AMNESTY INTERNATONAL
INTERNATIONAL SECRETARIAT

www.amnesty.org

e: [redacted]
t: [redacted]
f: [redacted]

1 Easton Street,
London, WC1X 0DW,
United Kingdom

AMNESTY INTERNATIONAL

Reference: TG AMR 51/2017.005

Acting Chairman Michael S. Piwowar
SEC Headquarters
100 F Street, NE
Washington, DC 20549
United States of America

17 March 2017

Dear Mr. Piwowar

AMNESTY INTERNATIONAL COMMENTS ON THE SEC CONFLICT MINERALS RULE

Thank you for the opportunity to provide a response to your recent invitation for public comment on the SEC's Conflict Minerals Rule and Guidance of April 2014.

Amnesty International is a global movement of more than seven million people working to ensure the protection and realisation of human rights worldwide. Our comments below are based on extensive research and experience on human rights issues linked to the extraction and trade of minerals, at the national, regional and international level. Amnesty International is Co-Chair of the Multi-Stakeholder Steering Group for the *OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (**OECD Guidance**). Since 2012, we have acted as intervenors in support of the SEC in the case brought by three U.S. industry groups to invalidate the Conflict Minerals Rule. In April 2015 we published *Digging for Transparency*, a joint analysis with Global Witness of the first Conflict Minerals Reports filed with the SEC. We are a leading member of the civil society coalition working on the recently adopted EU Conflict Minerals Regulation.

<u>Summary</u>:

Our comments focus on three areas:

1. The global consensus that companies have a responsibility to conduct due diligence in their mineral supply chains.
2. The benefits of and ongoing need for the Conflict Minerals Rule – including in helping companies reduce their potential exposure to legal liability and sanctions.
3. Substantive and procedural concerns with respect to Acting Chairman Piwowar's invitation for public comment on the Conflict Minerals Rule and 2014 Guidance.

The SEC's Conflict Minerals Rule effectively brought into U.S. law a globally-endorsed corporate due diligence standard developed by the Organisation for Economic Co-operation and Development (**OECD**). The OECD Guidance is not a "misguided rule" – it is a due diligence standard that was negotiated and agreed by a broad multi-stakeholder group including the U.S. government. The OECD Guidance reflects a clear international consensus – the origins of which can be traced back nearly 10 years – that companies have a responsibility to conduct due diligence when sourcing minerals from conflict-affected and high-risk areas. The Guidance provides specific advice to companies on how to meet that responsibility, including how to identify and mitigate potential and actual risks and abuses in their supply chains. It has now been endorsed in law and standards

across the world. U.S. and global industry actively supported the Guidance ten years ago, and still actively engage in the Multi-Stakeholder Steering Group for the OECD Guidance including as Co-Chairs.

There are clear benefits to the Conflict Minerals Rule. The Rule has led to an unprecedented number of companies doing their part to avoid fuelling conflict or human rights abuses by investigating and reporting on their supply chains. A variety of industry tools and specialised consultancies have emerged to help companies undertake due diligence. Companies understand their supply chains and potential links to conflict and human rights abuses far more than before.

Furthermore, by conducting supply chain due diligence, companies are reducing their own exposure to potential legal liability and sanctions. Guidelines on due diligence were originally developed to help companies mitigate the risk that they were directly or indirectly supporting armed groups in the eastern Democratic Republic of the Congo (**DRC**) – and thereby to help them avoid violating UN sanctions or being put on the UN Sanctions List. That sanctions regime still applies. The UN Security Council continues to highlight the link between the illegal exploitation and trade of minerals and conflicts in the Great Lakes region. And it continues to make clear that companies in the minerals supply chain must do their part to avoid financing armed groups or criminal networks by undertaking supply chain due diligence – as one element of a multi-pronged approach to ending the conflict in the eastern DRC that includes other measures such as targeted sanctions, arms control and security sector reform.

