

April 4, 2011

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

Re: Southern Africa Resource Watch's Submission to the US Securities and Exchange Commission (SEC) on Issues Relating to Conflict Minerals under §1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Chairman Schapiro:

This submission to the US Securities and Exchange Commission (SEC) is intended to provide comments pursuant to the SEC Regulatory Initiatives under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The submission is made by the Southern Africa Resources Watch (SARW), a leading extractive industry research and advocacy organisation operating in the Democratic Republic of Congo (DRC) and several southern African countries. A more detailed description of SARW is provided below. The following comments will focus on the 'Proposed Rules' 17 CFR Parts 229 and 249 of the Dodd-Frank Act.

SARW is currently funding an extensive research project in eastern DRC, which is investigating the socio-economic and security conditions under which artisanal and small-scale gold miners live and work. Based on a rigorous research methodology, the project began in November 2011 and preliminary findings are expected in May 2012. The project covers the provinces of North and South Kivu, Maniema and Oriental and involves 12 Congolese researchers, who speak the local languages and who are familiar with local government structures and mining communities, as well as an international consultant with many years of experience in conflict-affected regions, including eastern DRC. SARW has also been involved with many other projects in the DRC.

Based on its experience and expertise in relation to the extractive sector in the DRC, SARW has some general observations to make before focusing on a few key issues:

1. SARW agrees that the legislation, if properly implemented, could contribute to increasing transparency and reducing conflict linked to resource exploitation in DRC. However, if it is not properly implemented and does not take into account local conditions and realities, the legislation could prove to be entirely ineffective. SARW would also like to highlight the potentially negative impact that the legislation could have on the local population. In a country where the state does not provide basic services to its citizens and where artisanal mining is the only livelihood for large numbers of poor and vulnerable people, the introduction of Section 1502 could, unintentionally, leave many of these people with no means of survival.

2. The realities of informal mining in the DRC differ from site to site. While miners at one site might be able to operate under conditions that are considered by any standard ‘conflict-free’, miners at a nearby site might find themselves being preyed upon by government forces, local dignitaries or armed groups. SARW’s researchers even found one village where certain sites are subject to violence and extortion and others are not.

3. The definition of ‘conflict’ has changed dramatically in eastern DRC in recent years. The conditions that prevailed when Section 1502 was drafted are no longer relevant except in a few, relatively small mining areas. The vast majority of mining areas in eastern Congo are no longer wracked with conflict. Instead, they have been transformed into zones of high-density crime and corruption. In most documented cases, illegal exploitation takes place both at the point of extraction and along the supply-chain so it is not possible to separate one from the other in practicing reliable due diligence. Consequently, in response to item 50-55, the definition of what constitutes ‘conflict’ in the DRC needs to be addressed before reporting entities can engage in due diligence. The fast changing nature of the conflict zones in the DRC makes this a difficult challenge. The emerging consensus seems to be that reports from the United Nations Group of Experts and Non-Governmental Organisations (NGOs) – and possibly statements by the Government of the DRC – will be the only available source of pertinent information. However, there are serious disadvantages with all of these sources:
 - The UN Group of Experts reports infrequently. Usually, there is one annual report and sometimes one or two mid-term reports, which may or may not be published. Another important caveat is that the composition of the UN Group of Experts changes as does its methodology – sometimes dramatically.
 - NGO reports are also intermittent, while their methodologies vary and are not always disclosed.
 - Statements by the DRC government are by definition unreliable. Consistent reporting by the UN Group of Experts going back to 2007 shows that most violations of human rights and international humanitarian laws have been committed by members of government security and military bodies. Other state agencies with a mandate to support mining communities such as *Service d’Assistance et d’Encadrement d’Artisanal et Small-Scale Mining* (SAESSCAM) do not fulfil their mandate, focusing instead on fleecing the miners through illicit tax-collections.

4. The methods of extracting and trading gold are completely different from the methods used for industrial minerals such as tin, cassiterite or wolframite. Different supply chain control systems are required in order to obtain reasonably reliable results.

As for specific issues under ‘Proposed Rules’ 17 CFR Parts 229 and 249, SARW would like to highlight the following concerns:

