02 March 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission (SEC)
100 F Street, NE
Washington, DC 20549-1090

RE: Comments Regarding File Number S7-40-10 on Conflict Minerals

Dear Ms. Murphy

We are writing on behalf of EARTHWORKS, to provide comments on the Conflict Minerals rules of the Dodd-Frank Act.

EARTHWORKS has a 23-year history of working to protect communities and the environment from the impacts of irresponsible mineral and energy extraction around the world. Through our No Dirty Gold campaign, we have worked with jewelry retailers and refiners who are seeking to establish responsible supply chains for their precious metals. Those companies are seeking to avoid gold and other metals that come at the cost of communities and the environment around mining operations.

These Rules implementing Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act have the potential to help increase transparency and sourcing choice, and allow responsible companies, customers, and investors to avoid complicity in conflict and human rights violations in the Democratic Republic of Congo. Those are objectives supported by more than 70 jeweler companies that have signed the Golden Rules for responsible sourcing of the No Dirty Gold campaign. Firm and comprehensive rules are essential in order to provide the transparency that those Golden Rules signatories and other companies and investors require to assess risks and opportunities.

The Conflict Minerals reporting needs to be robust on a number of aspects in order to truly address the connection between conflict in the Democratic Republic of Congo and mining. We have provided detailed comments on a number of the questions below. In addition, we would like to highlight several key points.

- To meet statutory intent and requirements and the needs of companies and investors seeking to avoid implication in conflict and human rights abuses, the rules must fully include gold, and include metals mining companies. Gold is an important component of conflict financing that the rules must fully account for. Mining companies have previously been involved in supporting armed groups in the DRC and the rules must ensure disclosure to help prevent this from happening again.

- The rules must prevent loopholes that would exempt companies.

- Companies should "file" not just "furnish" conflict minerals disclosure, and that disclosure must include due diligence and evidence and identification of all known countries of origin, and actual specific mine origin of minerals if known for the DRC. The rules should also describe manufacturing and the "necessity" of conflict minerals in a product inclusively.

- Finally, the rules must carefully define recycled metals as 100% post-consumer metal. Recycled metals described through a Conflict Minerals Report as DRC conflict free must be 100% post-consumer metals and, for gold, must not include gold bars, coins, un-sold jewelry or scrap left over from manufacturing. This precise definition of recycled is necessary to avoid potentially allowing newly-mined gold to be masked as poorly defined or verified "recycled" metals.

Issuer and manufacturing criteria (questions 1-15)

The requirements should apply to all conflict minerals equally in accordance with statutory language and intent. Since supply chain traceability is possible for all of the minerals, no special conditions or exemptions are required for any of the conflict minerals. Gold is a high-value contributor to conflict financing in the DRC. If estimates of approximately 8 tonnes of gold mined in the DRC annually are correct, that would represent significant financing of over US$300 million at current gold prices.[1] The gold supply chain is also in need of greater transparency in order to allow gold investors, retailers, and customers to distance themselves from gold extracted from conflict zones in DRC and elsewhere, and the many mining operations that are irresponsible for other reasons. Retailers are keen to have increased traceability and transparency in the gold supply chain. Over 70 jewelry retailers representing approximately a quarter of the US market have signed the No Dirty Gold campaign's "Golden Rules" for responsible sourcing of precious metals.[2] Not only do the Golden Rules require that companies seek to not source from conflict zones, but also the Golden Rules require that companies seek third party, independent verification that their sources of gold meet the conflict-free and other criteria. These rules should help provide such assurances for gold and the DRC region. The continuing high price of gold -- which has risen from approximately

[1] 8 tonnes is an estimate based on GFMS data from Philip Olden (Olden, P. 2010. OECD Due Diligence Guidance for Responsible Supply Chain Management of Minerals from Conflcit-Affected and High Risk Areas; Implications for the Supply Chain of Gold and Other Precious Metals.). Current prices for gold are around US$1,300 per troy ounce, of which there are 32,150 in a tonne.
[2] For a full list of supporting retailers, please see:
http://www.nodirtygold.org/supporting_retailers.cfm

US$300/oz. to over US$1,300/oz. in the past 10 years and has doubled in just the past five years – should more than offset any additional costs that the process of increasing gold supply chain transparency might result in.[3]

The rules should also apply to all issuers that file reports under the Exchange Act, even if those issuers are relatively small, are foreign companies, or have existing reporting exemptions. The rules should also apply to companies exchanging American Depository Receipts. The statutory language does not provide for exemptions for any types of issuers and these rules ought to reflect that.

The Commission should establish a mechanism for non-issuing companies to report in a similar way to issuing companies. This would allow private companies to demonstrate to investors and the public their commitment to keep "blood metals" out of their supply chain.

