CLEARY GOTTLIEB Alert Memo

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SEC Proposes Disclosure Rules Pursuant to the Dodd-Frank Act Relating to Conflict Minerals, Mine Safety and Resource Extraction Payments

On December 15, 2010, the Securities and Exchange Commission voted unanimously to propose rules governing specialized disclosure relating to (a) conflict minerals, (b) mine safety and (c) payments to governments by companies engaged in resource extraction.[1] The proposed rules implement Sections 1502, 1503 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[2] which added three disclosure provisions to Section 13 of the Securities Exchange Act of 1934. Although the mine safety and resource extraction payments provisions are generally applicable only to companies in those industries, the conflict minerals rules will have much broader applicability, and companies should carefully consider whether they will be subject to the new rules.

In the Dodd-Frank Act, Congress substantially fixed the contours of these disclosure requirements and directed the Commission's rulemaking activities, requiring the Commission to adopt rules implementing Section 1502 (conflict minerals) and Section 1504 (resource extraction payments) by April 15, 2011. The final rules will apply beginning with the annual report for the first full fiscal year after the enactment of the final rules – *i.e.*, for a calendar-year company, the annual report for 2012 to be filed early in 2013. The Commission is also proposing regulations to clarify reporting under Section 1503 (mine safety), which did not require Commission rulemaking under the Dodd-Frank Act and is already in effect. Although the timing for the mine safety rules is unclear, companies should take them into account in preparing their annual reports for the 2010 fiscal year, as they largely clarify the existing statutory requirements.

As Chairman Schapiro observed at the December 15 open meeting, the Commission does not have expertise on these specialized disclosure matters, and it has followed the statutory provisions closely. The proposals reflect a laudable effort on the Commission's part, working within the constraints imposed by the statute, to develop a workable system, consider comments submitted in advance of the proposals as the Commission requested, and seek further input on some difficult open questions. Although the Commission's requests for comment cover virtually every aspect of the rule proposals, commenters would be well advised to respect the statutory constraints and focus on the open questions. The comment period for all of the proposals expires on January 31, 2011.

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1 *See* SEC Rel. No. 34-63547 (Dec. 15, 2010), available at http://sec.gov/rules/proposed/2010/34-63547.pdf; SEC Rel. No. 33-9164 (Dec. 15, 2010), available at http://sec.gov/rules/proposed/2010/33-9164.pdf; SEC Rel. No. 34-63549 (Dec. 15, 2010), available at http://sec.gov/rules/proposed/2010/34-63549.pdf.

2 Pub. L. No. 111-203 (the "Dodd-Frank Act").

SECTION 1502 – CONFLICT MINERALS

Highlights of the Proposal

Affected companies:	• Any reporting company that manufactures or contracts to manufacture products for which conflict minerals are necessary to those products' functionality or production. • Includes foreign private issuers and smaller reporting companies.
Disclosure location:	• Disclosures must be included in the annual report on Form 10-K, Form 20-F or Form 40-F. Some companies will be required to file a report as an exhibit to the annual report. • Disclosures must also be placed on the company's website (and maintained at least until the next annual report is filed). • Disclosures are "furnished," not "filed," and are not automatically incorporated by reference in registration statements under the Securities Act of 1933.
Timing:	• The Commission must adopt rules no later than April 15, 2011. • The provisions will apply beginning with annual reports filed for the first full fiscal year ending on or after April 15, 2012.[3]
Disclosure content:	• A company must undertake a three-step process to determine what, if any, disclosure is required regarding conflict minerals: o *Step One* – The company must determine whether it manufactures or contracts to manufacture any products for which conflict minerals are necessary to the functionality or production of those products. If so, it must proceed to Step Two. If not, no disclosure is required. o *Step Two* – The company must conduct a "reasonable country of origin inquiry" to determine whether the conflict minerals necessary for its products originated in the Democratic Republic of the Congo (the "DRC") or an adjoining country. If so, it must proceed to Step Three. If not, disclosure of that conclusion and the inquiry process is required in the annual report and on the website, although disclosure of the actual country of origin of the conflict minerals is not required. The company must also maintain reviewable records supporting its conclusion.

