global witness

529 14th Street NW, Suite 1085
Washington, DC 20045
t: (202) 621-6665
f: (202) 450-1347

February 28, 2011

By E-mail

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Conflict Minerals, File No. S7-40-10

Dear Secretary Murphy:

Global Witness respectfully submits the following written comments regarding the proposed regulations published by the Securities and Exchange Commission (the "SEC" or the "Commission") to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Conflict Minerals Provision" or "Section 1502"), which mandates certain disclosures concerning conflict minerals that originate in the Democratic Republic of the Congo ("DRC") or an adjoining country (collectively, the "DRC countries").

Global Witness is a non-profit organization that runs pioneering campaigns against natural resource-related conflict and corruption and associated environmental and human rights abuses.[1] Our mission is to expose and to end the brutality and injustice that result from the fight to access and control natural resource wealth. Global Witness strives to break the links between natural resource exploitation, human rights abuses, and corruption. One of the most effective ways to break those links is by requiring transparency regarding the use of conflict minerals, such as the type of disclosure required by Section 1502. We have played a leading role in developing and implementing international transparency and natural resource governance mechanisms, including the Kimberley Process rough diamond certification scheme, of which we are an accredited observer, and the Extractive Industries Transparency Initiative, of which we are a board member.

[1] For example, our investigations have had direct and major impacts on the IMF withdrawal from Cambodia in 1996 over corruption in the logging industry and the imposition of timber sanctions on Charles Taylor's Liberia in 2003.

For the past seven years, Global Witness has conducted research and advocacy on a broad range of issues relating to natural resources in the DRC. Over the past three years we have focused on documenting the militarization of mining in the east of the country and the central role the trade in minerals plays in financing the conflict there. Rebel groups and senior commanders of the national army are fighting over and illegally profiting from the minerals sector in eastern DRC. These groups, responsible for mass rape and murder, enrich themselves through the international minerals trade.

Our work related to the minerals trade is directly informed by regular, in-depth field investigations in eastern DRC, involving visits to mine sites and interviews with all stakeholders involved in the trade — from artisanal miners and local traders to government mining officials and the Congolese national army. Based on the knowledge and experience we have gained through these field investigations and through dialogue with firms along the entire supply chain, Global Witness is convinced that companies sourcing minerals from eastern DRC can implement reasonable, straightforward processes to identify, and exclude from their supply chains, minerals that are benefiting abusive armed groups. We believe that the most effective way to do this is via comprehensive due diligence. Our extensive field experience informs our comments, set forth below.

Global Witness recognizes the enormous effort made by the Commission and its staff to implement the provisions of the Dodd-Frank Act within the timeframe mandated by Congress. Section 1502 of the Dodd-Frank Act represents a critical step forward in the global campaign — as recognized and supported by Congress — to expose and eradicate natural resource-related human rights abuses in the DRC. Congress also recognized that the country of origin inquiry and supply chain due diligence disclosures are of significant consequence and must be made available to the public. As noted by Senator Feingold, "[c]reating these mechanisms . . . will also help American consumers and investors make more informed decisions."[2]

Granting the appropriate deference to Congress's concern regarding the emergency humanitarian situation in the DRC and its objective of achieving transparency in the conflict minerals trade, it is clear that the disclosures required by Section 1502 are qualitatively comparable to other significant disclosures required under Section 13 of the Exchange Act upon which investors rely to make fully informed investment decisions. In adopting final rules implementing Section 1502, we respectfully urge the Commission to embrace this Congressional mandate and to be mindful not to diminish the substantive importance of the required disclosures. Global Witness also emphasizes that the emergency humanitarian situation in the DRC — which is characterized by significant human rights abuses, including sexual violence — is ongoing. We strongly believe that delaying the implementation of Section 1502 is not an option. Delays will undermine the aims of the provision to reduce violence on the ground and send the wrong message to perpetrators of abuse and to companies about the importance of the legislation. To that end, Global Witness appreciates the opportunity to comment on the proposed rules and stands ready to meet with the Commission and its staff to further clarify our comments.

Overall, Global Witness is supportive of the Commission's proposed regulations implementing Section 1502 of the Dodd-Frank Act. We believe, however, that the proposed

[2] 156 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold).

regulations should be clarified and enhanced in several respects. In particular, it is critical that the Commission provide clear guidance regarding the steps issuers must take (1) to satisfy the reasonable country of origin inquiry standard, and (2) to execute appropriate and effective due diligence on the source and chain of custody of conflict minerals. The results of an issuer's reasonable country of origin inquiry determines whether the issuer must file a Conflict Minerals Report, and the due diligence standard governs how the issuer satisfies its obligation to assess and report on the supply chain for its conflict minerals. Without clear and meaningful guidance with respect to these standards, there is grave risk that the purpose of the legislation would be defeated because the required disclosures would not be consistent or reliable.

In addition to our recommendations regarding the reasonable country of origin inquiry and the due diligence standard, our further comments are summarized as follows:

- Global Witness agrees with the Commission that the regulations should not exempt any class of issuer.

- Issuers should be required to maintain reviewable business records for at least five years.

- The implementation of the Commission's final rules should not be delayed.