It is therefore vital that companies are still legally required to undertake due diligence under the Conflict Minerals Rule. Many companies in the minerals supply chain are only exercising due diligence because they are legally required to do so under the Rule. Our own investigations on child labour and hazardous working conditions in the cobalt supply chain from the DRC, for example, have shown that even well-known brands will not address these types of risks unless they are legally obliged to do so.

Suspending or amending the Conflict Minerals Rule at this point – even assuming such action would be consistent with the government's legal obligations – would therefore be a huge step backwards that risks increasing instability in the eastern DRC. It would undermine global efforts to tackle the ongoing conflict and human rights abuses in the region. It would increase the risk of U.S.-listed companies becoming subject to legal liability or targeted sanctions for supporting armed groups or criminal networks in the DRC. It would also mark a return to the secrecy that previously allowed companies along the minerals supply chain to turn a blind eye to their links with conflict and human rights abuses.

1. <u>The Global Consensus That Companies Have a Responsibility to Conduct Due Diligence in Their Mineral Supply Chains</u>

The SEC's Conflict Minerals Rule essentially requires certain U.S.-listed companies to undertake due diligence on tin, tantalum, tungsten and gold (**3TG**) in their products in accordance with the OECD Guidance. Far from being a "misguided rule", the OECD Guidance is <u>the</u> globally-recognised and endorsed standard on conducting due diligence in mineral supply chains. It reflects a clear consensus that companies have a responsibility to exercise due diligence when sourcing minerals from conflict-affected and high-risk areas, given the well-known links between the minerals trade, conflict and human rights abuses. The OECD Guidance was specifically designed to help companies fulfil that responsibility.

The UN Security Council first recognised the need for companies to exercise due diligence when sourcing minerals from the DRC in December 2008 (UN Doc. S/RES/1857(2008), p.2 and para. 15). The concept of corporate due diligence had been put forward earlier that year by the Special Representative to the UN Secretary-General on business and human rights, as part of his work in developing the internationally-endorsed UN Guiding Principles on Business & Human Rights (**UNGPs**) (UN Doc. A/HRC/8/5).

In December 2009, the Security Council instructed the Group of Experts on the DRC to begin developing due diligence guidelines for actors sourcing minerals from the DRC (UN Doc: S/RES/1896(2009), para. 7). At that time, the trade in 3TG had fuelled conflict in the eastern DRC for over a decade. Although minerals were not the

root cause of the conflict, the UN Security Council had explicitly recognised that the illicit exploitation and trade of natural resources was “one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of Africa” (UN Doc. S/RES/1857(2008)). The UN Security Council had therefore expanded its Chapter VII sanctions regime on the DRC to cover actors supporting armed groups in the eastern DRC through the illicit trade of natural resources (UN Doc: S/RES/1857(2008), para. 4(g)).

The original purpose of the due diligence guidelines was to help actors in the supply chain (including companies) mitigate the risk that they were directly or indirectly supporting armed groups in the eastern DRC – and thereby to help them avoid violating UN sanctions or being put on the UN Sanctions List.

As part of that work the Group of Experts identified the broader risk that actors in the minerals supply chain were “directly or indirectly supporting criminal networks and perpetrators of serious human rights abuses … [and] directly or indirectly worsening the conflict in the east [of the DRC]” (UN Doc. S/2010/569, para. 313). The Group of Experts therefore developed an expanded set of due diligence guidelines designed to help companies mitigate the risk of exacerbating the conflict through providing direct or indirect support to illegal armed groups <u>or</u> perpetrators of serious human rights abuses (among others) (UN Doc. S/2010/569, para. 317).

In November 2010, the UN Security Council voted to take forward the Group of Experts’ expanded due diligence guidelines (UN Doc. S/RES/1952(2010)). Those guidelines relied upon the five-step, risk-based due diligence framework recently elaborated by the OECD. That framework – the OECD Guidance – was negotiated and agreed by the United States and other governments within the OECD and the International Conference of the Great Lakes Region (**ICGLR**), in consultation with the UN Group of Experts on the DRC, the minerals industry and civil society.

