

December 26, 2011

The Honorable Mary L. Schapiro, Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Roundtable on Issues Relating to Conflict Minerals under § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Release No. 34-65508; File No. S7-40-10)

Dear Chairman Schapiro:

Observatoire Gouvernance et Paix (“OGP”) and Bureau d’Etudes Scientifiques et Techniques (“BEST”) appreciate the opportunity to provide the U.S. Securities and Exchange Commission (the “Commission”) with comments in response to the Commission roundtable held on October 18, 2011 (the “Roundtable”) and the proposed rule for conflict minerals under § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) (the “Proposed Rule”).¹

OGP and BEST are non-governmental organizations (“NGOs”) based in the Democratic Republic of the Congo (“DRC”). OGP focuses on improving the accountability of government institutions, contributing to the reconciliation effort between communities in the DRC that have experienced conflict, and supporting local artisanal mining communities. BEST performs technical and scientific studies, often in collaboration with European and North American academic institutions, which explore the design, management, and evaluation of a variety of local activities. Recently, the organization participated in surveys of local mining communities in collaboration with institutions from South Africa, Germany, and the United States.

Section 1502 of the Dodd-Frank Act states that its purpose is to address “the exploitation and trade of conflict minerals originating in the [DRC] [that] is helping to finance conflict characterized by extreme levels of violence . . . and contributing to an emergency humanitarian situation therein”² OGP and BEST support the purpose of § 1502, and we are actively working with stakeholders on the ground in the DRC to address these issues, as well as participating in international programs, including initiatives regarding smelter certification, guideline development, and tracing mechanisms.

At the recent Roundtable, the Commission invited discussion and comment on the Proposed Rule. In response to the Roundtable discussion, we write (i) to describe the current impact of § 1502 of the Dodd-Frank Act on mining communities in Eastern DRC; (ii) to outline the

¹See Conflict Minerals, 76 Fed. Reg. 80948 (December 23, 2010) for the Commission’s request for comment on various issues related to conflict minerals in the DRC and adjoining countries.

²Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010).

mechanisms necessary for the traceability and due diligence of conflict minerals; (iii) to recommend a phased approach for implementing § 1502; and (iv) to encourage the Commission to undertake a more comprehensive cost-benefit analysis before promulgating its final rule, in part by studying the law's impact on local communities in Eastern Congo.

Section 1502 Has Already Had Negative, Unintended Effects on the Local Population in the DRC.

As a result of years of conflict, the DRC is one of the poorest countries in the world,³ and ranks last in the United Nations' Human Development Index.⁴ Though § 1502 seeks to provide a mechanism for combating the corruption and violence crippling the DRC, its impact on the upstream mining industry has been devastating to the mining communities and the broader economy of Eastern DRC. Before the passage of § 1502, roughly 400,000 Congolese worked as artisanal miners in the Kivus region. The majority of these miners supported families, meaning that as many as two million people relied on the industry for their livelihood.

Section 1502's passage precipitated a *de facto* embargo of minerals from the DRC, as U.S. companies, fearing negative publicity and lacking mechanisms to establish the origin of minerals within the region, directed smelting companies to stop accepting minerals from Eastern Congo entirely. This *de facto* embargo has led to a 75% to 90% drop in the region's export of tin, tantalum, and tungsten. A recent article in the Economist reported that "[h]undreds of mines in the surrounding countryside [of Goma] have cut output by as much as 95%."⁵ Those miners still able to sell their cassiterite (tin ore) find the price is less than half of what they previously made.

This precipitous decline in mineral exports has had a severe impact on mining communities. Thousands of miners experienced a sudden loss of livelihood. Many have been unable to afford school enrollment fees or pay for their families' health needs. We have even heard of communities experiencing outbreaks of hunger and incidents of the protein deficiency disease kwashiorkor as a result of the embargo.

Many mining communities exist in remote locations in the Kivus region, virtually unreachable by road. Once the embargo was put in place, the air freight companies that serviced these communities discontinued their flights, depriving these communities of critical provisions.⁶ Their status remains unknown at this time. The embargo has also had negative economic effects on the economy of the broader region. The Economist reports that as a result of the embargo, the local economy has "fallen off the cliff":

³See Aneki.com, <http://www.aneki.com/poorest.html>, noting that DRC has a per capita GDP of \$300.

⁴*Sustainability and Equity: A Better Future for All*, HUMAN DEV. REP. 2011 (United Nations Dev. Programme, New York, N.Y.) at 129.

⁵*Digging for Victory*, The Economist, September 24, 2011, at 60.

⁶ Indeed, a further cost of the *de facto* embargo has been the loss or disruption of flights from the Goma and Bukavu airports, of dozens of daily rotations by small Antonov airplanes carrying typically two tons of merchandise of all kinds: digging tools, shoes, second-hand clothes, medicines, radios, batteries, etc. In this way, a very significant segment of the Kivus region population has been adversely affected.

