

March 2, 2011

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

Re: File No. S7-40-10; Proposed Rule: Conflict Minerals

Dear Ms. Murphy:

Deloitte & Touche LLP appreciates the opportunity to respond to the request for comments from the Securities and Exchange Commission (the "SEC" or the "Commission") on the proposed rule contained in Release No. 34-63547, *Conflict Minerals* (the "Release").

The Release proposes 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 (the "Exchange Act") to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"). The proposed rules would require an issuer, including a foreign private issuer, to undergo a reasonable¹ due diligence process to ascertain whether (1) conflict minerals² are used in the manufacture of its products or (2) conflict minerals are necessary to the functionality or production of any of its manufactured products.³ If an issuer asserts that conflict minerals are used in, or are necessary to the functionality or production of, any of its products, then the issuer would be required to disclose in the body of its annual report on Form 10-K or Form 20-F ("annual report") whether its conflict minerals originated in the Democratic Republic of the Congo (DRC) or an adjoining country.

Furthermore, in addition to disclosure in its annual report, an issuer would also be required to furnish a separate report (the "Conflict Minerals Report") as an exhibit to its annual report when (1) an issuer concludes that conflict minerals are used in, or are necessary for the manufacture or functionality of,

¹ As further described in the Release.

² As noted in footnote 13 of the Release, "The term 'conflict mineral' is defined in Section 1502(e)(4) of the Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted; cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC countries."

³ The Release clarifies that the proposed requirements would also extend to products that an issuer has "contracted to be manufactured."

any of its products or (2) an issuer is unable to conclude whether any of the named minerals originate from the DRC or adjoining countries.⁴

The issuer's Conflict Minerals Report should include, among other items, a description of the measures taken by the issuer to exercise due diligence on identifying the source and chain of custody of its conflict minerals. These due diligence measures would include an independent private sector audit (IPSA) of the issuer's Conflict Minerals Report conducted in accordance with standards established by the Comptroller General of the United States ("Comptroller General"). Further, any issuer furnishing a Conflict Minerals Report as an exhibit to its annual report would be required to (1) certify, in its Conflict Minerals Report, that it obtained an IPSA of its Conflict Minerals Report, (2) furnish the auditor's report as an exhibit to its annual report, and (3) make the issuer's Conflict Minerals Report and the auditor's report publically available on the issuer's internet Web site.

We therefore understand that the Commission is required to promulgate rules that will require IPSAs to be performed in accordance with standards established by the Comptroller General. While our letter focuses on audit-related implications, fundamentally we believe that more guidance is needed for issuers to prepare their Conflict Minerals Report. With additional clarity in the nature, objectives, criteria, and evidence of the issuer's Conflict Minerals Reports, the independent private sector auditor would have better clarity on the type of audit procedures and reporting for its IPSA report. Consequently, our comments and observations mainly deal with implementation issues under the standards established by the Comptroller General and include both issuer-related considerations and audit considerations because of their interdependency. Our comments are in the following areas:

- The nature and form of the independent private sector audit.
- Suitable criteria.
- Sufficiency of evidence to support the assertion.
- Who may perform the IPSA engagement.

We believe that the Release intends for the level of assurance of the IPSA to be that of an audit rather than a review or agreed-upon procedures, but we believe that the final rule should state this. Furthermore, we believe the final rule should also clarify the nature and objective of the IPSA because the nature and objectives would directly impact the complexity, practicability, and level of effort involved for the IPSA. For example, it is unclear whether the objective of an IPSA is for the independent private sector auditor to opine on the accuracy and completeness of information within an issuer's Conflict Minerals Report or on the design and effectiveness of an issuer's process used to identify the origin of conflict minerals.

In addition, we support the Release's proposal to allow IPSAs to be performed either as examination attestation engagements or performance audits. However with regard to both examination attestation engagements and performance audits, we note that there is insufficient guidance regarding suitable and available objectives and benchmarks (i.e., criteria), and consequently there is not a consistent framework (1) for issuers to prepare their Conflict Minerals Reports and (2) against which independent private sector auditors need to perform the IPSA. We also believe that the final rule needs to provide additional guidance on defining what would constitute sufficient audit evidence.

⁴ Otherwise, the Release indicates that an issuer would not be required to furnish a Conflict Minerals Report; however, an issuer would nonetheless be required to disclose that conflict minerals are not used in, or are not necessary to, the manufacture of its products or that conflict minerals did not originate from the DRC or adjoining countries.

We believe that without additional clarity in the areas of objective, criteria, and evidence, there will be significant inconsistency and lack of comparability of information in issuers' Conflict Minerals Reports. In turn, we believe this will lead to inconsistency in the procedures that independent private sector auditors may perform and in the content of IPSA reports. We note an additional potential consequence that may result from a lack of suitable criteria or guidance around sufficiency of evidence, namely, that an independent private sector auditor may not be able to form an opinion on an issuer's Conflict Minerals Report. We therefore recommend that the final rule provide the criteria needed for issuers to prepare their Conflict Minerals Report and for independent private sector auditors to perform the IPSAs.

