
3. Design and implement a strategy to respond to identified risks;
4. Carry out an independent third-party audit of supply chain due diligence at identified points in the supply chain; and
5. Publicly disclose supply chain due diligence and findings.

We note that steps 4 and 5 of the due diligence framework are covered specifically in the context of Section 1502 under the auditing provision and reporting requirements.

We would like to point out that these standards apply as much to gold as to tin, tantalum and tungsten. The OECD is currently developing a supplement which provides additional guidance on how companies in the gold trade can meet the standards summarized above. This does not mean that the core standards (summarized as 1-5 above) do not currently apply to gold or that companies that use gold cannot currently comply with them. We note, moreover, that by the time the SEC issues its rules, the process of devising the OECD due diligence supplement for companies using gold is likely already to be finalized – it is slated for completion by the end of November 2011.

Recycled Minerals

We agree with the Commission's proposal that issuers claiming that their minerals are recycled should describe how that determination was made in a conflict minerals report that will then be audited by a third party. We also agree with the Commission that it is acceptable for recycled conflict minerals to be described, through a Conflict Minerals Report, as DRC conflict free.

We are concerned, however, that the exemption for recycled minerals could be used to circumvent the intent of the statute if manufacturing companies receive recently mined minerals altered to appear to be recycled or scrap. Therefore, the Commission should define "recycled" minerals as follows:

> "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. Recycled minerals do not include gold coins, bars or financial gold. Recycled minerals also do not include scrap from jewelry and other manufacturing and any jewelry or other product not previously owned as end-use products by consumers."

Failure to define recycled minerals could potentially allow issuers to claim that newly mined minerals, for example gold, are actually recycled

In order to close this loophole, the Commission should require issuers who report that they use recycled minerals in their products to conduct due diligence through an audited statement of provenance for recycled content determinations. This would help ensure that what is claimed as

recycled is actually recycled. Such diligence is of critical importance because definitions of recycled vary, and less responsible elements of the supply chain could falsely claim that newly mined minerals are actually recycled. Post-consumer recycled products should be the only sources of minerals, in addition to newly-mined minerals not supporting DRC conflict, described in a Conflict Minerals Report as DRC conflict free.

For gold, the Commission should require that issuers claiming that their products are recycled must independently verify with statements of provenance that the recycled gold contains 100% gold from post-consumer products, such as post-consumer jewelry, electronics, or dental gold. Gold coins and bars, or financial gold, should not be considered "recycled" as they do not represent a clear consumer, end-of-life product and are less identifiable as not newly-mined gold. Companies or individuals could launder DRC conflict gold by making claims that gold bars are recycled when they may be newly mined gold bars, or an un-quantified mix of recycled and newly mined gold.

Stockpiled Minerals

Stockpiled minerals may have originated in mines that support the conflict; however, it would be impractical to ask companies to trace the origin of these minerals. These minerals should be exempt as long as companies can document that the minerals in the stockpile pre-dated the implementation of Exchange Act Section 13(p).

Small Entities

We support the Commission's proposal to apply the rules equally to smaller reporting companies. According to the Commission's initial Regulatory Flexibility Act analysis, there are 793 companies that may be considered "small entities." If the Commission were to exempt just these "small entities" from the disclosure requirements, then more than 13% of issuers covered by Section 1502 would be excluded. Of course, the annual revenue maximum used to determine which issuers are "small entities" is lower than revenue thresholds used for classification of "smaller reporting companies." Therefore, it stands to reason that if the Commission were to exempt smaller reporting companies, the percentage of issuers who would not be required to report under Section 1502 would be higher than 13%. In short, exempting this large swath of issuers from the reach of Section 1502 would significantly impair the disclosure objectives of the legislation.

We also believe that the disclosure requirements do not impose costs on smaller entities significant enough to justify an exemption. First, because these issuers are smaller, it stands to reason that they will have fewer products that contain conflict minerals, thus reducing the amount of products that must undergo a reasonable country of origin inquiry and supply chain due diligence. Second, the cost burden to perform due diligence is manageable, even for smaller entities.

If the SEC adopts the OECD guidance as a definition of due diligence, the principal responsibilities of smaller manufacturers will be first to establish the identity of the smelters that

processed the metal they are using and then to verify that the smelters carried out comprehensive due diligence on their supply chains back to the mines of origin. One of the first impacts of the Commission's rules being introduced will be to stimulate a flow of information along the supply chain regarding the identity of the smelters that produced the metal that issuers are using. Larger companies, with greater resources, will lead the way in generating this information flow, which smaller entities will be able to tap into.

When it comes to assessing smelters' supply chain controls, companies are already pooling resources to do this, as a means of saving costs, notably via the development of the Conflict Free Smelter scheme. Smaller entities will be able to draw on these kinds of mechanisms and the information they generate to make their assessments of smelters' due diligence efforts.

In addition, we do not support exempting smaller entities from any of the due diligence requirements, such as conducting an independent audit and submitting the audit report to the Commission with the Conflict Minerals Report. The independent audit is a crucial step in the due diligence process, and the requirement for an independent private sector audit is explicitly included in the statutory language of Section 1502.

Conclusion

Section 1502 was prompted by the U.S. Congress' concern "that the exploitation and trade of conflict minerals originating in the DRC is helping to finance conflict characterized by extreme levels of violence in the eastern DRC…" In order for this provision to be effective in addressing an urgent humanitarian crisis, we urge the SEC to issue the final rules as soon as possible, incorporate the UN/OECD due diligence standards into the final rule and to follow the clear intent of the law by allowing no delays or phase-in periods for implementation and reporting requirements.

Yours sincerely,

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