The dusty streets of Goma, North Kivu's capital and a mining hub, illustrate Congo's ills. Metals dealerships dominated the city's economy until last year but are mostly padlocked now. Repair shops and bars that relied on mining business are empty. So are most public offices. Local government, financed by mining taxes, is insolvent; salaries have not been paid in full for months.⁷

The impacts of the embargo go beyond the economic. As Ms. Kay Nimmo of the International Tin Research Institute ("ITRI") discussed during the Roundtable, the effects of the *de facto* embargo include lost tax revenue and a consequent weakening in provincial governance; a delay in several donor and investor mining projects; and increasing theft and violence, as militia and rogue army units profit from the illegality of the trade to smuggle minerals abroad.

Given the unintended and immediate effects of § 1502 in the DRC, OGP and BEST respectfully submit that the Commission should consider a three-year phased implementation of the law so that certification methods can be designed and tested in the concerned sites.

The Necessary Infrastructure and Capacity to Comply with the Proposed Rule Do Not Yet Exist in the DRC.

Section 1502 requires companies to perform due diligence on the source and chain of custody of conflict minerals and to disclose whether such conflict minerals originated in the DRC or adjoining countries. Advocates of the Proposed Rule suggest that companies rely upon industry-wide processes to verify whether a smelter's ore supply originates in the DRC region and, if so, whether it supports armed conflict. However, the interruption of existing certification methods on the ground has all-but obligated companies to embargo all minerals from Eastern Congo.

Industry and public-private partnerships are in the process of establishing the necessary infrastructure to facilitate compliance with § 1502. For example, the U.S. State Department-sponsored Public Private Alliance ("PPA") will develop pilot supply chain systems that enable businesses to source minerals from within the Congo by certifying them as conflict-free. Further, ITRI and its tin-producing member companies plan to undertake a phased implementation of a due diligence scheme known as the ITRI Tin Supply Chain Initiative ("iTSCI").⁸ ITRI recently noted, however, that "it has been impossible to find industry partners willing to invest in developing due diligence systems in [North and South Kivu] when the lack of buyers for the processed metal from the downstream manufacturing sector becomes ever more apparent."⁹ The German Federal Institute for Geosciences and Natural Resources is also helping to develop a mineral certification scheme.¹⁰

⁷*Id.*

⁸See ITRI comment letter, dated November 22, 2010.

⁹ITRI comment letter, dated October 31, 2011. ITRI also noted that given the election in the DRC at the end of November, it is not practically possible to begin due diligence infrastructure development until January 2012.

¹⁰Mineral Certification at the BGR:

http://www.bgr.bund.de/EN/Themen/Min_rohstoffe/CTC/Home/CTC_node_en.html, accessed December 11, 2011.

Until such due diligence mechanisms are developed, it is unrealistic to expect industry to comply with § 1502 in any manner other than by refusing to import any minerals from Eastern Congo.¹¹ Regulations that do not adequately consider the current state of certification systems will inevitably lead to further negative consequences for the Congolese people. We, therefore, urge the Commission to craft a final rule with a phased implementation plan that allows for the development of industry-wide verification systems.

A Phased Approach for the Implementation of § 1502 Is Necessary to Ensure the Law Has Its Intended Effect in the DRC.

OGP and BEST encourage the Commission to adopt a rule mandating a three-year transition period for implementing § 1502.¹² The phased approach would enable the Congolese and their international partners to install mechanisms, such as the U.S. State Department-sponsored PPA, that allow purchasers to certify minerals as conflict-free.¹³ In order to be effective, however, such initiatives must be given time to develop. Accordingly, we urge the Commission to adopt a rule that allows for the following infrastructure to be established in the DRC.

Year One	Year Two	Year Three
<ul style="list-style-type: none"> ▪ Allow businesses to source from mines in conflict-free areas of the Kivu region. ▪ Expand upon existing source mechanisms to develop a standard due diligence mechanism. ▪ Disseminate information regarding the aims of the program in the Kivu region. ▪ Initiate “bag and tag” certification systems and other pilot supply chain systems. ▪ Establish trading centers 	<ul style="list-style-type: none"> ▪ Complete a mapping exercise to determine clean mining sites and provide mechanisms to update maps in real time. ▪ Construct independent “open-source” audit databases. ▪ Secure the commitment of local mining cooperatives to maintain conflict-free sites. ▪ Expand the number of mining sites under the program and establish additional trading centers. ▪ Recruit independent 	<ul style="list-style-type: none"> ▪ Strengthen local governmental institutions, such as mining police. ▪ Focus on improving the working conditions of artisanal miners and enforcing regulations regarding child labor, the environment, and worker safety. ▪ Develop and implement effective transparency mechanisms. ▪ Implement a system to trace the use of funds entering the region to ensure such funds are used for development and not

¹¹As the undersigned BEST representative has testified, “it makes no sense to put a tag on an empty bag,”

¹²In its October 31, 2011 comment letter to the Commission, ITRI similarly stated that “[a] staged introductory period of 3 years is essential in order to allow development of suitable and reliable infrastructure”

¹³Indeed, the following organizations are in the process of developing such mechanisms: the Organization for Economic Cooperation & Development (OECD), the International Commission on the Great Lakes Region (ICGLR), the German Federal Institute for Geosciences and Natural Resources (BGR), ITRI, United Nations Organization Stabilization Mission in the DRC (MONUSCO), and the International Organization for Migration (IOM).