[3] Assumes final rules are adopted on April 15, 2011. The Commission also appears to make this assumption in the proposing releases.

	o *Step Three* – If any of the conflict minerals necessary for the company's products originated in the DRC or an adjoining country, if the company is unable to conclude that the conflict minerals did not originate there or if the conflict minerals came from recycled or scrap sources, the company must furnish a Conflict Minerals Report (including an independent private sector audit), described below, as an exhibit to its annual report and on its website.

Issues under the Proposal

- **Non-Reporting Companies –** Despite requests in the advance comments, the Commission declined to extend any disclosure obligation to private companies not otherwise subject to Exchange Act reporting. It did, however, request comment on whether it should reconsider and, if so, how it could administer such a regime.

- **Definition of Conflict Minerals** – The statute defines the term "conflict mineral" as columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives (including tin, tantalum, and tungsten), or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC or an adjoining country. Noting the broad use of these minerals in various types of products, the Commission indicated that it expects the proposed rules to apply to approximately 6,000 companies.

- **Definition of "Manufacture" and "Contracting to Manufacture"** – The proposed rules do not include a definition of "manufacture" as the Commission regards the term to be "generally understood," although it has requested comment on this point. The release indicates that a company would be considered to be "contracting to manufacture" a product if it has any influence over the manufacturing of the product, or if it contracts with a third party to have a product specifically manufactured for it for sale under its own brand name or a separate brand name that it establishes (regardless of whether it has any influence over the manufacturing). This aspect of the proposal would, for example, subject retailers to the requirements if they contract for the manufacturer of products that they sell under a private label. The proposal also treats a mining company as manufacturing conflict minerals, although the release seeks comment on whether the extraction of minerals should be considered to be "manufacturing" only if the company performs additional transformative processes on the minerals.

- **Definition of "Necessary"** – The proposed rules do not define when a conflict mineral is necessary to the functionality or production of a product, although the release seeks comment on whether a definition is needed, on whether it should be related to a product's "basic function" and on the meaning of the terms "necessary to the functionality" and "necessary to the production." The release clarifies that if a conflict mineral is necessary for a product, there is no *de minimis* exception. In addition, if a mineral is intentionally included in, and is a necessary part of, the production process for a product, the mineral would be considered necessary for its production even if it is not included in the final product. However, a mineral necessary to the functionality or production of a physical

tool or machine used to produce a product would not be considered necessary to the production of the product even if the tool or machine is necessary to producing the product.

- **Reasonable Country of Origin Inquiry** – The proposed rules do not establish what would constitute a reasonable country of origin inquiry. The reliability of any inquiry would depend on a company's particular facts and circumstances and be based on whether it provides a reasonable basis for the company to trace the origin of the conflict minerals it uses. Consistent with other rules that incorporate a "reasonableness" standard,[4] the inquiry need not determine the origin of conflict minerals with absolute certainty, although a company could not conclude that it would be unreasonable to conduct an inquiry because of the large amount of conflict minerals it uses or the large number of its products that include conflict minerals, nor could it conclude that there is "no evidence" that the conflict minerals it uses originated in the DRC or adjoining countries and conduct no further inquiry. Based on the statutory language, the release also indicates that the country of origin inquiry could be less exhaustive than the supply chain due diligence required in the Conflict Minerals Report described below. The release also notes that what would constitute a reasonable inquiry will depend on the available infrastructure or information at a given point in time. For example, reliance on smelter certifications and supplier declarations may suffice at present, but different efforts may be required as information systems improve over time.

- **Conflict Minerals Report** – The report must include a description of the company's due diligence on the source and chain of custody of the conflict minerals it uses (including, as a critical component, the independent private sector audit described below), as well as a description of the company's products that are not "DRC conflict free,"[5] the facilities used to process the conflict minerals used in those products, the country of origin of those minerals and the company's efforts to determine the mine or location of origin with the greatest possible specificity.

