

## MEMORANDUM

**To:** File

**From:** John Fieldsend  
Special Counsel  
Office of Rulemaking  
Division of Corporation Finance  
U.S. Securities and Exchange Commission

**Date:** February 16, 2012

**Re:** Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act Regarding Congolese Conflict Minerals

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On February 16, 2012, Paula Dubberly, Felicia Kung, Steven Hearne, and John Fieldsend of the Division of Corporation Finance met with Jason Stearns, the former Coordinator of the United Nations Group of Experts on the Democratic Republic of the Congo, and Jana Morgan of Global Witness. The participants discussed the Commission's required rulemaking in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which relates to reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo and adjoining countries. Prior to the meeting, Jason Stearns submitted to the Commission the transcript of an interview he conducted with the current United Nations Group of Experts on the Democratic Republic of the Congo, which we have provided as an attachment to this memorandum.

Attachment

## Interview with UN Group of Experts

TUESDAY, FEBRUARY 7, 2012

[HTTP://CONGOSIASA.BLOGSPOT.COM/2012/02/INTERVIEW-WITH-UN-GROUP-OF-EXPERTS.HTML](http://congosiassa.blogspot.com/2012/02/interview-with-un-group-of-experts.html)

*The following is the first of two interviews with the United Nations Group of Experts on the Congo. The group has a mandate to investigate support to armed groups in the eastern Congo and to propose sanctions to the UN Sanctions Committee. Their last report was published on December 28, 2011 and can be found here.*

*1. Congo Siasa: The report is hugely detailed and covers many different areas. What, in your mind, are the main conclusions of the report?*

With some difficulty, we can summarize a sizeable amount of analysis and documented case studies, by highlighting the following six major findings:

1. Tin, tantalum, tungsten production levels have fallen in the Kivus because companies aspiring to Dodd Frank compliance are not purchasing from there, This has led to a decrease in revenues for armed groups and criminal networks within the Congolese armed forces, but also shifting production of these minerals, to an extent, to non-conflict areas, such as Maniema and North Katanga. However, as army troops have withdrawn from mining areas, armed groups have been able to carry out incursions in some places
2. The gold trade is booming and helps finance armed groups and criminal networks within the FARDC. It has not been affected thus far by the limited international efforts to promote due diligence in supply chains, as nearly all the gold trade goes unrecorded. We believe close to three tons of Congolese gold likely to have been smuggled out of Uganda to Dubai alone during 2010.
3. Non-mineral natural resources continue to provide financing for armed groups and criminal networks including the sale and/or taxation of land, fuel, timber, charcoal, commercial goods in mining zones, cannabis and agricultural products such as palm oil.
4. Congolese armed groups have benefited from support provided by national and provincial politicians seeking to affect the electoral process and enhance their own political clout and leverage.
5. Rebel groups in the Congo continue to seek support and alliances with political opposition figures throughout the region. Burundian political opponents and some lesser known Rwandan dissidents, rather than the more widely suspected prominent Rwandan opposition figures, mobilised support for foreign armed groups in the eastern DRC during 2011.
6. Despite his designation on the sanctions list, and an arrest warrant from the ICC, General Bosco Ntaganda has dramatically increased his military and economic empire, which included fuel rackets, gold scams targeting international businessmen, and rampant cross border smuggling of tin, tantalum, and tungsten into Rwanda. Led by Ntaganda, CNDP officers have expanded their power and enhanced their privileges during the restructuring of the Congolese army. In turn, this has further fractured the

army and resulted in generalized discontent and support to armed groups by some disgruntled officers.

*2. Some governments and individuals have responded over the years that the Group of Experts reports are full of unsubstantiated allegations and rumors? What is the Group's methodology and how do you reach conclusions about arms embargo violations?*

As you know well the Group of Experts is not in the business of making unsubstantiated allegations, but rather reporting information as objectively as possible to the Security Council and seeking to corroborate, document, and/or disprove information relevant to its mandate based upon what we're able to obtain through first-hand observations, witness testimony, extensive interviews with current and former combatants, documentary evidence and government cooperation. We rely on the latter in gathering telephone, money transfer, or e-mail records, but are often not granted access due to privacy laws in certain countries. It's important to clarify that the GoE is not a judicial mechanism or an intelligence service, nor does it benefit from any technological equipment in its investigations. Nevertheless, we rigorously investigate financial and material support to armed groups to the highest methodological standards possible within the reach of our limited resources. In addition, we aim to provide individuals cited in the report with the right of reply and are always willing to address any issues raised in subsequent reports for further clarification or correction.