The rules should adequately describe "manufacture" in order to ensure comprehensive applicability. Manufacturing should include the production, preparation, assembling, combination, compounding, or processing of ingredients, materials, and/or processes. This should specifically include the mining (initial ore extraction), processing (including beneficiation and production of doré or concentrate), refining, alloying, fabricating, importing, exporting, or sale of conflict minerals -- because sales supporting conflict could occur at various parts of the metals supply chain. For this reason, all mining companies should be included under the rules since they all transform minerals in some way: even when a mining company extracts ore and transports it for further processing elsewhere, that is a new and distinct product from the rock as it lay in the earth, particularly for gold and other minerals covered in this policy. One mining company has claimed that gold doré bars "have no commercial uses," but clearly doré bars, similar to concentrates containing gold from polymetallic mining, are products transformed from ore that have tremendous value and are readily sold as a commercial commodity to refining companies.

There are additional reasons to require reporting by mining companies that are issuers. Large-scale mining companies have been implicated in conflict in DRC in the past and many large-scale mineral exploration and mining projects are in planning and exploration stages.[4] Large-scale mining operations in some parts of the world on occasion buy gold produced by nearby artisanal and small-scale gold miners, and issuers may have ownership in mineral aggregators and processors in the DRC

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[3] World Gold Council 2011 data. http://www.gold.org/investment/statistics/prices/
[4] Human Rights Watch. 2005. The Curse of Gold; Democratic Republic of Congo.
http://www.hrw.org/en/reports/2005/06/01/curse-gold
International Peace Information Service
http://www.ipisresearch.be/mining-sites-kivus.php

region.[5] Several parts of Section 1502 of the Dodd-Frank Act also indicate an intent to address mining, including requiring that the Secretary of State strategy "address linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products" and "monitor and stop commercial activities involving the natural resources of the Democratic Republic of Congo." The statute does not provide for any exemptions for any companies that manufacture products which could contain conflict minerals, and the rules should, therefore, not exempt mining companies. Finally, mining projects that are seeking to establish more responsible operations away from and unassociated with conflict in the region should welcome the opportunity to demonstrate that their products are not contributing to conflict.

The rules should also apply to entities that manufacture products and entities that contract to manufacture products, including entities that contract for products that they sell under their own brand. For large companies such contracting operations can represent relatively large quantities of metals that could be financing conflict if lacking audited due diligence.

Necessity of conflict mineral content in products (questions 16-21)

The rules should describe in what situations a conflict mineral is necessary to a product, and that should include cases in which the mineral: is intentionally added; is essential for product use, purpose, or marketability; or is part of a process needed for production of the product (but does not appear in the final product).

Congo origin (questions 22-36)

The conflict minerals disclosure, including the Conflict Minerals Report and its audit, should be "filed" as statements in the annual report and as an exhibit to annual reports for issuers.

The rules need to ensure that issuers cannot avoid filing Conflict Minerals Reports by submitting incomplete evidence that their minerals were mined outside of the DRC and adjoining countries. The rules should require that issuers file, not furnish, the "reasonable country of origin enquiry." The Commission should define what methods constitute a minimum "reasonable country of origin enquiry" and require strong due diligence and evidence that minerals do not come from the "DRC countries." Such evidence must include evidence that those minerals come from a different stated country or group of countries. Companies must describe that evidence and country origins in the body of the annual report and keep reviewable

[5] See "Comments by the Secretariat of the International Conference of the Great Lakes Region (ICGLR) on Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act"

business records supporting origin claims for 10 years. The standards for supply chain determinations should apply as a minimum to the "reasonable country of origin" determination as well and the rules should not allow qualifying language or expressions of uncertainty if companies are indicating that their minerals did not come from "DRC countries." If the requirements for a "reasonable country of origin enquiry" are not rigorous, they could be seen as more lax than the requirement for due diligence for recycled metals and this could risk having the unintended effect of promoting new mining over use of recycled metals.

Annual reports should, in addition to the information on the reasonable country of origin enquiry, also include a summary and likelihood of implication in conflict from Conflict Minerals Report that is filed as an exhibit. The Conflict Minerals Report and its audit should go on the company's website as well with access provided to archived reports from previous years.

Conflict Mineral Report and supply chain (questions 37-55)

Supply chain due diligence and the Conflict Mineral Report must rigorously determine possible involvement of minerals in conflict. Labels for products should be "not DRC conflict-free" or "DRC conflict-free," and not a third category expressing uncertainty of origin. Such a third, uncertain category would be confusing to customers and investors. "Not DRC conflict-free" is different from an indication that minerals are "DRC conflict minerals" and so an uncertain category is confusing because it should be included by definition under "not DRC conflict-free." Products with minerals of uncertain origin must be described as "not DRC conflict-free." The rules should require disclosure of facilities, countries of origin, efforts to find the mine or location of origin for all of its conflict minerals, and the location of the mine or location of origin (with name, province, and geographic coordinates to the nearest second) whether "DRC conflict free" or not. This is important because conditions may change, and also because conflict can occur in other areas and comprehensive transparency will be helpful in preventing future financing of conflict through minerals production.

The Conflict Minerals Report and associated audit must be filed as exhibits to the annual reports of companies. It is of critical importance that companies provide a thorough due diligence and that investors be as protected as possible from unintentional investment in conflict minerals. Requiring that disclosure be "filed" will assist in doing so.