The OECD Guidance now forms the basis of due diligence laws and standards on the responsible sourcing of minerals across the world. Since Dodd-Frank was passed in July 2010, due diligence laws and other measures based on the OECD Guidance have been endorsed by the European Union, China and the 12 African countries that constitute the ICGLR. The OECD Guidance also aligns with the UNGPs, unanimously endorsed by the UN Human Rights Council in 2011, which make clear that companies have a responsibility to respect human rights and conduct due diligence for those purposes throughout their global operations and supply chains. The minerals industry actively supported the Guidance ten years ago, and still actively engage in the Multi-Stakeholder Steering Group for the OECD Guidance including as Co-Chairs.

2. <u>The Benefits of and Ongoing Need for the Conflict Minerals Rule</u>

The SEC’s Conflict Minerals Rule is a vital regulation, which is working and is still needed.

The Conflict Minerals Rule has led to an unprecedented number of companies doing their part to avoid fuelling conflict or human rights abuses through their supply chain practices. There has been a significant increase in the number of companies investigating their supply chains and a huge change in company sourcing practices – in 2016, over 1,200 companies submitted Conflict Minerals Reports. The Rule has led to the emergence of a number of industry tools and specialised consultancies to help companies undertake due diligence more effectively. Companies know far more about their supply chains and potential links to conflict and human rights abuses than before.

In April 2015, Amnesty International and Global Witness published *Digging for Transparency*, an analysis of the first Conflict Minerals Reports filed by companies under the Conflict Minerals Rule. The report found that 21% of the companies surveyed met the minimum requirements of the law based on 12 criteria. The fact that this proportion of companies were able to conduct due diligence in accordance with the law in the first year of reporting, and after the ruling of the Court of Appeals following the industry challenge, demonstrates that companies can comply with the Conflict Minerals Rule.

The disclosure requirements of the Conflict Minerals Rule have also led to companies being far more transparent about what they are doing to avoid contributing to conflict and human rights abuses. Transparency

is an integral element of any supply chain due diligence framework. The fifth-step of the OECD Guidance requires companies to publicly disclose their due diligence efforts and findings. The UNGPs require companies to "know and show" that they respect human rights. Transparency is also vital to ensuring that companies are held to account if they contribute to conflict or human rights abuses through their supply chain practices.

Furthermore, supply chain due diligence enables companies to identify and take corrective steps to address risks and abuses in their supply chains. This in turn reduces their exposure to potential legal liability as well as sanctions. As noted above, the UN Group of Experts on the DRC originally developed due diligence guidelines to help companies mitigate the risk that they were directly or indirectly supporting armed groups in the eastern DRC – and thereby to help them avoid violating UN sanctions or being put on the UN Sanctions List. The UN Security Council's Chapter VII sanctions regime still applies to individuals and entities that support armed groups or criminal networks involved in the illicit exploitation or trade of minerals in the DRC (UN Doc. S/RES/2293(2016), para. 7(g)). The UN Security Council continues to highlight the link between the illegal exploitation and trade of minerals and the conflicts in the Great Lakes region. And it continues to make clear that companies in the minerals supply chain must do their part to avoid financing armed groups or criminal networks by undertaking supply chain due diligence – as one element of a multi-pronged approach to ending the conflict in the eastern DRC that includes other measures such as government action to cut-off financing to those groups, targeted sanctions, arms control, improvements in governance and security sector reform.

The fact remains that many companies in the 3TG minerals supply chain from the Great Lakes region are only exercising due diligence and disclosing their efforts because they are legally required to do so under the Conflict Minerals Rule. For example, in our January 2015 investigation into hazardous working conditions and child labour in the cobalt supply chain from the DRC, we found that none of the big-brand companies within that supply chain were undertaking due diligence despite the expectation that they do so under the OECD Guidance. Companies identified during that investigation told us they were not carrying out due diligence on cobalt because they were not required to under the Conflict Minerals Rule.