- The regulations should treat gold the same as they treat tantalum, tin, and tungsten.

- Global Witness supports the Commission's proposed definition of "manufacture" and "contract to manufacture."

- Global Witness agrees with the Commission that mining issuers should be considered to be manufacturing conflict minerals when they extract or contract to extract those minerals.

- Global Witness agrees with the Commission's decision not to define "necessary to the functionality and production of a product."

- The Commission should prescribe a clear definition of "recycled" or "scrap" conflict minerals, and Global Witness agrees with the Commission's proposal to require issuers who use recycled or scrap conflict minerals to issue a Conflict Minerals Report.

- The disclosures required under Section 1502 should be filed with, not furnished to, the Commission.

Specifically, Global Witness offers the following comments on the Conflict Minerals Provision:

I. Reasonable Country of Origin Inquiry

In response to Questions 33-36, Global Witness offers the following comments:[3]

a. The reasonable country of origin inquiry standard should be defined

Global Witness supports the Commission's proposed use of a reasonable country of origin inquiry standard for determining whether an issuer's conflict minerals originated in the DRC countries. To yield meaningful, reliable, accurate, and consistent disclosures, however, we respectfully urge the Commission to define, or provide further guidance regarding, what constitutes a reasonable country of origin inquiry.

As proposed, the reasonable country of origin standard is vague and ambiguous, and adopting such an uncertain standard risks thwarting the purposes of the legislation — ending the violence in the DRC countries and protecting investors who may, unknowingly, transact in the securities of issuers who support armed groups and/or rely on conflict minerals to conduct their business. Under the statute, the country of origin inquiry is the first significant step that issuers (for whom conflict minerals are necessary) are required to take to determine whether their sourcing practices are funding warring parties in eastern DRC. If this inquiry is not undertaken credibly — whether as a result of deceitful practices or unintentionally because of a lack of clear guidance — some issuers whose conflict minerals *do* originate in eastern DRC will avoid the requirement to carry out supply chain due diligence. This would undermine the transparency goals of the legislation, which are designed to "(1) reduce the demand (and therefore price) of black-market conflict minerals, (2) formalize the DRC mining sector, and (3) end the exploitation of transit routes for conflict minerals in the DRC."[4]

Companies sourcing conflict minerals from the DRC countries risk disruption in their supply chain as a result of the armed conflict, as well as face a significant reputational risk if it turns out that their business partners in the region are committing crimes against humanity. As Congress recognized in passing Section 1502, the investing public is entitled to reliable disclosures on this point. Without a clear, uniform standard to guide the reasonable country of origin inquiry, issuers will not be operating on a level playing field, the quality of disclosure will likely suffer, and investors will struggle to evaluate the reliability of the information disclosed.

We further submit that leaving the standard ambiguous will invite issuers to test the standard's boundaries. The SEC should not be forced to spend precious enforcement resources investigating questionable "reasonable country of origin" determinations, and we believe the best way to minimize the likelihood that such investigations will be necessary is to provide clear guidance regarding the Commission's expectations from the outset. Furthermore, from an enforcement perspective, it will be more difficult for the Commission to argue that a particular

[3] For ease of reference, we address the issues raised by the Commission topically and not necessarily in the order of the questions as they appear in the proposing release.

[4] Letter from Senator Richard J. Durbin and Congressman Jim McDermott to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Oct. 4, 2010).

issuer's inquiry failed to meet the applicable standard when the contours of that standard have not been articulated.

Over the past two years, Global Witness has had extensive dialogue with companies and trade associations all along the mineral supply chain. Companies have told us repeatedly that they want specific guidance from governments and the United Nations (the "UN") with respect to supply chain due diligence and sourcing practices. Many of these companies are supportive of the objectives underlying the country of origin disclosure requirement and are ready and willing to participate, but are in need of additional guidance as they consider policies and procedures to comply with the new requirement. The stakes are too high for the Commission to allow companies to use the lack of guidance as an excuse to perform sub-standard reasonable country of origin inquiries.

In sum, the primary objective of the legislation is to determine whether issuers are using conflict minerals from the DRC countries. If issuers do not know where their resources are coming from, they could be — intentionally, recklessly, or otherwise — supporting civil war and contributing to an emergency humanitarian situation. Under the circumstances, additional guidance is necessary to ensure that the required reasonable country of origin inquiries are appropriate and effective.

b. Proposed definition of the reasonable country of origin inquiry standard

We understand the Commission's view that, under the statute, a reasonable country of origin inquiry could be less exhaustive than the due diligence required to prepare a Conflict Minerals Report. In our view, just because the standard could be less exhaustive under the statute does not mean that it should be any less effective as implemented by the Commission.

As noted in our October 12, 2010 submission to the Commission, Global Witness supports a reasonable country of origin inquiry standard that requires a covered issuer to take sufficient steps to accurately determine whether its conflict minerals originate from DRC countries. Our proposed standard consists of three components.[5] Specifically, under our proposal, a covered issuer must:

- Identify and disclose the processor(s) that produced the refined metal used by the company.

- Verify the processor's chain of custody documentation. While reasonable representations from processors are a helpful part of this step, relying on these assurances alone is insufficient. A number of the companies involved in this trade, including processors and mineral concentrate traders who supply them, have knowingly or recklessly sourced conflict minerals from the DRC for most of the duration of the war without introducing any responsible sourcing practices.