The rules should identify acceptable due diligence options (e.g., *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* and UN guidelines), and include gold in the same way as the other conflict minerals are covered. A due diligence process for minerals sourced in the DRC and/or adjoining countries containing the following elements and demonstrating

good faith and a reasonable standard of care, should be presumed to be reliable if the issuer's disclosure includes at least:

a. A conflict minerals policy;
b. A supply chain risk assessment procedure that includes "upstream" and "downstream" due diligence, which includes a description of efforts made and the result of efforts to obtain outlined information;
c. A description of the policies and procedures to remediate any instances of non-conformance with the policy;
d. An independent third party audit of the due diligence report, which includes a review of the management systems and processes; and
e. The results of the independent third-party smelter or refiner audit detailing items (b)i-x (below); or the inclusion of a link to the published smelter audit reports made available via the issuer's website detailing items (b)i–x (below).

Reliable due diligence of "downstream" suppliers includes using thorough means to assure that direct and component suppliers and others in the supply chain are only sourcing refined metals from compliant smelters.

An "upstream" due diligence process should be presumed to be reliable if comprising at least the following, when performed in good faith and to a reasonable standard of care:

a. Smelter or refiner auditing protocol performed by an independent 3rd party.
b. When it is determined that incoming minerals originate from DRC or adjoining countries, the third party audit in (a) would additionally include the following information (which is aligned with the OECD Guidance, p. 22, 26 & 37):
i. an on-the-ground risk assessment which addresses the points outlined in the OECD's Guidance Step 2 and Appendix;
ii. all taxes, fees or royalties paid to government for the purposes of extraction, trade, transport and export of minerals;
iii. any other payments made to governmental officials for the purposes of extraction, trade, transport and export of minerals;
iv. all taxes and any other payments made to public or private security forces or other armed groups at all points in the supply chain from extraction onwards;
v. the ownership (including beneficial ownership) and corporate structure of the exporter, including the names of corporate officers and directors; the business, government, political or military affiliations of the company and officers.
vi. the mine from which the mineral originated and its location;
vii. quantity, dates and method of extraction (artisanal and small-scale or large-scale mining);
viii. locations where minerals are consolidated, traded, processed or upgraded;
ix. the identification of all upstream intermediaries, consolidators or other actors in the upstream supply chain;
x. transportation routes.

The rules should also provide requirements for accreditation and selection of third-party auditors.

Time periods for reporting and stockpiles (questions 56-61)

Rules should not allow delays on disclosure and reporting or allow excessive lenience for existing stockpiles. Violent conflict and human rights abuses continue in the DRC and efforts to mitigate them must not be delayed.

Gold stockpiles (e.g., bars and coins) of unknown mine origin existing outside of DRC and adjoining countries before 15 July 2010, could be considered exempt after due diligence to determine time and place of origin as part of the Conflict Minerals Report. This would help to avoid the risk of encouraging new gold mining rather than use of existing gold stocks should those stockpiles, where already outside of DRC countries, be pre-existing.

Thresholds and recycled metals (questions 62-69)

The rules should not allow a *de minimis* criterion, since the conflict mineral content in products can represent significant value to armed conflict groups even if it is a small material portion of a product.

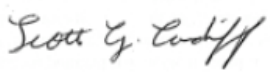
It could be acceptable for post-consumer recycled conflict minerals (but not scrap) to be described, through a Conflict Minerals Report, as DRC conflict free, but the Commission must precisely define "recycled" and require thorough due diligence and audits of statements of provenance for recycled content determinations to ensure that what is claimed as recycled is actually recycled. This is of critical importance because definitions of recycled vary, and less responsible elements of the supply chain could falsely claim that newly mined metals are actually recycled. Post-consumer recycled products should be the only sources of minerals, in addition to newly-mined minerals not supporting DRC conflict, described in a Conflict Minerals Report as DRC conflict free. For gold, this should be defined as gold that is independently verified with statements of provenance to contain 100% gold from post-consumer products, such as post-consumer jewelry, electronics, or dental gold. The definition of post-consumer recycled gold must exclude scrap from jewelry (bench waste, etc.) and other manufacturing, and any jewelry or other product not previously owned as end-use products by consumers ("unwanted" jewelry). This is necessary because there are cases elsewhere of companies turning newly-mined gold into apparent manufacturing scrap (to avoid taxes), and of operations making and subsequently "recycling" rough jewelry to easily earn a government pre-export manufacturing incentive. Gold coins and bars, or financial gold, should not be included in the definition as they do not represent a consumer, end-of-life product and are less identifiable as not newly-mined gold. Companies or individuals could launder DRC conflict gold by making claims that gold bars are recycled when they

may be newly mined gold bars, or an un-quantified mix of recycled and newly mined gold.

Thank you for your consideration of these comments. Please do not hesitate to contact us for further clarification.

Sincerely,

Payal Sampat
International Program Director
EARTHWORKS' No Dirty Gold campaign



Scott Cardiff
International Program Coordinator
EARTHWORKS' No Dirty Gold campaign