It is therefore vital that companies are still legally required to undertake due diligence under the Conflict Minerals Rule. This has the added benefit of ensuring fair competition and a level playing-field for all U.S. listed companies whose products contain 3TG from the Great Lakes Region.

3. Substantive and Procedural Concerns with respect to Acting Chairman Piwowar's Invitation for Public Comment

Although Amnesty International appreciates the opportunity to respond to the invitation for public comment on the Conflict Minerals Rule and the 2014 Guidance, it would also like to emphasize its concerns with some aspects of the invitation from Acting Chairman Piwowar.

First, the invitation for public comment suggests that the SEC may consider "additional relief" to regulated entities under the Conflict Minerals Rule. Although it is unclear what "relief" is contemplated, Amnesty International stresses that the Conflict Minerals Rule is a substantive rule adopted by way of notice-and-comment rulemaking. The Commission cannot effectively repeal that rule or deprive the public of its right to information mandated by that rule by using guidance or other mechanisms that fall short of new rulemaking in compliance with the SEC's legal obligations under the Administrative Procedure Act (APA). A statement by a single commissioner on the SEC's website encouraging the public to comment on "all aspects of the rule and guidance," without any indication of what is under consideration, does not satisfy the SEC's legal obligations in this regard. Amnesty International also notes that some actions by the Commission to weaken the rule would be inconsistent with specific statutory mandates imposed by Section 1502. And although Amnesty International submits these comments based on what it can glean from the invitation for public comment, these comments are no substitute for the type of feedback we would offer if given clear notice of what the SEC is considering.

Second, no "additional relief" to regulated entities is necessary. The D.C. Circuit made clear that Section 1502, 15 U.S.C. § 78m(p)(1)(A)(ii) and (E), and the Conflict Minerals Rule, 77 Fed. Reg. 56,274, 56,362-65 (Sept. 12, 2012), violate the First Amendment only to the extent that the Statute and the Rule require regulated

entities to report to the SEC and to state on their website that any of their products "have not been found to be 'DRC conflict free'". The SEC need not expand the relief provided through a revision to the 2014 Guidance or take other action that sweeps beyond the D.C. Circuit's ruling, nor could it do so without engaging in a new notice-and-comment rulemaking.

Third, Amnesty International is deeply concerned by the unsupported and vague assertions in the invitation for public comment that the Rule has caused a *de facto* boycott of minerals from the region and is harmful to U.S. national security interests. We note in this respect that the invitation for comment mirrors similarly unsupported and vague assertions in a draft Presidential Memorandum to suspend Section 1502, which was recently reported to be under consideration by the Trump Administration. The draft contends that "[m]ounting evidence shows that the disclosure requirements in the Conflict Minerals Rule have instead caused harm to some parties in the Democratic Republic of the Congo and have thereby contributed to instability in the region and threatened the national security interest of the United States."

Amnesty International strongly disagrees with the assertions made in Acting Chairman Piwowar's invitation for public comment and in the draft Presidential Memorandum. Suspending Section 1502's corporate due diligence requirement and allowing the indiscriminate funding of abusive armed groups in the eastern DRC, or weakening the Conflict Minerals Rule in other ways, would – if anything – do more to contribute to instability in the region and to threaten the U.S.'s national security interests than the ongoing implementation of the current Conflict Minerals Rule. As stated above, the UN Security Council continues to recognise the link between the minerals trade and conflict and human rights abuses in the eastern DRC, and the need for companies to exercise due diligence in response (UN Doc. S/RES/2293(2016)). The DRC Government and the ICGLR continue to take steps to allow for the effective implementation of due diligence within the DRC. In its most recent resolution on the DRC of June 2016, the UN Security Council welcomed these measures and called on all States to assist the ICGLR, the DRC and other countries in the Great Lakes region of Africa in developing a responsible minerals trade, and to raise awareness of the due diligence guidelines including by urging actors sourcing minerals from the DRC to exercise due diligence (UN Doc. S/RES/2293(2016), paras. 24 and 25).

Yours sincerely,

Seema Joshi
Head of Business and Human Rights
Amnesty International