[5] For a more detailed explanation of what these three components would require, please refer to our initial submission: Letter from Corinna Gilfillan, Head of U.S. Office of Global Witness, to The Honorable Mary L. Schapiro, Chairwoman, U.S. Securities and Exchange Commission 4-5 (Oct. 12, 2010).

Some of these companies have been named and shamed in UN reports in conjunction with the conflict trade.[6] The most effective way for issuers to ensure they are obtaining accurate information from suppliers and to guard against potential misrepresentation or negligence is to review and cross-check chain of custody documentation themselves or have a reliable third party do it for them. Issuers should specifically review mineral consignment records, license details of traders and exporters, export and import permits, transportation records, shipping documents, and processor's stock records.

- Review for and consider "red flags" indicating possible sourcing from DRC countries. Red flags include, but are not limited to: (1) the stated origins of the conflict minerals are countries that have limited or no capacity to produce them; (2) the processor or their suppliers have relationships or a history that links them to the DRC countries; and (3) the minerals supplied to the processor are partially-processed and declared as originating from the country where the partial-processing took place, rather than the country where the minerals were mined.[7]

Issuers cannot credibly determine the country of origin of their conflict minerals without identifying their processors and verifying the processor's chain of custody documentation. The processing facility represents a bottleneck in the supply chain, and there are a relatively limited number of processing facilities for these minerals.[8] Up until this point in the supply chain, it is feasible to trace country of origin; after the minerals are processed, however, it is virtually impossible to do so.

---

[6] *See* United Nations Security Council [UNSC], Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/1146 (Oct. 16, 2002), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/621/79/PDF/N0262179.pdf?OpenElement; UNSC, Group of Experts on the Democratic Republic of the Congo, *Final report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2008/773 (Dec. 12, 2008), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report); UNSC, Group of Experts on the Democratic Republic of the Congo, *Interim report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2009/253 (May 18, 2009), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report); UNSC, Group of Experts on the Democratic Republic of the Congo, *Final report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2009/603 (Nov. 23, 2009), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report); GLOBAL WITNESS, FACED WITH A GUN, WHAT CAN YOU DO? WAR AND MILITARISATION OF MINING IN EASTERN CONGO (July 2009), http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf.

[7] For an instructive list of red flags for issuers using tin, tantalum, or tungsten, s*ee* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 20 (2010), http://www.oecd.org/dataoecd/62/30/46740847.pdf.

[8] For example, according to the Information Technology Industry Council there are fewer than 20 major tantalum smelters worldwide. *See* Letter from Rick Goss, Vice President for Environment & Sustainability, Information Technology Industry Council, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission 3 (Nov. 18, 2010). To the best of our knowledge and based on conversation with industry sources, we understand there are fewer than 20 major tin smelters and fewer than 15 major tungsten smelters worldwide.

If the Commission remains disinclined to adopt our proposed standard, we strongly believe that the Commission should provide more guidance in terms of what steps are necessary to satisfy the reasonable country of origin inquiry standard. In particular, we are troubled by the suggestion in the Commission's proposing release that because systems and infrastructure at the processor level are weak, a weaker reasonable country of origin inquiry standard is appropriate. Specifically, the Commission stated:

> We believe that the steps necessary to constitute a reasonable country of origin inquiry will depend on the available infrastructure at a given point in time. Presently, we do not believe there is any single or exclusive manner for issuers to conduct this inquiry. However, one way we would view an issuer as satisfying the reasonable country of origin inquiry standard is if it received reasonably reliable representations from the facility at which its conflict minerals were processed that those conflict minerals did or did not originate in the DRC countries . . . . It is important to note, however, that although reliance on smelter certifications and supplier declarations may be sufficient now due to our understanding of the current information systems in place to discover conflict minerals' countries of origin, as these systems improve, the facts and circumstances surrounding what would be considered a reasonable country of origin inquiry may change. In other words, as systems improve, smelter certifications and supplier declarations may not satisfy a reasonable country of inquiry standard.[9]

To the contrary, it is precisely because those systems and infrastructure are developing that more is required to satisfy the standard of review and achieve accurate and reliable disclosure. Moreover, if it were to deem a weaker standard acceptable, the Commission would be missing a significant opportunity to encourage enhancements to the systems, and the associated reporting, in place in the industries using conflict minerals.

Some commenters have asserted that country of origin information is difficult to obtain and that the Commission should be mindful of this notion when establishing requirements for conducting this inquiry.[10] These assertions are overstated. The desired country of origin information exists and it is available. If Global Witness field researchers can track the supply chains in the DRC countries, so can multinational corporations. There is a relatively small universe of smelters who process each mineral and the community of companies who use conflict minerals is more than capable of establishing, and enhancing over time, appropriate systems to track and report on this type of information. Moreover, companies could easily pool their resources for this purpose.

---

[9] Conflict Minerals, Exchange Act Release No. 63,547, 75 Fed. Reg. 80,948, 80,957 (Dec. 23, 2010).

