Congress of the United States
Washington, DC 20510

February 28, 2011

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

As authors of the Congo Conflict Minerals provision enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), we write to respond to the proposed rule for Section 1502 of the Act and further clarify congressional intent behind the provisions.

We commend the Commission for its diligent work on the proposed rule and its thoughtful requests for comments. We appreciate this opportunity to provide feedback on congressional intent in addressing the following five issues:

1. Reporting timelines and consequences
2. Reporting and how it should be done
3. What companies need to know about their sourcing
4. Liabilities for not reporting and for poor reporting
5. The meaning of the term "Due Diligence"

1. Reporting timelines and consequences

One concern raised during the drafting of the law was the expected short amount of time between promulgation of the SEC rule (scheduled for April) and the beginning of the first reporting period (which for many companies will be July 1). We expect some companies will argue they don't yet know the source of their minerals. Others may claim that their products are too complicated to know what is in them. Some industry groups are already warning that the law will lead to a "de facto ban" on conflict minerals from the Democratic Republic of Congo (DRC) and adjoining countries.

The war in the DRC has been raging for 15 years. Conflict minerals legislation was first considered in 2008 and the current law is already almost a year old. Many companies have been involved in this conversation for years. We believe that industry has had sufficient time to determine the sourcing of their conflict minerals. While we remain sensitive to the impact of the law on U.S. business, we currently see no justification for delaying compliance with the law's reporting obligations.

We readily acknowledge that, like with other new reporting requirements, the quality of reporting in the first year under this law will be uneven. However, with experience and the expected development of an industry of qualified independent auditors, the reporting will steadily improve. It is critical that reporting start this year as prescribed in the law to get these "growing pains" out of the way.

Congress debated whether to allow a company to simply declare that it didn't know whether conflict minerals from the DRC countries were included in its products, but in the end, this was rejected. Just as it is against the law to import goods into the United States that are produced with forced labor or any number of carcinogens in them, Section 1502 requires companies to exercise strict due diligence to determine the source of conflict minerals in their products. Goods must meet these requirements upon entry, and companies have substantial liability if they do not meet these requirements or do not tell the truth.

Some industry groups have raised the specter of a "de facto ban" on the purchase of any conflict minerals from the DRC countries if the law is implemented on the current schedule, warning that this could cause significant economic dislocation for the region. NGO experts in Congo note that only approximately one percent of the Congolese workforce depends on mining, so even if a de facto ban came to pass – which we doubt – the economic impact would not be as great as commonly assumed. Some disruption would likely have the benefit of motivating all the parties involved to implement a conflict minerals tracking system. It would also likely decrease the money in the black market of conflict minerals, thereby helping to defund the war. As a policy matter, creation of a formal mining sector (including the jobs that come with it) and shrinking the conflict minerals black market are among the central goals of the law.

2. Reporting and how it should be done

Our intent was for the requirements of Section 1502 to apply to all companies that fall under the jurisdiction of the SEC, including those who issue classes of securities otherwise exempt from reporting. We believe that companies should report at the end of their respective fiscal years and should do so in a uniform format and on a website that allows ready access by outside organizations and the public.

On the question of whether certain conflict minerals should be treated differently than others, Congress decided – after considerable research of the commercial aspects of each mineral– that all conflict minerals should be reported the same way. Further, there was general agreement that the reporting requirements should apply equally to all companies regulated by the SEC, no matter what their size. There is no necessary correlation between the size of a company and the quantity of conflict minerals it sources or how much it costs to track the sourcing of those minerals.

Regarding the question of when a conflict mineral should be considered "necessary" to the functionality or production of a product, and therefore subject to reporting requirements, we intended this to cover practically all uses of conflict minerals – except for those that are naturally occurring or unintentionally included in a product. If an entity manufactures or contracts other entities to manufacture, all or part of a product that contains conflict minerals, that company and

its directly-involved subsidiaries should report on the totality of the product and work with suppliers to comply with the requirements. This chain of transparency and liability is the same for many other requirements in place today and it was our intent for products made with conflict minerals to mirror those. In the example of the car whose only conflict minerals are contained in the radio, we would argue that the car manufacturer would, in fact, be covered by Section 1502.

