

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

2 March 2011

Conflict Minerals
(Release No. 34-63547)
Commission File No. S7-40-10

Dear Ms. Murphy:

Ernst & Young LLP is pleased to comment on the Securities and Exchange Commission's (the Commission or the SEC) proposed rule *Conflict Minerals*. The proposed rule, which responds to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or the Act), would impose new reporting requirements on issuers concerning the use of conflict minerals and whether they originated in the Democratic Republic of the Congo or an adjoining country. Our comments are limited to the aspects of the proposal related to the independent private sector audit requirement.

We understand that the proposed rule would require issuers to engage in a three-step process to determine the level of disclosures in their filings with the Commission. These disclosures aim to provide investors with an understanding of an issuer's use of minerals declared by the Secretary of State to be conflict minerals and whether such minerals are sourced from the Democratic Republic of the Congo or any of its adjoining countries (DRC countries). If an issuer determines that its conflict minerals are from the DRC countries, or concludes that it is unable to determine that such minerals did not originate from the DRC countries, the issuer would be required to furnish a Conflict Minerals Report to provide further disclosure of the following information:

- A description of the due diligence measures taken by the issuer on the source and chain of custody of the issuer's conflict minerals
- An independent private sector audit of such a report
- A certification by the issuer that it obtained an independent private sector audit of such a report
- A description of the issuers' products that are not "DRC conflict free"
- For minerals that are not "DRC conflict free," the facilities used to process those conflict minerals, the country of origin of those conflict minerals and the efforts of the issuer to determine the mine or other location where the minerals were sourced

Independent Private Sector Audit

Due Diligence Criteria

As it relates to the independent private sector audit of the issuer's report, the Act provides that the "audit" is to be conducted in accordance with standards established by the Comptroller General of the United States in consultation with the State Department. The proposed rule indicates that in the SEC staff's discussions with the United States Government Accountability Office (GAO) staff, the GAO staff believes no new standards would be required and that generally accepted government auditing standards (GAGAS), such as the standards for Attestation Engagements or standards for Performance Audits, would apply. GAGAS related to Attestation Engagements and Performance Audits require the existence of stated criteria, meeting specified suitability requirements, against which an auditor can perform an evaluation. However, the nature of the criteria is determinative of the type of engagement that can be performed by the auditor.

With respect to Attestation Engagements, GAGAS incorporates the American Institute for Certified Public Accountants' (AICPA) general standard on criteria, which requires that the criteria contain the following attributes:¹

- Objectivity - criteria should be free from bias
- Measurability - criteria should permit reasonably consistent measurements, qualitative or quantitative, of subject matter
- Completeness - criteria should be sufficiently complete so that those relevant factors that would alter a conclusion about subject matter are not omitted
- Relevance - criteria should be relevant to the subject matter

In addition, the criteria used are required to be available to users of the reports. Reports under Attestation Engagements provide the auditors' conclusion about the subject matter or the assertion in relation to the criteria against which the subject matter was evaluated.

With respect to Performance Audits, GAGAS defines criteria as laws, regulations, contracts, grant agreements, standards, measures, expected performance, defined business practices and benchmarks against which performance is compared or evaluated. The auditors' responsibility under these engagements is to obtain sufficient, appropriate evidence to support the findings in the report related to the criteria.

The proposed rule does not dictate the standard for, or otherwise provide guidance concerning, the due diligence that an issuer must use related to the evaluation of its supply chain. Instead, the proposed rule would require the issuer to disclose the due diligence it used in making its determinations, including for example, whether it used any nationally or internationally recognized standards or guidance of supply chain due diligence. For calendar-year issuers, these new processes and procedures would need to be in effect for the year ending 31 December 2012, which provides limited time to develop and implement appropriate due diligence procedures to comply with this new reporting obligation. Many companies would be conducting supply chain due

¹ AICPA Attestation standards - AT Section 101, "Attest Engagements," paragraph 24

diligence procedures for the first time and would not have the benefit of the experiences of others in applying the new standards or guidance.

The SEC should consider identifying a comprehensive framework to satisfy the criteria necessary to perform either a GAGAS Attestation Engagement or Performance Audit. The proposing release cites the Organization for Economic Cooperation and Development's (OECD) effort to develop due diligence guidance for conflict mineral supply chains. The SEC should consider whether the due diligence guidance issued by the OECD would provide a sufficient framework and, if so, reference to that guidance could be provided in the final rule.

Applicable GAO Standards

We are concerned that the lack of specificity as to the relevant GAO standards to be followed by the auditor could result in significant variability in the type of engagements performed by auditors, which would affect the nature and extent of procedures performed. In addition, we note that the reporting standards related to Attestation Engagements differ significantly from the standards related to Performance Audits. Therefore, to the extent an issuer may engage an independent private sector auditor to perform the conflict minerals audit under either set of GAO standards, investors would be provided with different types of auditors' reports. This could be confusing to investors and might result in them making inappropriate inferences about the nature and extent of due diligence performed by the issuer or the extent of assurance provided by the audit.

Accordingly, the SEC or Comptroller General should consider providing specific guidance to auditors regarding the appropriate standards to use in performing a conflict minerals audit. The SEC, along with the GAO and Department of State as appropriate, also should consider whether GAGAS alone provides appropriate guidance related to the performance and documentation standards associated with these engagements. This effort should consider whether the GAGAS general standards related to independence, competence and quality control and assurance are sufficient for engagements of this nature. The criteria, performance, documentation and reporting guidance associated with specialized GAGAS audits that are legislatively mandated are typically expressed through an audit guide developed by the appropriate agency.

Independence

The Commission should clarify the particular independence standards to which the independent private sector auditor would be subject. For instance, we note that GAGAS includes independence standards that generally extend beyond those required by the AICPA, but that are not identical to the SEC's independence requirements. Clarifying the relevant independence standards applicable in these engagements would avoid confusion regarding the level of independence of the third party performing the conflict minerals audit as compared to the independence of the issuer's registered independent public accounting firm.

The Act specifies that the issuer's report "shall not satisfy the requirements of the regulations" if the report itself "relies on a determination of an independent private sector audit," which suggests the issuer must reach its own conclusions in the report which is in turn subject to an independent audit. However, the SEC's proposal states that a certified audit would constitute a "critical component" of the issuer's due diligence in establishing the source and chain of custody of the

conflict minerals. This language in the proposing release could cause confusion as to the nature of the engagement and the role of the independent auditor if it is perceived to be a component of management's procedures.

Although the proposing release is silent as to the implications to the issuer's registered independent public accounting firm's independence if that firm also performed the conflict minerals audit, we believe the SEC should make clear that the external financial statement auditor would not be precluded from performing such an engagement. As a fundamental premise, the SEC should make clear that an issuer's use of a report rendered by an independent auditor does not impair the independence of that auditor. Moreover, we see no compelling reason for an independent private sector auditor performing a conflict minerals audit to be subject to more stringent independence criteria than those otherwise imposed by GAGAS (or SEC rules for that matter).

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We would be pleased to discuss our comments with the Commission or its staff at your convenience.

Very truly yours,

Ernst + Young LLP