  The proposed rules do not dictate the standard for the supply chain due diligence, although the release indicates that it should be more extensive than the country of origin inquiry, as noted above, and that use of a nationally or internationally recognized set of due diligence standards[6] would provide evidence of a satisfactory process. The Dodd-

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[4] The release notes two examples: management's report on internal control over financial reporting pursuant to Item 308 of Regulation S-K and Section 404 of the Sarbanes-Oxley Act of 2002, and the Foreign Corrupt Practices Act.

[5] A product is "DRC conflict free" if it does not contain conflict minerals that "directly or indirectly finance or benefit armed groups in the DRC or an adjoining country." The proposal does not clarify what would constitute, for example, "indirect benefit" to an armed group. If a company is unable to determine that conflict minerals did not originate in the DRC or an adjoining country, they are not "DRC conflict free."

[6] *See, e.g.*, OECD, Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2010), available at http://www.oecd.org/dataoecd/13/18/46068574.pdf. Although the release does not make this point, the term "due diligence" is often used to refer to the "reasonable investigation" defense provided under Section 11 of the Securities Act, which may provide helpful guidance as to an appropriate standard in this context as well.

Frank Act also provides that the Commission may determine a company's due diligence processes, including the audit, to be unreliable. The release does not indicate the basis on which the Commission might determine a company's due diligence process to be unreliable, although it notes that in accordance with the statute, if any Conflict Minerals Report relies on such an unreliable due diligence process, it would not satisfy the proposed rules. The release seeks particular comment on whether different due diligence measures should apply to the gold supply chain, in light of advance comments that suggested unique challenges in that industry.

- **Audit Requirement** – As required by the Dodd-Frank Act, the proposed rules require a company to certify that it obtained an independent private sector audit of its Conflict Minerals Report. Going beyond the statutory language, the proposal also requires the company to furnish the audit report together with the Conflict Minerals Report. The audit must be conducted in accordance with standards established by the Comptroller General of the United States,[7] and the release references an expected average cost for each audit of $25,000. It is unclear from either the statute or the proposed rules whether the audit to be performed is of the due diligence efforts of the company or of the actual supply chain. As noted above, the Conflict Minerals Report would not be automatically incorporated by reference into other filings, so the auditor would not have expert liability under the Securities Act unless the company specifically incorporates the report by reference into a Securities Act filing.

- **Stockpiles** – The release requests comment on how existing stockpiles of conflict minerals should be addressed, including the possibility of a transition period under the rules. Companies that typically maintain stockpiles of these minerals should consider conducting the relevant inquiries in advance of the final rules in case a transition period is not included in the final rules.

- **Recycled and Scrap Materials** – In response to concerns expressed primarily by gold and jewelry manufacturers, the proposal includes a modified disclosure regime for conflict minerals derived from recycled or scrap materials. Products made with recycled or scrap conflict minerals may be considered DRC conflict free, but the company must nevertheless furnish a Conflict Minerals Report (and related audit report) containing information about the use of the recycled or scrap minerals and the supply chain due diligence process.

[7] The release indicates that the staff of the Government Accountability Office preliminarily believes that no new standards will be required, and that existing Government Auditing Standards, such as the standards for Attestation Engagements or the standards for Performance Audits, will apply. *See* GAO-070-731G.

- **Liability and Registration Statements** – The information required by the proposal would be "furnished" and not "filed" under the Exchange Act, and accordingly would not be subject to the liability provisions of Section 18 of the Exchange Act. It also would not be incorporated by reference into filings under the Securities Act unless the company elects to do so expressly, and is not required in a long-form registration statement on Form S-1 (*e.g.*, in an initial public offering). There is precedent for this approach in the implementation of certain provisions of the Sarbanes-Oxley Act of 2002, which added requirements only to periodic reports under the Exchange Act.

- **Location and Deadlines for Providing Disclosures** – Because the disclosures are required in the annual report, they will be subject to the deadlines that otherwise apply to the annual report. This may be difficult to achieve, particularly in the first years of application.