<p>under the protection of the UN and reformed Congolese army units.</p>	<p>auditors and establish appropriate terms of reference.</p>	<p>to support corruption.</p> <ul style="list-style-type: none"> ▪ Work to reopen roads to remote mining sites. ▪ Conduct independent third party audits of the upstream mining supply chain.
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Prior to the Promulgation of the Proposed Rule, A Thorough Cost-Benefit Analysis Is Necessary to Determine the Impact on the People of the DRC.

The Commission’s cost-benefit analysis notes the potential impacts on various parties, including reporting companies that would be required to disclose information on conflict minerals, market participants and observers, independent private sector auditors, reporting issuers, and manufacturing companies.¹⁴ With respect to considering the impacts on the people of the DRC, however, the Commission states only that it expects “[the] proposed rules will have the benefit of furthering Congress’s goal of deterring the financing of armed groups in the DRC countries through commercial activity in conflict minerals.”¹⁵

We respectfully submit that this analysis fails to come close to meeting the requirements imposed on the Commission’s rulemaking under Executive Order (“EO”) 13579,¹⁶ which applies to independent agencies the requirements applicable to Executive Branch agencies under EO 13563.¹⁷ In pertinent part, EO 13563 states as follows:

This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired

¹⁴See Conflict Minerals, 76 Fed. Reg. at 80968.

¹⁵*Id.*

¹⁶Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41587-41588 (July 14, 2011).

¹⁷Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821-3823 (January 21, 2011).

behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

OGP and BEST strongly support a comprehensive cost-benefit analysis of the impacts of the final rule implementing § 1502 on the people of the DRC, which takes into consideration recent news reports¹⁸ and statements from the Roundtable participants. The Commission has not provided an assessment of the costs of the Proposed Rule on the Congolese, nor has it supported its predictive judgment regarding the goal of deterring the financing of armed groups in the DRC.¹⁹ Further, as discussed above, § 1502(a) of the Dodd-Frank Act states that its purpose is, in part, to address the “emergency humanitarian situation” in the DRC. Thus, we respectfully submit that the Commission should conduct a more comprehensive cost-benefit analysis of the impact of the final rule on the people of the DRC.

Our preliminary assessment is that, if implemented without a transition period adequate to develop the infrastructure described above, one significant cost of the Proposed Rule would be the permanent loss of livelihood for 400,000 artisanal miners in the Eastern Congo. To this cost must be added the suffering caused to each miner’s family by the loss of income, including inadequate nutrition and loss of educational opportunities for children. These and other consequences make it critical that the Commission adopt its final rule only after determining that the benefits to the Congolese outweigh these costs – as the Executive Order mandates.

Ours is the perspective of local NGOs established, in part, to support local communities in the DRC. We recognize that an initiative to regularize the mining trade in the DRC can be beneficial, but feel it should be implemented without effectively destroying the very civil society that § 1502 of the Dodd-Frank Act was enacted to protect. In time, with the development of supply chain systems that enable businesses to certify minerals as conflict-free, this will be possible. Requiring immediate compliance before those systems are established ensures continuation of the devastation already brought about by the *de facto* embargo on minerals from Eastern Congo. The ultimate objective of deterring financing for armed groups in the DRC can be achieved without further impoverishing the people of the region. Indeed, we submit that the laudable objectives of § 1502 can be achieved only without inflicting such suffering on the people, for it is only by securing their cooperation and trust that viable certification systems can be put in place.

In addition to ensuring that the costs of the rule implementing § 1502 do not outweigh its benefits, EO 13563 instructs the Commission to “tailor its regulations to impose the least burden on society.” The magnitude of the suffering already caused by the *de facto* embargo cautions against immediate implementation of the certification requirement without local structures in place to enable certification. Equally important, the Commission must select the regulatory alternative that maximizes net benefits, including economic, environmental, and health and safety. Each of these factors, for the people of the DRC, weighs heavily in favor of a phased implementation approach.

¹⁸See *Digging for Victory*, THE ECONOMIST, September 24, 2011, at 60.

¹⁹As a result of the *de facto* embargo, the circulation of money from the mining trade has been drastically reduced. In turn, armed groups have resorted to kidnapping for ransom.

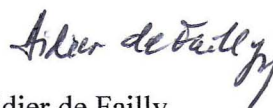
While OGP and BEST support the underlying purpose of § 1502 of the Dodd-Frank Act and believe it is possible to implement the law in a manner that will produce its intended results, we strongly urge the Commission to more fully assess the impacts of the rule on the artisanal mineral production industry and, more broadly, the people of the DRC. In order to ameliorate the unintended consequences of the provision, we strongly urge a phased approach for the implementation of § 1502.

We thank the Commission for the opportunity to comment. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



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