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Business Law Section
Securities Regulation Committee

March 1, 2011

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

Re: Release No. 34-63547 – Conflict Minerals (File No. S7-40-10)

Ladies and Gentlemen:

The Securities Regulation Committee of the Business Law Section of the New York State Bar Association (the "NYSBA Committee") is pleased to have the opportunity to comment on the proposed changes to the annual reporting requirements of issuers that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The NYSBA Committee is composed of members of the New York State Bar Association, a principal part of whose practice is in securities regulation. The NYSBA Committee includes lawyers in private practice and corporation law departments. A draft of this letter was reviewed by certain members of the NYSBA Committee. The views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Section 1502 raises a wide range of difficult issues touching upon many business and technical areas. While we understand from clients and others that compliance with the new requirements will be quite burdensome, many of the most challenging aspects are beyond our competence as securities lawyers. In this letter, we therefore focus primarily on those aspects of the proposed rules that touch upon the periodic reporting system under the Securities Exchange Act of 1934.

Our Overall Perspective

Section 1502 of the Dodd-Frank Act (like its sister provisions, Sections 1503 and 1504) presents the Commission with a new and unusual challenge. Section 1502 adds a new Exchange Act Section 13(p), which directs the Commission to require specific disclosures, but for a purpose that is fundamentally different from the purposes underlying the existing Exchange Act reporting system. Unlike the existing system, which focuses on information that is "material" to investors from a financial perspective, Section 13(p) requires disclosure of information designed to shed light on supply chain practices that may be contributing to a humanitarian crisis in Africa. Of course, there may be overlap between the two categories of information – for example, supply chain issues may involve questions as to materials availability or cost, or reputational risks, that could represent a material known trend or uncertainty for an issuer – but to the extent of that overlap, disclosure is already required under existing Exchange Act rules and forms. In our view, Section 13(p) is therefore best understood as focusing on other issues, and on dissemination of information to a broader audience, not limited to investors. The rules implementing Section 13(p) should focus on those other issues, and how best to collect, report and disseminate the information bearing on these other issues to the general public. At the same time, the Commission must be mindful of the need to avoid "information overload" in Exchange Act periodic reports, and to promote an organized and clear presentation of material information in those reports for the use of investors.

We think that several principles follow from this perspective. The Section 13(p) rules should not be shaped by what may be "material to investors", but should instead aim to disseminate the new required disclosures, in easily accessible form,

to the public at large. To the greatest extent possible, Section 13(p) disclosures should be kept separate from currently required Exchange Act disclosures. Ideally, rather than being "buried" in periodic reports, the Section 13(p) information would be submitted and available in a separate website location, designed to be readily accessible to and easily used by the general public. By the same token, we do not think issuers should be allowed to satisfy their existing disclosure obligations by referring to their Section 13(p) disclosures. Rather, they should be required to distill any information that would be "material" to investors and present it clearly under the relevant periodic report items. We believe that the foregoing approach would not only help preserve the focus of the existing Exchange Act reporting on information that is material to investors, but is in fact the best way to promote the purposes underlying Section 13(p), as well.

Issuers Covered

Given the constraints of Section 13(p), we generally agree with the approach the Commission has taken in terms of which issuers will be subject to the new reporting requirements. While we do not see a principled basis for excluding reporting foreign private issuers, we expect these new requirements will represent just one more strong disincentive for such issuers to access the U.S. markets, which we believe is a negative from the perspective of U.S. investors. On the other hand, we feel strongly that the Section 13(p) requirements should not be extended to foreign private issuers that rely on Rule 12g3-2(b). This would be inconsistent with the basic premise of 12g3-2(b) (which is to rely on home-country disclosure requirements for this category of issuer), and would be at variance with how that rule operates in all other respects. We also think imposition of these requirements would likely lead to a reduction in 12g3-2(b) filers, which would be a negative outcome for U.S. investors.

We have two other suggestions relating to which issuers are subject to the new reporting requirements. First, we suggest that majority-owned subsidiaries should be allowed to omit any Section 13(p) filing if the required disclosure appears in a parent-company filing. This would promote cleaner and simpler disclosure, with no resulting loss of information being reported. Second, we suggest that an exemption, or at least greater time to report, should be afforded to an issuer that has recently acquired

operations, or that holds relevant operations on a temporary or transitory basis (for example, a lender that forecloses on a company, or on individual assets or operations, that use conflict minerals). Otherwise, Section 13(p) reporting could become a factor in the timing of completely unrelated business decisions, which we think would be an unfortunate and unnecessary result.

Location of Disclosure

Given our overall perspective on Section 13(p), we feel strongly that the best approach would be to require this new disclosure to be set forth in a new, special-purpose report, which could be kept separate from existing, investor-focused reporting. This would not only minimize disruption to the existing Exchange Act reporting system; in our view, it would also better serve the objectives of Section 13(p) by promoting the accessibility of these new reports to the new and broader audiences interested in this disclosure. By adopting a new special-purpose report, the Commission could also avoid, or at least separately address, many of the serious issues – including, among others, timing of the new disclosure, and treatment of the new disclosure for liability and officer certification purposes – that are the subject of our comments below.