  The release requests comment on whether the conflict minerals disclosure should instead be a new, freestanding report or filing on Form 8-K or 6-K, and whether, if required as part of the annual report, the disclosure could be provided through an amendment to the annual report within a specified period of time after the annual report due date. The latter alternative would be similar to the approach taken in Rule 3-09 of Regulation S-X, where certain financial statements required in an annual report on Form 10-K may in certain circumstances be provided as an amendment to the report within a prescribed time period after the end of the company's fiscal year.

SECTION 1503 – MINE SAFETY

Highlights of the Proposal

Affected companies:	• Any reporting company that operates or has a subsidiary that operates coal or other mines in the United States. • Generally includes foreign private issuers (except as to Form 10-Q and Form 8-K disclosures) and smaller reporting companies.
Disclosure location:	• Disclosures must be included in an exhibit to the annual report on Form 10-K, Form 20-F or Form 40-F, and to quarterly reports on Form 10-Q. • Some disclosures must also be included in current reports on Form 8-K within four business days of specified triggering events. • Disclosures are "filed" and automatically incorporated by reference in registration statements under the Securities Act. • Failure to file Form 8-K on a timely basis will not result in loss of Form S-3 registration statement eligibility.[8]
Timing:	• Disclosure is currently required under the Dodd-Frank Act. • The timing, including the effective date, of final rules is unclear, but companies should take the proposal into account in preparing their annual reports for the 2010 fiscal year.
Disclosure content:	• The disclosure must include information about certain orders, violations and citations regarding mine safety and health standards under U.S. Federal Mine Safety and Health Act of 1977[9] requirements, proposed assessments from the U.S. Labor Department's Mine Safety and Health Administration (MSHA) under the Mine Act, mining-related fatalities and pending legal actions before MSHA.

Issues under the Proposal

- **U.S. Mining Operations Only** – The proposal clarifies that the disclosure requirements apply only to coal and other mines located in the United States. Accordingly, the requirements apply to foreign private issuers if they have mining operations in the United States, but not to U.S. or non-U.S. companies with mining operations exclusively outside the United States. The Commission requests comment on whether the disclosure should

[8] Timely filing of reports on Form 8-K is also not relevant for Rule 144 eligibility.

[9] 30 U.S.C. 801 *et seq.* (the "Mine Act").

be expanded to mining operations outside the United States (focusing in particular on whether the existing disclosure requirement puts companies that operate U.S. mines at a competitive disadvantage) and, if so, what the basis for that disclosure should be, particularly if a jurisdiction does not have similar mine safety regulations.

The Commission also notes in the proposing release that to the extent information about mine safety issues for non-U.S. mines is material, it may already be required elsewhere in a company's reports (*e.g.*, MD&A, risk factors, business or legal proceedings). As noted elsewhere in the release, the same is also true of issues related to U.S. mines.

- **Definition of Subsidiary** – The proposal does not define the term "subsidiary," which the Commission notes would result in the application of the existing definition in Regulation S-X Item 1-02(x).[10] The proposing release requests comment on whether a different definition should apply. Commenters should focus in particular on whether this definition takes adequate account of issues of availability of information to, and control of operations by, the parent reporting company.

- **Requirement to Describe Categories of Disclosed Information** – To aid investor understanding, the Commission has proposed that companies briefly describe each category of order, violation or citation that they disclose. In their initial mine safety disclosures, many companies tried to develop a comprehensible format for this information, but we expect that this proposed addition to the mandated disclosure will entail expanded descriptions.

- **No Aggregation** – Following the statutory language and the Mine Act data available through MSHA's data retrieval system,[11] the release makes clear that the disclosure must be provided for each mine and that providing the disclosure for groups of projects or by geographic region is not permitted.

- **Contested Items Must Be Included But Additional Context Disclosure Permitted** – In response to advance comments, the proposed rules clarify that orders, violations or citations that a company is contesting must be included in the disclosure, even if they were dismissed or resolved during the period covered by the report. All orders, violations or citations received during the period must be disclosed (and in an annual report on Form 10-K, information must be provided for both the fourth quarter and the full year). The proposal clarifies, however, that additional information may be included to provide context for the required disclosure, so that companies may indicate that orders, violations or citations received were subsequently dismissed, reduced or otherwise resolved. This clarification is consistent with the approach that many companies took in their initial mine safety disclosures immediately following the enactment of the Dodd-Frank Act to include various additional information to provide context for the disclosures.