[10] *See* Letter from Cecilia L. Gardner, Esq., President, CEO and General Counsel, Jewelers Vigilance Committee, *et al.*, to the Securities and Exchange Commission 2-5 (Sept. 13, 2010); Letter from National Association of Manufacturers to Mary L. Schapiro, Chairman, Securities and Exchange Commission 4 (Nov. 19, 2010).

In response to Question 28, Global Witness supports requiring issuers to maintain reviewable business records for at least five years. A one-year retention requirement is wholly insufficient. If companies are going to be held accountable for their conflict minerals disclosures, they should be required to retain these records for a sufficient period of time to allow for review by the Commission or other regulatory authorities. For example, the Commission generally requires registered broker-dealers and investment advisers to retain most business-related records for a period of three to six years.[11] The general five-year statute of limitations applicable to material misstatements also provides a useful benchmark.[12] Discovery of conflict mineral abuses, just like the discovery of information suggesting false or misleading statements by issuers, often occurs more than one year after the conduct takes place or the statement is made. Indeed, some industry sources have informed us that it can take many months for a batch of minerals to make their way through the whole supply chain. Business records must be maintained for a sufficient time period so that, if concerns arise about accuracy of disclosures, the relevant supporting documentation will be available for review.

In response to Questions 35 and 52, Global Witness reiterates its view that solely relying on the representations of processors is an insufficient basis for fulfilling the reasonable country of origin inquiry or due diligence requirements. Permitting issuers to fulfill the statute's obligation in this manner will significantly impact the quality of disclosures. In their October 4, 2010 letter to Chairman Schapiro, Senator Durbin and Congressman McDermott specifically commented that relying on the representations of processors without verification would weaken the reporting requirements and policy goals of Section 1502. In particular, they stated:

> Some processing facilities are beyond the reach of United States law and may not be compelled to provide reliable information. Many companies buy raw conflict minerals and process them themselves for use in their products and for sale to other firms. Also, over time, firms will change their roles in the supply chain. Therefore, a strict rule relying on the word of processing firms is not enough. While information provided by processing facilities is important, it would not cover many companies and cannot be the limit of manufacturers' responsibilities.[13]

In order to reasonably rely on the representations of their processing facilities, issuers need additional information demonstrating that these representations are accurate. This additional

[11] *See generally* 17 C.F.R. § 275.204-2; 17 C.F.R. § 240.17a-4.

[12] 28 U.S.C. § 1658(b) ("Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of — (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."); 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.").

[13] Letter from Senator Richard J. Durbin and Congressman Jim McDermott to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 3 (Oct. 4, 2010).

information may come in the form of third-party verifications of the representations provided or from an issuer's on the ground assessment of processing facilities.

In response to Question 36, Global Witness does not support permitting qualifying or explanatory language in addition to, or instead of, the reasonable country of origin inquiry standard. Issuers should not be permitted to state that none of their conflict minerals originated in the DRC countries "to the best of their knowledge" or that "they are not aware" that any conflict minerals originated in the DRC countries. Permitting any such approach would incentivize, if not condone, less than thorough inquiries, thereby resulting in unreliable disclosures.

Similarly, Global Witness does not support any kind of implementation delay for issuers who are unable to determine, after a reasonable country of origin inquiry, whether their conflict minerals originated from the DRC countries. The Commission should be cautious of proposals, however framed, that would ultimately create a backdoor implementation delay, stagnate the flow of information, and run counter to the plain language of the statute, which articulates a precise, effective date for all covered issuers. Global Witness supports the rules as proposed, which require issuers who are unable to determine that their conflict minerals did not originate in the DRC countries to submit a Conflict Minerals Report.

II. Due Diligence Standard

In response to Questions 50-55, Global Witness offers the following comments:

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 believe that there are basic due diligence steps that every covered issuer must take, regardless of its particular circumstances, in order to make reliable supply chain determinations and to gather the information required to be included in the Conflict Minerals Report. As set forth in our letter dated October 12, 2010 and in our July 2010 report, "Do No Harm," Global Witness has developed and published five components necessary for effective supply chain due diligence. These correspond to the five-step due diligence framework adopted by the Organisation for Economic Co-Operation and Development ("OECD") last year. This policy

already has been endorsed by the United Nations Security Council[14] and the International Conference for the Great Lakes Region, a regional intergovernmental body.

We recognize that the Commission is likely to receive many comments suggesting different due diligence policies and we understand that the Commission may hesitate to identify a specific due diligence standard to apply to the conflict minerals industries. While the conflict minerals industries may be somewhat foreign to the Commission, internationally-respected experts in this field have been engaged in intensive efforts for the past two years to help the OECD develop due diligence standards for issuers who deal in conflict minerals.

We urge the SEC to adopt the policy drafted by the OECD. The OECD is an international organization with 34 member countries (including the United States) that seeks to promote policies that will improve the economic and social well-being of people around the world. The OECD works internationally with governments and businesses to recommend policies to improve the lives of ordinary people. The "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas" is the result of a collaborative initiative among governments, international organizations, civil society organizations, and industry participants to promote accountability and transparency in the supply chain of minerals from conflict-affected and high-risk areas. If the Commission adopts the OECD standard, it will be setting a uniform policy that is already well-regarded internationally.