We also provide our observations below on matters such as training and peer review requirements, which are necessary to be able to perform the IPSA under the current standards of the Comptroller General. These requirements may impact who performs the IPSA engagement.

In addition, we do not believe that an external financial statement auditor's independence will be impaired if the auditor were also to perform the IPSA of the issuer's Conflict Minerals Report. We recommend that the Commission state this in the final rule and identify the independence standards that would be applicable to the independent private sector auditor.

We also support the Release's proposal to furnish to the SEC, rather than file, the Conflict Minerals Report and the IPSA report and that such reports would not be automatically incorporated by reference into filings under the Securities Act of 1933 ("Securities Act") or Exchange Act.

The Nature and Form of the Independent Private Sector Audit

As described in the Release, Section 13(p)(1)(A)(i) of the Exchange Act states that a Conflict Minerals Report must include "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an **independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States**, in accordance with the rules promulgated by the Commission, in consultation with the Secretary of State" (emphasis added).

Because Section 1502 of the Dodd-Frank Act stipulates that the IPSA is to be performed in accordance with the standards established by the Comptroller General, the Commission must also propose rules that are consistent with this provision of the Act. Accordingly the Commission would need to promulgate rules that require issuers to obtain IPSAs that are performed in accordance with standards set by the Comptroller General known as Government Auditing Standards (GAGAS) or "the Yellow Book"⁵ issued by the Government Accountability Office (GAO).

According to the Release, the staff of the GAO has informed the Commission staff that it preliminarily believes that no new standards need to be promulgated, but rather auditing standards that are currently part of GAGAS, such as standards for Attestation Engagements or standards for Performance Audits, will be applicable.⁶ As a result, in the absence of new standards, IPSAs would need to be performed under existing GAGAS. Following are nature and form (whether performed as an attestation engagement or a performance audit) considerations and recommendations related to the proposed rule's requirements that the IPSA be in accordance with GAGAS.

⁵ For additional information see <http://www.gao.gov/yellowbook>.

⁶ See Release No. 34-63547, Conflict Minerals, footnote 101.

I. Nature of the Independent Private Sector Audit

It is unclear from the Release if the independent private sector auditor would be required to issue an opinion on the content of the issuer's Conflict Minerals Report or the procedures that the issuer had in place to support assertions in the issuer's Conflict Minerals Report. There are numerous possible objectives that would differ based on the nature of the IPSA, some of which include the following:

- Whether the products included in or excluded from the Conflict Minerals Report were appropriate.
- Whether assertions regarding the origin of the conflict minerals are appropriate.
- Whether the issuer's description of procedures it used to form its due diligence procedures are fairly depicted in its Conflict Minerals Report and whether those procedures have been adequately performed.
- Whether the due diligence procedures designed by management and described in the Conflict Minerals Report were in conformity with a recognized standard of due diligence and whether those procedures were effective to support any conclusions asserted in the Report.

Accordingly, because each involves varying levels of complexity and would result in varying levels of efforts, we recommend that the Commission's final rule describes the nature of the IPSA. For example, we recommend clarifying whether the independent private sector auditor should opine on the information contained in the issuer's Conflict Minerals Report or on the design and effectiveness of the issuer's process to identify the origin of conflict minerals.

II. Form of the IPSA — Attestation Engagements and Performance Audits

We believe that the form of the IPSA should be specified and could be as an attestation engagement or performance audit. Below we provide observations about both.

(i) Attestation Engagements

Attestation engagements can take the form of an examination,⁷ a review,⁸ or an agreed-upon procedures⁹ (AUP) engagement. Because the Dodd-Frank Act requires an audit of the issuer's Conflict Minerals Report, we believe that the intention is that review and AUP attestation engagements are not sufficient to meet the Act's requirement because they do not provide "reasonable assurance" through the expression of an opinion. In addition, we believe that the use of the word "audit" in the Release

⁷ The goal of an examination, often referred to an "audit," is to express an opinion based on sufficient, appropriate evidence that assertions are not materially misstated and are fairly presented. For example, in a financial statement audit, an accountant expresses an opinion — on the basis of having obtained "reasonable assurance" — on whether the financial statements and related disclosures are fairly presented and not materially misstated.

⁸ Compared to audits, reviews are more limited in scope and only provide "negative" assurance such that based on the procedures performed, the accountant is not aware that any material modifications are required (e.g., to the financial statements and related disclosures in a financial statement review).

⁹ AUPs provide no level of assurance as these engagements consist of specified parties requesting an auditor to perform certain procedures that are identified and agreed upon as being sufficient by these specified parties for their own use. The auditor's report in this case provides no opinion or negative assurance and only reports the procedures performed and related findings. As a result, an AUP report's use is restricted to the specified parties.

indicates that it is intended for the work to be performed in accordance with a specific framework where an opinion is expressed based on conformity with specified criteria. Please see the “Suitable Criteria” section below for additional comments.

In addition, it is important to note that under GAGAS, examination attestation engagements may only be performed by licensed certified public accountants or persons working for a licensed certified public accounting firm or a governmental auditing organization.¹⁰ Please see the “Who May Perform the IPSA Engagement” section below for additional comments.