[10] Item 1-02(x) defines a subsidiary of a specified person as "an affiliate controlled by such person directly, or indirectly through one or more intermediaries."

[11] *See* http://www.msha.gov/drs/drshome.htm.

- **Disclosure of All Outstanding Assessments** – In addition to the total dollar value of assessments proposed by MSHA during the period covered by the report, as required by the Dodd-Frank Act, the proposed rules also require disclosure of the total dollar value of all outstanding assessments as of the last day covered by the report. As discussed above, this disclosure must be provided regardless of whether the company has challenged or appealed the assessment, although the proposing release again notes that additional context may be provided.

- **Pending Legal Actions** – The proposed rules require disclosure of the following information with respect to legal actions commenced during the period covered by the report: the date the action was instituted, the name of the instituting party, the name and location of the mine involved and the category of order, violation or citation underlying the action. In addition, companies would be required to disclose material developments to previously reported legal actions. These provisions expand the disclosures required by the Dodd-Frank Act.

- **Disclosure in Exhibit** – The proposed rules contemplate including the annual and quarterly report disclosures in an exhibit to those reports, with a reference to the existence of the exhibit in the body of the report. This represents a change from where most companies located their initial mine safety disclosures.

- **No Required Format** – The proposal does not require any particular format for the required disclosures, although it encourages tabular presentations. It also does not require the exhibit to be filed in XBRL or other interactive data format, although it requests comment on whether that type of format would be useful. The timing and other difficulties that companies have apparently experienced under existing requirements for filing in XBRL format can be expected to inform responses to this request for comment.

- **Treatment in Registration Statements** – Following the statutory provision, the disclosure is required only in periodic reports and current reports on Form 8-K. This information would be automatically incorporated by reference into a registration statement on Form S-3, but it would not be required in a long-form registration statement on Form S-1 (*e.g.*, in an initial public offering).

SECTION 1504 – PAYMENTS TO GOVERNMENTS BY RESOURCE EXTRACTION ISSUERS

Highlights of the Proposal

Affected companies:	• Any reporting company that is a "resource extraction issuer," defined as an issuer that is required to file an annual report with the Commission and that engages in the commercial development of oil, natural gas or minerals. • Includes foreign private issuers and smaller reporting companies.
Disclosure location:	• The statute requires that the disclosures be made in an interactive format, and under the proposal, disclosures must be included in two exhibits (one in HTML or ASCII format, the other in XBRL format) to the annual report on Form 10-K, Form 20-F or Form 40-F. • Disclosures are "furnished," not "filed," and are not automatically incorporated by reference in registration statements under the Securities Act.
Timing:	• The Commission must adopt rules no later than April 15, 2011. • The provisions will apply beginning with annual reports filed for the first full fiscal year ending on or after April 15, 2012.[12]
Disclosure content:	• The disclosure must report payments made during the fiscal year covered by the report to any foreign government or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals.

Issues under the Proposal

- **Relationship with Extractive Industries Transparency Initiative (EITI)** – Section 1504 derives from the Extractive Industries Transparency Initiative, a global initiative of a voluntary coalition of companies, governments, investor groups and non-governmental organizations. It is, however, different in many important respects from the kind of disclosure regime the EITI contemplates.

- **Definition of "Resource Extraction Issuer" –** The proposal relies on the statutory definition of "resource extraction issuer." The disclosure requirements will apply to foreign private issuers, which the proposing release explicitly states is required based on the statute and the legislative history. The release nonetheless seeks comment on whether the Commission should exempt foreign private issuers and permit them to follow home

[12] *See* note 3 above.

country rules. The release also notes that the requirements will apply to government-controlled reporting entities and asks whether they should be modified for those entities.