We have outlined below the five-step due diligence framework which forms the basis of the OECD Guidance, the UN's recommendations, and Global Witness's recommendations. We urge the Commission to require issuers to implement this framework:

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 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.

In response to Question 51, Global Witness does not support the adoption of a separate due diligence standard for gold. Gold must be treated in the same manner as the other conflict minerals because the trade in conflict gold, like the trade in the other conflict minerals, helps finance extreme levels of violence in the DRC.[15] Congressional intent clearly directs that the

[14] UNSC, Group of Experts on the Democratic Republic of the Congo, *Interim report of the Group of Experts on the Democratic Republic of the Congo*, ¶69, U.N. Doc. S/2010/252 (May 25, 2010), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report); *See also* S.C. Res. 1952, U.N. Doc. S/Res/1952 (Nov. 29, 2010), http://www.un.org/Docs/sc/unsc_resolutions10.htm (click on link to report).

[15] The gold trade in North and South Kivu provinces is typically controlled by the Forces démocratiques pour la libération du Rwanda (the "FDLR"), one of the most notorious and brutal rebel groups. Elements of the FDLR are reported to be partly responsible for the mass rapes that took place in July-August 2010 in North Kivu. *See* United Nations Organization Stabilization Mission in the Democratic Republic of the Congo and Office of the United

Conflict Minerals Provision must pertain to all minerals contributing to the conflict.[16] Congress expressly included gold in the definition of conflict minerals along with tin, tantalum, and tungsten ores. Excluding gold from the requirements of Section 1502 — particularly on the basis that carrying out due diligence on the gold supply chain would be difficult or impractical — is contrary to the plain language of the legislation.

III. Exemptions

In response to Questions 1-8, Global Witness offers the following comments:

Global Witness applauds the Commission's proposal not to exempt any particular category of issuer. Section 1502 was enacted to help expose and eradicate natural resource-related human rights abuses that have contributed to an emergency humanitarian situation in the DRC. Exempting scores of issuers from any of the disclosure requirements would do irreparable damage to the statute's ability to fulfill its purpose and would be contrary to Congressional intent.[17]

In response to Question 4, Global Witness supports the Commission's proposal to apply its rules equally to foreign private issuers. Foreign private issuers account for a notable portion of the issuers who are, by the statute's terms, required to file conflict minerals disclosures. According to the Commission's Paperwork Reduction Act analysis, there are 443 foreign private issuers covered by the statute.[18] The Commission estimates that in total, 5,994 issuers will be

---

Nations High Commissioner for Human Rights, *Rapport préliminaire de la mission d'enquête du Bureau Conjoint des Nations Unies aux Droits de l'Homme sur les viols massifs et autres violations des droits de l'homme commis par une coalition de groupes armés sur l'axe Kibua-Mpofi, en territoire de Walikale, province du Nord-Kivu, du 30 juillet au 2 août 2010* (Sept. 24, 2010), http://www.ohchr.org/documents/countries/zr/Rapport_preliminaire_viols_massifs.pdf; GLOBAL WITNESS, THE HILL BELONGS TO THEM: THE NEED FOR INTERNATIONAL ACTION ON CONGO'S CONFLICT MINERALS TRADE 9-10 (Dec. 2010), http://www.globalwitness.org/library/hill-belongs-them-need-international-action-congos-conflict-minerals-trade (click on "Download the report"). *See also* UNSC, Group of Experts on the Democratic Republic of the Congo, *Final report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2010/596 (Nov. 29, 2010), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report); UNSC, Group of Experts on the Democratic Republic of the Congo, *Interim report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2010/252 (May 25, 2010), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report).

[16] *See* Letter from Senator Richard J. Durbin and Congressman Jim McDermott to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 2 (Oct. 4, 2010) ("The policy goal of Section 1502 is therefore to require transparency of *all* such conflict mineral sourcing in the DRC and its adjoining countries . . . If the SEC issues rules that do not require *all* companies whose products contain conflict minerals from the DRC and its adjoining countries to be transparent, then the black market mineral trade will likely continue to fund more violence."); *See* 156 Cong. Rec. S3866 (daily ed. May 18, 2010); 156 Cong. Rec. S3817 (daily ed. May 17, 2010) (statement of Sen. Durbin).

[17] *See* H.R. Rep. No. 111-517, at 879 (2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC . . . .").

[18] Conflict Minerals, Exchange Act Release No. 63,547, 75 Fed. Reg. 80,948, 80,966-67 (Dec. 23, 2010).

affected by the Conflict Minerals Provision.[19] If the Commission were to provide an exemption to foreign private issuers, then more than seven percent of issuers required to make disclosures under Section 1502 would be excluded, which is an unacceptably large percentage under the circumstances.

In response to Question 5, Global Witness supports the Commission's proposal to apply its 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."[20] If the Commission were to exempt just these "small entities" from the disclosure requirements of the Conflict Minerals Provision, 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. Global Witness, a small NGO with a modest budget, regularly undertakes field investigations and supply chain research that is very similar to the due diligence measures we are recommending to the SEC. For example, we gather specific information on the location of armed groups and patterns of illegal taxation, we document the supply chains of individual companies, and we collect and examine chain of custody documentation. If we can accomplish this much on a modest budget, there is no reason to believe that smaller companies cannot put systems in place to discharge their responsibilities under the legislation in an efficient and cost-effective manner.