5. Regardless what due diligence and disclosure standards will ultimately be implemented, the effectiveness of the measures under Section 1502 will depend on US law-enforcement authorities’ ability to verify and, where necessary, investigate cases when the SEC has reasons to believe that a reporting company is willfully filing information that it knows is false and in doing so is attempting to defraud investors.
6. Reporting companies and entities that the SEC might engage to conduct spot-checks or field investigations in case of fraud, will not be able to ascertain the origin of minerals with any real degree of accuracy without a strong monitoring system in place. Given the rapid changes of control and exploitation of individual mining sites reporting companies and the SEC need to ensure permanent monitoring across the vast mineral-rich areas of eastern DRC. In practical terms, this is either impossible or, if not built on solid bilateral agreements, a challenge to the sovereignty of the DRC.
7. SARW believes that the US Government is imposing disclosure obligations on companies even though there is no likelihood that it will be able to gather reliable and up-to-date information on the situation at all relevant mining sites. This point is relevant under “Comments invited items 33-36: As long as the US Government is unable to establish “eyes and ears” in the Eastern DRC to determine whether at time of purchase of a particular quantity the original extraction site and trading chain is “conflict-free” any version of the “reasonable country of origin inquiry standard” will be largely worthless. Reporting companies will always be able to declare, however perfunctory their inquiry efforts are, that they are “reasonable”.
8. The alternative approach, as suggested under item 35, of imposing a due diligence process that essentially depends on assurances from refining and smelting facilities will not be helpful either. As long as no permanent mechanism is put in place to monitor every extraction site that supplies the refining and smelting facilities, no reliable information can be expected. In addition, the quick and unpredictable changes of control coupled with the definitional question of what constitutes ‘conflict’ will make it very difficult to create reasonable and effective standards. And in response to Item 40/41, one essential demonstration of adequate micro-level due diligence of the respondents would be if they disclose the detailed locations of the extraction sites, expressed in GPS verifiable coordinates and with local nomenclatures.
9. SARW also believes that the range of certification systems being used in the DRC – including the Public Private Alliance, the ITRI initiative, the German Federal Institute for Geoscience and Natural Resources initiative – is a clear indication of the inability of the international community to come together and present a united


front. While some might argue that the multitude of systems will be mutually reinforcing, SARW feels that these different initiatives will not compliment one another as they do not have the same objectives. Indeed, SARW believes that a genuinely consolidated approach to dealing with ‘conflict’ minerals in the DRC would be far more constructive and impactful.

- 10 SARW is particularly concerned that the SEC will rely on companies to do their own due diligence and will accept audits conducted by independent private sector auditors even though it is common knowledge that private sector auditors in the DRC have been found to be dishonest and unreliable. Given the scope and scale of corruption in the DRC, the SEC will need to be extra-vigilant to ensure that its financial oversight is effective. Indeed, in relation to item 42, SARW feels that the certification of an audit will make little sense unless the signatories verify on a quarterly basis that certain minimal standards have been maintained by the auditors. These standards should include:
 - Extraction-site monitoring reports that reflect at least weekly visits;
 - The identity of miners, traders, and government officials interviewed and observed during their work;
 - A general assessment of the social, gender, and health conditions at the extraction and raw-processing sites; and,
 - The prices paid for a range of sample transactions between miners and traders, and any fees, taxes or other payments either miners or traders are required to make.

11. SARW is sceptical that the effective due diligence will be possible without support from Congolese state institutions. And yet there is no real possibility that DRC state structures will be in a position to provide any genuine backup for the monitoring process. States agents, such the SAESSCAM, are weak and do not provide support to artisanal miners. Indeed, SAESSCAM has become just another ‘tax collector’.

SARW appreciates the opportunity to comments and thank you the Commission.

Sincerely,



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About the Southern Africa Resource Watch (SARW)

The Southern Africa Resource Watch (SARW) is a project of the Open Society Initiative for Southern Africa (OSISA), one of the four African foundations within the network of Open Society Foundations (OSF). SARW is based in Johannesburg, South Africa and operates in ten southern African countries, including the Democratic Republic of Congo (DRC).

SARW's mission is to ensure that the extraction of natural resources in southern Africa contributes to sustainable development, which meets the needs of the present without compromising the ability of future generations to meet their needs. SARW aims to monitor corporate and state conduct in the extraction and beneficiation of natural resources in the region; consolidate research and advocacy on natural resource extraction issues; shine a spotlight on the specific dynamics of natural resources in the region; build a distinctive understanding of the regional geo-political dynamics of resource economics; provide a platform of action, coordination and organization for researchers, policy makers and social justice activists to help oversee and strengthen corporate and state accountability in natural resource extraction; and, highlight the relationship between resource extraction activities and human rights, and advocate for improved environmental and social responsibility practices.

While SARW focuses on ten southern Africa countries, it also seeks to build a strong research and advocacy network with research institutions, think tanks, universities, civil society organizations, lawyers and communities across southern Africa, the continent and beyond, which are interested in the extractive sector as it relates to revenue transparency, corporate social responsibility, human rights and poverty eradication.

Along with numerous other projects and initiatives, SARW recently organised a workshop in Kinshasa to discuss the possible consequences of section 1502 of the Dodd-Frank Act if it were to be implemented. The meeting was attended by all key stakeholders, including the Congolese Ministry of Mines; all provincial ministries of mines from eastern DRC; Congolese civil society (including *Observatoire Gouvernance et Paix (OGP)* and *the Bureau d'Etudes Scientifiques et Techniques (BEST)*, which have both made a submission to SEC emphasising similar concerns to those raised in this submission) as well as civil society representatives from the USA and Europe, the American Embassy in Kinshasa and the World Bank. Participants at the workshop expressed their support for the Dodd-Frank legislation in general and Section 1502 in particular considering the positive impact it could have on peace and economic development in the DRC – but only if it were properly implemented.