*3. What is your analysis about the Dodd-Frank law on conflict minerals and its impact on the mining sector in the eastern Congo?*

As per our previous letter to the SEC, the Group of Experts findings and recommendations have remained consistent that the U.S. legislation on supply chain due diligence in Central Africa has overall been quite positive and a critical catalyst for reform. This impact has included important positive developments in mining sector governance as well as extensively increasing the awareness amongst affected industries of the importance of ensuring that their supply chains are not linked to the financing of armed actors. We witnessed increases in production and improved governance in non-conflict areas such as North Katanga, decreases in financial revenue for many armed groups such as the FDLR from tin, tantalum, and tungsten, and the facilitating of the Congolese government's attempts to demilitarize some key mining areas, notably Bisie, while undergoing a restructuring of army units in the Kivus prior to the elections.

However, the market uncertainty resulting from the lengthy delay in the publication of the SEC rules coupled with the fear of potential 100% "conflict free" demands in their reporting obligations has led most industry actors to pull out of the market rather than conduct due diligence on their supply chains. This has exacerbated the criminalization and militarization of wide-spread smuggling of minerals out of the Kivus, and has had a considerable, but not disastrous, impact on local livelihoods. As a result of this pull-out only trading houses selling to countries where there is little pressure for supply chain due diligence are officially exporting from the Kivus.

*4. In your last report, you argued that "criminal networks" within the Congolese army were profiting from the exploitation of natural resources. Have there been any improvements in this regard?*

The presidential suspension of mining activities from September 2010 to March 2011 and subsequent reform of army units in the eastern part of the country has led to progress in

demilitarising some important mining areas, such as Bisie, Lulingu and Kamituga. This has diminished criminal networks' opportunities to levy taxes in the mines. However, these networks have expanded their schemes of protecting smuggling operations, facilitating business transactions and investing in mineral exploitation.

These activities can often be traced back to Ntaganda, whose soldiers control an illegal border crossing near his home in Goma, where they smuggle minerals into Rwanda in plain view of the Rwandan army stationed on the opposite side of the border. Troops loyal to Ntaganda also provide security and levy taxes in several mines in Kalehe and Masisi territories.

Despite this flagrant abuse, isolated cases notwithstanding, there appears little chance of the Congolese state prosecuting of high-ranking army officers supervising such activities, as military prosecutors have limited logistical capacities and often fear personal or career reprisals for such efforts. Nevertheless, the overall increase in less visible and more indirect forms of profit seeking can be seen as a response to increased international and domestic opposition to illegal taxation at mine sites and roadblocks.

*5. What are the most important steps to improving governance in the mining sector in eastern DRC and de-linking conflict from the minerals trade?*

First of all, punitive measures should be taken by the Congolese state so that military figures involved in economic crimes are held to account. While this is principally a responsibility of the Congolese government, MONUSCO and international donors could provide specialist training and logistical support to military and civil prosecutors and mining and border police in investigating cases of military involvement in illegal exploitation and trade of minerals. Recognising the challenges in the Congolese judicial system, a first step would be to shut down illegal border crossings controlled by criminal networks within FARDC, particularly the crossing near Ntaganda's house in Goma.

Second, formalised and traceable trade of minerals from validated mines in the Kivus and Maniema must take-off within a short delay. During 2011 it has become clear that without mineral tagging by iTSCi, a supply chain initiative established by ITRI, a tin industry group, smelters that seek to be Dodd Frank compliant will not buy from eastern DRC. But, a significant bottleneck is the lack of funds available to validate mines with regard to their conflict status and subsequently roll-out of a minerals traceability system. Member States and private business must therefore provide assistance during the start-up period. We also recommend that MONUSCO should play a more prominent role in accompanying and supporting Congolese officials in carrying out regular spot checks to mining sites, trade routes and markets.