Additionally, Global Witness does 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 SEC 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.[21]

---

[19] *Id*. at 80,966.

[20] *Id*. at 80,970.

[21] 15 U.S.C. § 78m(p)(1)(A)(i) ("a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission.").

As required by the statute, the Commission has proposed to apply Section 1502 reporting to conflict minerals originating from all of the DRC's adjoining countries. This is an extremely important requirement. As Congress recognized, key transport and trading routes for conflict minerals pass through neighboring countries, which act as laundering hubs for minerals benefiting armed groups and human rights violations in eastern DRC. Accordingly, given the regional trading patterns, it is important for the Conflict Minerals Provision to apply to all of the DRC countries.

IV. Definitions

In response to Questions 9-21 and 62, Global Witness offers the following comments:

Global Witness agrees that the term "manufacture" is generally understood and we support the Commission's proposal to apply the rules equally to issuers who "contract to manufacture" products, which will cover a sufficiently broad range of issuers who wield influence over manufacturing processes that require the use of conflict minerals. Moreover, Congress intended for both issuers who "manufacture" and issuers who "contract to manufacture" products to be covered by Section 1502.[22] For example, Senator Durbin and Representative McDermott recognized the economic value achieved by companies that use component parts from several suppliers when assembling their own products, yet they noted that "it is of paramount importance that this business model choice not be used as a rationale to avoid reporting and transparency."[23] We believe it is important for the Commission to continue to give substantial weight to clearly-stated Congressional intent in the formulation of the final rules.[24]

We also agree with the Commission's decision, as set forth in the proposing release, to consider mining issuers to be manufacturing conflict minerals when they extract or contract to extract those minerals. It is important to include mining issuers within the scope of the Conflict Minerals Provision because mining is a part of the conflict minerals supply chain, and oftentimes mines in the DRC countries are controlled by armed groups. Both the OECD and United Nations Group of Experts on the DRC agree that mining companies should perform due diligence. The OECD due diligence guidance applies "to all companies in the mineral supply chain that supply or use" conflict minerals, and the United Nations Group of Experts takes the position that due diligence should apply to "individuals and entities prospecting, exploring for and extracting minerals in the eastern area of the Democratic Republic of the Congo."[25]

---

[22] *See* Letter from Senator Richard J. Durbin and Congressman Jim McDermott to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 2-3 (Oct. 4, 2010) ("We were also clear to include the term 'or contracted to be manufactured' when outlining a manufacturing company's responsibilities.").

[23] *Id*.

[24] *See supra* notes 16-17 and 22-23.

[25] *See* OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 7-8 (2010), http://www.oecd.org/dataoecd/62/30/46740847.pdf ("The process of bringing a raw mineral to the consumer market involves multiple actors and generally includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of end product. The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final

Global Witness agrees with the Commission's decision, as set forth in the proposing release not to specifically define "necessary to the functionality and production of a product." We think the proposed guidance, which describes a conflict mineral as necessary if it is "intentionally included in a product's production process and is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product,"[26] provides issuers with a clear and workable standard.

Global Witness also supports the Commission's decision to expressly include products containing a conflict mineral "necessary to the functionality or production" without regard to the amount of mineral involved. We urge the Commission not to adopt a de minimis threshold in the rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise. In their October 4, 2010 letter, Senator Durbin and Congressman McDermott noted that Congress carefully considered including a de minimis rule but ultimately decided not to do so because "it would have created an overly generous loop-hole in the law."[27] We applaud the Commission for recognizing that implementing a de minimis standard would undermine the statute and firmly believe that including any such standard in the final rules would have disastrous results.

V. Recycled or Scrap Materials

The proposed rules allow for different treatment of conflict minerals from recycled or scrap sources than from mined sources. According to the proposing release, because issuers generally will not know the origin of their recycled or scrap conflict minerals, they should be permitted to submit Conflict Minerals Reports subject to special rules. In essence, under the proposed rules, recycled or scrap conflict minerals are automatically considered "DRC conflict free" and the issuer would then be required to describe in its Conflict Minerals Report the measures taken to exercise due diligence in determining that such conflict minerals came from recycled or scrap sources. Global Witness believes that labeling recycled or scrap conflict minerals as "DRC conflict free" is something of a misnomer because no inquiry is required to be performed on the origins of these minerals. Instead, Global Witness believes that recycled or scrap minerals should be labeled as what they are, "recycled or scrap."

Additionally, the Commission is not proposing to include specific definitions for the terms "recycled" or "scrap." Given that the Commission is proposing to apply special rules to

---

product for end consumers."); UNSC, Group of Experts on the Democratic Republic of the Congo, *Final report of the Group of Experts on the Democratic Republic of the Congo*, U.N. Doc. S/2010/596 ¶ 309 (Nov. 29, 2010), http://www.un.org/sc/committees/1533/egroup.shtml (click on link to report). *See also* S.C. Res. 1952, U.N. Doc. S/Res/1952 (Nov. 29, 2010), http://www.un.org/Docs/sc/unsc_resolutions10.htm (click on link to report) (Resolution taking note of the findings in the Group of Experts *Final report of the Group of Experts on the Democratic Republic of the Congo*).