Alternatively, the Commission could add a new item to Form 8-K (and perhaps to Form 6-K) pursuant to which this disclosure could be furnished on an annual basis. This approach would make the new information relatively easy to find, and would also permit the segregation of Section 13(p) information from the balance of the issuer's Exchange Act disclosure which, for the reasons noted above, we believe is important.

That said, if the new disclosure is required to be included in Exchange Act annual reports, we think the proposed rules generally embody a reasonable approach. Consistent with our overall perspective, we think that any disclosure in the body of the annual report should be limited to a heading, in a precisely specified place, with either a negative conclusion or a cross-reference to a conflict minerals report ("CMR") filed as an exhibit, under a new, special-purpose exhibit number. We disagree with the requirement, in proposed Item 104(a) of Regulation S-K, that an issuer reporting a negative conclusion must also describe the reasonable county of origin inquiry it undertook; this goes beyond the statutory requirements and, we believe, serves no constructive purpose in the context

of the Form 10-K's investor- focused disclosure. Where the issuer is filing a CMR, there should be no need to further describe the CMR, as such, in the annual report. Of course, something addressed in the CMR might also be required, under existing rules, to be addressed as well in the body of the annual report, in which case that required disclosure should be set forth clearly in the appropriate places in the annual report. The presence of the CMR as an exhibit should not affect the disclosure requirements in the body of the annual report itself.

Other Implementation Points

We agree with the Commission that an issuer that determines, based on a reasonable country of origin inquiry, that its conflict minerals did not originate in "DRC countries" should not need to make any other disclosures with respect to its conflict minerals.

We also agree with the Commission that "certify the audit", as used in Section 13(p), should be understood to mean that the issuer certifies that it obtained the audit. This seems like the only reasonable interpretation, since an audit, by its nature, is a check of underlying information that the issuer itself has produced and is responsible for. And we agree with the Commission that no further formalities (such as officer certifications) should be required in connection with the filing of a CMR.

We strongly agree that CMRs should be treated as "furnished", not filed, for Exchange Act purposes. Since the purpose of CMRs (like the other Section 13(p) disclosures) is not to convey information material to investors, as such, issuers should not be responsible to investors under Exchange Act liability provisions for them. Nor should issuers be relieved of any obligation to make full disclosure to investors by reason of what they put in their CMRs. Once again, keeping the CMRs separate from the existing investor-focused disclosure of the Exchange Act reporting system would actually promote investor protection, by keeping the Exchange Act disclosure clear and focused.

For the same reasons, CMRs should not be required to be incorporated into any Securities Act or Exchange Act filings; indeed, as noted above, we believe they should not be permitted to be so incorporated. In this connection, we note that the audit

reports included in CMRs are qualitatively different from any expert reports included in Securities Act filings under current practice. Those existing reports are produced to support investor-oriented disclosure, while CMRs have an entirely different purpose. Inclusion of CMRs and related audit reports in Securities Act filings, in particular, will raise a host of nettlesome issues with respect to directors' and underwriters' due diligence obligations and liabilities, for no good reason.

In a similar vein, the Commission should amend Exchange Act Rules 13a-14(a) and (b) and 15d-14(a) and (b) to provide that the various officer certifications required by those rules do not extend to any CMR filed as an exhibit to an annual report. These certifications were designed in the context of the existing investor-focused Exchange Act disclosure system, and should not be carried over to the new and different Section 13(p) disclosures, at least not without fresh consideration of the purposes being served.

In terms of the timing of filing CMRs, we see no logical reason why it should have anything to do with current filing deadlines for Forms 10-K, 20-F and 40-F. We do not have a specific suggestion in this regard, but believe that it should be considered as an entirely new question, and suggest that the Commission be generous with the time period, given the novelty and complexity of this new disclosure. In order to facilitate compliance, the Commission might consider selecting a deadline for Section 13(p) that is out of phase with the Exchange Act annual report deadlines—for example, a date in the second half of the issuer's fiscal year. If the Section 13(p) information is required to be included in annual reports, the Commission should adopt a mechanism for adding the new required information on a delayed basis, similar to the prospective incorporation by reference of information from the issuer's proxy statement contemplated by General Instruction G. (3) of Form 10-K, or the prospective incorporation by reference of separate financial statements of unconsolidated entities contemplated by Item 3-09 of Regulation S-X. Whatever deadline is selected, we urge that the rules make clear that late filing of a CMR (i) would not affect an issuer's eligibility to use Securities Act Forms S-3 and F-3; (ii) would not render the issuer an "ineligible issuer" under Securities Act Rule 405; (iii) would not cause the current public

information condition of Securities Act Rule 144(c) to fail to be met; and (iv) would not preclude an issuer from satisfying the condition of Securities Act Rule 502(b)(2)(ii) in connection with an offering effected pursuant to Rule 505 or 506.

Respectfully submitted,

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