Third, companies presently exporting and importing minerals from eastern DRC should commit to implementing due diligence. We believe that although a comprehensive traceability system, à la iTSCi, is not yet established in the Kivus and Maniema, companies active here should already undertake efforts to ensure that their activities do not fund armed groups or criminal networks within the army. Neighboring governments, particularly Uganda and Rwanda, must not only continue to increase criminal investigations and seizures of smuggled minerals from the DRC but also oblige export companies to conduct similar due diligence on minerals lawfully purchased. The expeditious publication of the SEC rules in the U.S. could galvanize such enhanced due diligence efforts. In this connection, we welcome the Congolese Government's *note circulaire* of 6 September 2011 requiring all mining operators to exercise due

diligence, as defined by the Group and OECD. Development partners of the DRC should assist the Government in implementing this requirement and evaluating compliance.

*6. To what degree are foreign companies or consumers complicit in violence in the eastern Congo? Are they just negligent or actively complicit?*

Following language in Security Council resolutions, our report refers to direct and indirect support to armed groups, sanctioned individuals and criminal networks within the army in eastern DRC. Outside of one mineral trading company, SAFAA mining based in Tanzania and working with Mai Mai Yakutumba, we did not find extensive evidence of foreign companies' direct support to armed groups. However, those companies knowingly purchasing from or relying on the services of Ntaganda's smuggling rackets directly empower him financially and thereby militarily in his attempts to undermine and co-opt reforms critical for sustainable peace in the region.

Furthermore, we found evidence that three *comptoires*— TTT Mining, Huaying Trading, and Donson International —made purchases in Walikale territory during 2011 that indirectly supported armed groups due to their levying of illegal payments on local traders. Traders told us that they had never been asked by these *comptoires* about where exactly the minerals had come from and whether any armed groups had benefited from them. According to Congolese trade statistics, the three *comptoires* have sold to importers in China that do not require any evidence of due diligence. Both the Congolese *comptoires* and the Chinese importers can and should be considered negligent in this regard. In Resolution 1952, the Security Council agreed that a company's failure to conduct due diligence would be taken into account when considering its designation.

*7. The large majority of official exports from the Kivus at the moment go to China. How important is Chinese collaboration in order to make any due diligence scheme work?*

In contrast to the OECD's guidelines on due diligence, the Group's nearly identical guidelines apply to all members of the United Nations. Last year, the Security Council, where China is a permanent member and has a veto, by resolution 1952 supported taking our due diligence guidelines forward, and called upon Member States to urge their companies to exercise due diligence. Collaboration of public and private stakeholders in China is of critical importance to generate the necessary pressure on suppliers active in the DRC and the sub-region so as to create a level playing field for all trading, processing or mining companies. Uneven application and scrutiny of the due diligence guidelines, for example only of OECD registered companies and their supplying companies, risks generating a sense of unfairness and reduce these companies' willingness to implement them.

*8. Perhaps the most sensational sanctions violations you document is a Hollywood-worthy case of gold trade involving a former NBA basketball star, a rich businessman who sits on a US trade committee, and a Congolese war criminal. What does this case tell us about the mineral trade in the eastern Congo?*

This case is actually atypical of the broader gold trade in the region, as it's important to recall that there was never any real gold involved. It was merely a scam in which intermediaries based in Kampala, reached out to Ntaganda, with whom they've worked in the past, to guarantee the security of the set-up scheme from Goma. As such, the case does reveal Ntaganda's involvement with regional scam artists as just another indication of the vast financial network

that he oversees. Secondly, the case also illustrates a well-known fact for those familiar with North Kivu: nothing big can take place in the province without him being involved in one form or another.

Thirdly, the pattern of scams within which this deal falls tell us that given skyrocketing gold prices, numerous inexperienced buyers become easily infatuated with the allure of Congolese gold that they can obtain large amounts of gold at rock-bottom prices. Unfortunately, many of these individuals seeking to buy gold from the Congo throughout East Africa often do not find military involvement in the supply chains to be problematic at all. We even documented another gold dealer based in Nairobi, General Kabamba, whose business card describes himself as a Mai Mai commander.

In this particular case involving CAMAC, following the loss of millions of dollars in Nairobi, company delegates went to Goma to confirm the deal once again and found that the alleged gold was clearly in the hands of military officers. However, this did not stop Kase Lawal from sending his CAMAC jet to Goma with over six million dollars to complete the purchase. When he later learned that Ntaganda was directly involved, Lawal was reportedly relieved to be finally interacting with the ultimate decision-maker in the convoluted deal. This is the opposite of the behavior that due diligence would promote.