[26] Conflict Minerals, Exchange Act Release No. 63,547, 75 Fed. Reg. 80,948, 80,953 (Dec. 23, 2010).

[27] *See* Letter from Senator Richard J. Durbin and Congressman Jim McDermott to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 2 (Oct. 4, 2010).

this category of conflict minerals, it is important for the Commission to prescribe clear definitions so that the special rules are not used as an avenue to avoid reporting on the country of origin, the processing facility, or the issuer's efforts to determine the mine or location of origin with the greatest possible specificity. To curb such abuses, we suggest that the Commission adopt the following definition for recycled or scrap conflict minerals, which is taken from the OECD's definition for recycled or scrap metals:

> Recycled conflict minerals are reclaimed end-user or post-consumer products, or scrap processed conflict minerals created during product manufacturing. Recycled conflict minerals includes excess, obsolete, defective, and scrap conflict minerals materials which contain refined or processed conflict minerals 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 conflict minerals.[28]

Although we appreciate the Commission's proposed guidance that it would not consider minerals to be "recycled" if they are processed, unprocessed, or a byproduct of another ore, we believe that the Commission should provide specific definitions in the body of the regulation. We are concerned that any vagaries in the definitions might lead to confusion or misinterpretation or, even worse, could be exploited by some to avoid significant disclosure requirements, which would have unfortunate consequences in terms of realizing the principal aim of the statute – ensuring full disclosure of the use of conflict minerals.

We agree with the Commission's determination that issuers using conflict minerals from recycled or scrap sources must still submit Conflict Minerals Reports describing the measures taken to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, "which would include due diligence on the source of the mineral."[29]

VI. The Commission Should Require Section 1502 Disclosures to be Filed With the Commission

In response to Questions 46-49, Global Witness offers the following comments:

Global Witness opposes the Commission's proposal to stipulate that the Conflict Minerals Report will be deemed to have been "furnished," and not "filed," with the Commission.

First, such a distinction is contrary to a plain reading of the statute. Congress has made clear that any reports or disclosures made under the statute are to be filed with the Commission. Paragraph (1)(A) of the statute requires "any person described in paragraph (2)" to disclose annually whether any of its necessary conflict minerals originated in the DRC and, if so, to

[28] OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 6 (2010), http://www.oecd.org/dataoecd/62/30/46740847.pdf. For purposes of Section 1502, we modified the OECD definition by changing "metals" to "conflict minerals."

[29] Conflict Minerals, Exchange Act Release No. 63,547, 75 Fed. Reg. 80,948, 80,963 (Dec. 23, 2010).

"submit" a Conflict Minerals Report to the Commission.[30] While some may attempt to seize upon the supposed uncertainty attendant in Congress' use of the word "submit" in this context, any such reliance is misplaced. Paragraph (2) plainly states that disclosure is required if conflict minerals are necessary to the functionality or production of a product manufactured by such person and "the person is required *to file* reports with the Commission pursuant to paragraph (1)(A)."[31] By outlining in Paragraph (1)(A) the disclosures that a person described in Paragraph (2) is required "to file" with the Commission, Congress clearly and unambiguously addressed the issue. To conclude that the required information does not have to be "filed" with the Commission, but rather "furnished" — a term that appears nowhere in the text of the statute — is inconsistent with the plain language of the statute.

Second, permitting issuers to "furnish" rather than "file" the required disclosures would severely undermine the significance which Congress intended to attach to the disclosures both from a more global, policy-based perspective and from an investor perspective. Allowing these disclosures to be "furnished" rather than "filed would send a regrettable signal that the Commission believes these disclosures to be of lesser importance at the very moment that issuers, regulators, investors, and governments around the world are looking to the Commission to help establish the way forward. This, in turn, would scale back the vigor of issuer compliance and undermine the entire purpose of the statute.

One consequence of diminishing the status of the required information from "filed" to "furnished" would be to undermine the goals of ending the resource-related violence in the DRC and providing meaningful and reliable disclosures to the American consumer and investor. In this regard, by enacting Section 1502, Congress sent a clear message that achieving transparency and accountability in the conflict minerals trade is of significant importance and the required disclosures represent a critical aspect of the total mix of information available regarding a covered issuer. We are concerned that downgrading the status of the required disclosures sends a signal — whether intended or not — that the Commission does not view Section 1502 disclosures as qualitatively meaningful to investors, consumers, or the public at large. This is contrary to the spirit in which Section 1502 was enacted.[32]

Another consequence of diminishing the status of the required information from "filed" to "furnished" would be to deprive investors of certain causes of action normally available to seek redress for misstatements in filed annual reports. We are not advocates for private plaintiffs, but we understand that the availability of private rights of action in this instance would serve two functions to: (1) permit investors to seek remedies for material misstatements regarding conflict minerals disclosures, and (2) incentivize issuers (and auditors and underwriters) to conduct an appropriate level of diligence prior to the publication of such disclosures. Given the context, why does the Commission believe that these are unnecessary and unwanted results?