- **Definition of "Commercial Development"** – The proposal defines "commercial development of oil, natural gas, or minerals" to include "exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license of any such activity." This is broader than the language used in the context of the EITI, which is limited to exploration and production. The proposal notes that the term does not include transportation, or manufacture of equipment such as mining equipment. The inclusion of "processing" will lead to difficult questions, some of which the release notes, about what type of refining or processing activity triggers disclosure obligations.

- **Payments by Subsidiaries and Controlled Entities** – The proposed rules, tracking the statutory language, capture payments not only by the reporting company but also by its subsidiaries and entities under its control. The release notes that this includes entities that are consolidated for financial accounting purposes and can include other entities if the company has control over them. The release notes a number of questions about this concept, including its application to joint ventures and equity method investees.

- **Types of Payments Required to be Disclosed** – The list of types of payments and "other material benefits" that must be disclosed follows the statute closely.[13] The proposed rules include instructions stating that the list includes taxes on corporate profits, corporate income and production but not taxes levied on consumption, such as value added taxes, personal income taxes or sales taxes. The release also notes that disclosable payments do not include payments for infrastructure improvements and "social or community" matters, such as improving schools or hospitals.

  The proposal includes without elaboration the statutory criterion that payments are disclosable if they are "not *de minimis*." The release rejects the suggestion that this should be read to require only "material" payments, but it solicits comment on whether the Commission should include a definition or other guidance on the meaning of "not *de minimis*."

- **Aggregation** – The proposal follows the statute in requiring disclosure of payments to be broken down in various ways – by project, by government and by category – and requires information about the type and amount of payments, the period and currency in which the payments were made and the business segment of the company that made the payments. The release seeks comment on whether and how to define "project," and on the extent to which payments may be aggregated.

- **Definition of "Foreign Government"** – The proposal requires disclosure of payments to any foreign government, which is defined, following the statute, to include "a company

[13] The proposal defines "payment" as "an amount paid that (i) is made to further the development of oil, natural gas, or minerals; (ii) is not *de minimis*; and (iii) includes (A) taxes, (B) royalties, (C) fees (including license fees), (D) production entitlements, and (E) bonuses."

owned by a foreign government." An instruction states that this means "at least majority-owned." In many countries, this criterion will capture a variety of commercial entities exercising non-governmental functions.

- **Confidentiality** – A number of commenters have urged the Commission to provide some kind of accommodation when otherwise reportable payments are subject to legal or contractual confidentiality requirements. The proposal does not provide any accommodation in that case. The release questions whether an accommodation would be consistent with the statute, but requests comment on this issue, including how pervasive the problem may be and how the rules might address it.

- **Liability and Registration Statements** – The information required by the proposal would be "furnished" and not "filed" under the Exchange Act, and accordingly would not be subject to the liability provisions of Section 18 of the Exchange Act. It also would not be incorporated by reference into filings under the Securities Act unless the company elects to do so expressly, and is not required in a long-form registration statement on Form S-1 (*e.g.*, in an initial public offering).

- **XBRL Implementation** – The statute provides that the disclosure must be provided in an interactive data format, and the SEC proposes to use XBRL, which is now used for financial statements under the Exchange Act. The proposed rules specify the data to be "tagged" and contemplate that the corresponding technical specifications would be included in the EDGAR Filer Manual. The release seeks comment on whether XBRL is the most suitable interactive data format for this data, including whether the use of the XBRL taxonomy based on U.S. GAAP would be confusing for reporting payments that may not be computed in accordance with GAAP.

- **Location and Deadlines for Providing Disclosures** – Because the disclosures are required in the annual report, they will be subject to the deadlines that otherwise apply to the annual report. This may be difficult to achieve, particularly in the first years of application. As in the conflict minerals proposal, the release requests comment on whether the resource extraction payment disclosure should instead be a new, freestanding report or filing on Form 8-K or 6-K, and whether, if required as part of the annual report, the disclosure could be provided through an amendment to the annual report within a specified period of time after the annual report due date.

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Please feel free to call any of your regular contacts at the Firm or any of our partners and counsel listed under "Capital Markets" or "Corporate Governance" in the Practices section of our website (http://www.clearygottlieb.com) if you have any questions.

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