We welcome the Commission's intention to consider mining commensurate with manufacturing and to therefore require both mining companies and minerals processors to report.

3. What companies need to know about their sourcing

For transparency's sake, our intent was that all company reports and business records supporting those reports be maintained and readily accessible to the public for the duration of the law. We also intended that the independent audits be a part of each company's conflict minerals report.

The Commission asks whether it should provide additional guidance about what would constitute a "reasonable" country of origin inquiry. We think it should – it was our intent that companies use "informed compliance" and "reasonable care" standards in their inquiries, such as those issued by Customs and Border Protection (CBP). There are over 100 Informed Compliance publications issued by CBP on the inputs and processes for manufacturing products brought into the United States. In short, the intent behind Section 1502 is that companies must know the origin of their conflict minerals and be liable for penalties if they do not report or are not transparent.

The proposed rule differentiates between the country of origin inquiry and the due diligence involved in determining the source and chain of custody of conflict minerals, indicating that the former could be "less exhaustive." This is a misreading of our intent – we see no difference in the effort that should be exercised in each case.

It was also not Congress's intent to allow companies to rely solely on the good faith representations of processing facilities or suppliers to meet due diligence requirements. This is why the unreliable determination and reporting sections were included in Section 1502. The liability for not meeting the reporting requirements of the law and for unreliable determinations lies with the companies whose products are in the marketplace.

We believe that the ability to label a product as "DRC Conflict Free" should be limited to manufacturers who use conflict minerals from the DRC countries, but who know (and can show) their use of conflict minerals does not foment war there.

4. Liabilities for not reporting and for poor reporting

We are deeply troubled by the Commission's intention to let companies "furnish" their conflict minerals reports rather than "file" them, which would mean that they would not be subject to the broader liabilities of the Exchange Act as we intended. It was Congress's intent that the reports be filed with the Commission and we find the Commission's rationale for this proposal deeply flawed.

The Commission incorrectly reasons that our use of the term "submit" equates to "furnish" because Section 1502 does not "otherwise mandate that the information be filed with the Commission."[1] We would point out, however, that the term "furnish" is used 41 times in the Dodd-Frank law, but is expressly not used in Section 1502. The fact is that Congress intended for the word "submit" to be synonymous with "filed," not "furnished."

The Commission claims that conflict minerals reporting is "qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provision of the Exchange Act."[2] But in fact, their purpose is very much the same – "to assure a stream of current information about an issuer for the benefit of purchasers…and for the public."[3] It was our intent to enact law that used transparency and liability to affect a company's standing in the marketplace relative to all actors – suppliers, shareholders, and consumers, among others.

Congress intended for conflict minerals reports to be subject to liability under Section 18 of the Securities Exchange Act of 1932 so that private sector remedies for false and misleading statements contained in those reports would be available. We believe that this will ensure that the reports are taken seriously and the requirements of Section 1502 are closely followed.

5. The meaning of the term "Due Diligence"

As the Commission notes, we did not include a definition of due diligence in the legislation. This was intentional as there are several evolving standards for due diligence, the most notable of which has been established by the Organization for Economic Cooperation and Development (OECD). It remains unclear at this time how the due diligence standard will develop over time. Until there is more clarity, we encourage the Commission to cite the OECD due diligence standard as an acceptable starting point, pending forthcoming Commerce Department and GAO studies on its effectiveness.

Thank you for your attention to this important matter. Our foreign policy advisors Chris Homan and Toby Whitney will contact your staff in the next week to follow up on this issue and will be happy to provide any further information or background you may need.

Sincerely,

Richard J. Durbin
United States Senator

Jim McDermott
United States Representative

[1] SEC Release no. 34-63547, 51
[2] SEC Release no. 34-63547, 51
[3] 17 CFR 240.12h-3