---

[30] 15 U.S.C. § 78m(p)(1)(A).

[31] 15 U.S.C. § 78m(p)(2).

[32] As noted by Senator Feingold, "[c]reating these mechanisms . . . will also help American consumers and investors make more informed decisions," 156 Cong. Rec. S3976 (daily ed. May 19, 2010).

Specifically, the Commission's proposal to diminish the required disclosures to "furnished" status coupled with the proposed proviso that the required disclosures will not be incorporated by reference into an issuer's Securities Act filings, absent a specific statement to that effect, will have a deleterious effect on the quality and fulsomeness of the required disclosures. With this proposal, the Commission would be removing potential liability under Sections 11 and 12(a)(2) of the Securities Act and Section 18 of the Exchange Act where an issuer publishes materially false or misleading information regarding its conflict minerals disclosures. The standards of liability under Sections 11 and 12(a)(2) of the Securities Act, and their attendant due diligence defenses, strongly incentivize issuers, auditors, and underwriters to ensure that appropriate diligence is conducted with respect to any such disclosure when engaged in a public offering.[33]

Since Section 1502 requires the disclosure of an auditor report in addition to the other conflict minerals disclosures, it is also important for the auditor to be subject to the same expert liability standard as it is subject to when auditing and reporting on financial statements.[34] Removing the possibility that the required disclosures could be subject to liability under the Securities Act would disincentivize diligence, and therefore compliance with the law. Moreover, removing the potential for Section 18 liability would even further restrict the avenues of redress available to investors when issuers fail to comply with the disclosure requirements. Although a private right of action would still be available under Section 10(b) of the Exchange Act, plaintiffs would be required to plead and prove scienter, a significant hurdle for many private plaintiffs to overcome. To be clear, we are not advocating that issuers be subject to heightened liability with respect to the conflict minerals disclosures. We are merely stating that such disclosures should be treated just like any other disclosure filed in an annual report and incorporated by reference into Securities Act filings.

---

[33] Under Section 11, any defendant, excepting the issuer, shall not be liable for any portion of a registration not made upon the authority of any expert or made upon his authority as expert, if he can sustain the burden of proof that "after reasonable investigation, he had reasonable ground to believe and did believe, at the time . . . the registration statement became effective, that the statements . . . were true and that there was no omission to state a material fact . . . ." For any portion of a registration statement made upon the authority of an expert (other than himself) or a public official, any defendant, excepting the issuer, shall not be liable if he can sustain the burden of proof that "he had no reasonable ground to believe and did not believe, at the time . . . the registration statement became effective, that the statements . . . were untrue or that there was an omission to state a material fact . . ., or that . . . the registration statement did not fairly represent the statement" of the expert or public official. 15 U.S.C. § 77k(b)(3). Similarly, under Section 12(a)(2), a defendant is not liable if he can "sustain the burden of proof that he did not know, and in the exercise of reasonable care should not have known, of such untruth or omission." 15 U.S.C. § 77l(a)(2).

[34] *See* Conflict Minerals, Exchange Act Release No. 63,547, 75 Fed. Reg. 80,948, 80,959 (Dec. 23, 2010); Rule 436 of Regulation C, 17 C.F.R. § 230.436. Auditors can be held liable under the Securities Act and Exchange Act for false or misleading statements contained in documents *filed* with the Commission. Auditors can be held liable under Section 11 of the Securities Act for preparing or certifying any portion of a registration statement filed with the SEC that contains materially misleading information. 15 U.S.C. § 77k(a). Section 12 of the Securities Act imposes the same potential liability on auditors for a materially misleading prospectus. 15 U.S.C. § 77l(a). Under the proposed rule's furnished standard, the Conflict Minerals Report auditor does not assume this liability unless the Conflict Minerals Report is specifically incorporated by reference into any filing under the Securities Act or Exchange Act.

We also note that an issuer's reasonable country of origin inquiry is required to be disclosed in a separate heading in the body of the annual report. Our view is that, in no case, should such disclosures be deemed "furnished." There is no justification for those statements to be treated any differently than other important disclosures that are required to appear in the body of an annual report.

Question 49 asks whether the Conflict Minerals Report should be furnished annually on Form 8-K. Global Witness opposes such an approach. Global Witness believes that the policy goals underlying the enactment of the statute call for the Conflict Minerals Report to be filed in the issuer's annual report, which fosters consistency in the form, location, and timing of the disclosures.

VII. Conclusion

Global Witness appreciates the opportunity to provide comments on the proposed rules. Section 1502 creates critically important disclosure provisions that are intended to bring much-needed transparency to the conflict minerals trade in the DRC countries. We want to reiterate the importance of issuing clear and understandable regulations to the issuers who are covered under the scope of Section 1502, particularly with respect to the reasonable country of origin inquiry and the supply chain due diligence standards. We also want to emphasize that exempting classes of issuers or delaying the full implementation of the statute will significantly impede express Congressional intent. We hope that our comments will be of assistance as the Commission finalizes its rules with respect to the Conflict Minerals Provision. As noted above, we would welcome the opportunity to meet with you to clarify any of our comments and recommendations.

Sincerely,

Corinna Gilfillan
Head of U.S. Office
Global Witness