(ii) Performance Audits

Performance audits are engagements that provide assurance or conclusions based on an evaluation of sufficient, appropriate evidence against stated criteria that are determined specifically for that engagement, such as specific requirements, measurements, or defined business practices. Performance audits that comply with GAGAS provide reasonable assurance that evidence is sufficient and appropriate to support the auditor’s findings and conclusions. The sufficiency and appropriateness of evidence needed and tests of evidence vary based on the audit objectives, findings, and conclusions. Because objectives for performance audits vary depending on the specific engagement, they range from narrow to broad and involve varying types and quality of evidence.

In general, performance audit reports are required under GAGAS to include a description of the audit objectives, the scope, and the methodology used to address the audit objectives specifically defined for each particular engagement for report users to understand (1) the purpose of the audit, (2) the nature and extent of the audit work performed, (3) the context and perspective regarding what is reported, and (4) any significant limitations in audit objectives, scope, or methodology. The performance audit report is also required to present sufficient, appropriate evidence to support the findings and conclusions in relation to the audit objectives.

As a result of the possible variations in objectives that different issuers may use in preparing their Conflict Minerals Reports, the types of procedures performed and evidence obtained during an IPSA under performance audit standards may also vary significantly. Not only will the procedures and evidence vary from issuer to issuer, but the form of auditors’ reports will vary. Thus, IPSAs of Conflict Minerals Reports under performance audit standards are also likely to lack consistency and comparability among issuers.

(iii) Recommendation

Because examination attestation engagements and performance audits are very different in terms of their scope and report, we recommend that the SEC’s final rule clarify which type of audit is acceptable. In addition, we believe the final rule should clarify:

- That because of the limited nature of their procedures, review or AUP engagements do not provide sufficient levels of assurance to satisfy the objectives of Section 1502 of the Dodd-Frank Act, and
- That due to required restrictions on the use of AUP reports, AUP reports are also not appropriate for inclusion in SEC filings.

¹⁰ 3.44 Government Auditing Standards, July 2007 Revision.

We also recommend that the Commission identify objectives that are critical in achieving consistency and comparability in (1) issuer's Conflict Minerals Reports and (2) procedures and reports of independent private sector auditors, especially those related to performance audits, for the reasons we note above.

Suitable Criteria

Defining the nature and form of the IPSA would not be sufficient without also identifying criteria, consistent with specified objectives, for an independent private sector auditor to conduct the IPSA. Specified criteria do not currently exist for issuers to use in preparation of their Conflict Minerals Reports and for independent private sector auditors to evaluate an issuer's adherence to such criteria in performing the Release's proposed IPSAs whether as examination attestation engagements or performance audits. Similar to the structure of the "Form of the IPSA — Attestation Engagements and Performance Audits" section above, following are considerations with respect to the need for suitable criteria as they relate to both examination attestation engagements and performance audits.

(i) Attestation Engagements

The third general standard of the AICPA Attestation Standards, which is the foundation of the attestation standards in GAGAS, requires that the auditor have reason to believe that the assertion or subject matter (upon which the auditor is requested to opine) is capable of evaluation against criteria that are suitable and available to users.

Criteria are the standards or benchmarks used to measure and present the assertion or subject matter and against which the auditor evaluates the subject matter or assertion. Ordinarily, criteria that are established or developed by groups composed of experts that follow due process procedures, including exposure of the proposed criteria for public comment, are considered to be suitable.

According to AICPA Professional Standards, suitable criteria are (1) objective or free from bias, (2) measurable, (3) sufficiently complete so that relevant factors are not omitted, and (4) relevant.¹¹ In addition, criteria need to be made available to users (and may be done in various ways).¹² Otherwise, if criteria are available only to specified parties, the auditor's report is required to be restricted to those parties who have access to the criteria.

(ii) Performance Audits

Similar to attestation engagements, in a performance audit, GAGAS requires auditors "to identify the potential criteria needed to evaluate matters subject to audit."¹³ The criteria should be relevant to the

¹¹ AICPA Professional Standards, AT Section 101, *Attest Engagements*, paragraph 24.

¹² AICPA Professional Standards, AT Section 101, *Attest Engagements*, paragraph 33, indicates that criteria may be made available by being (1) publicly available, (2) available to all users through inclusion in a clear manner in the presentation of the subject matter or in the assertion, (3) available to all users through inclusion in a clear manner in the auditor's report, (4) well understood by most users, although not formally available, or (5) available only to specified parties.

¹³ 7.12(a) Government Auditing Standards, July 2007 Revision. In addition, 7.37 of Government Auditing Standards, July 2007 Revision states, "Auditors should identify criteria."

audit objectives and permit assessment of the audit objectives in a consistent manner across issuers. GAGAS identify criteria as laws, regulations, contracts, grant agreements, standards, measures, expected performance, defined business practices, and benchmarks against which performance is compared or evaluated.¹⁴

(iii) Recommendation

We recommend that the final rule provide guidance that would form a framework to aid both the issuer and the auditor. The framework should provide issuers with suitable criteria for the measurement and presentation of the information to be reported so that their Conflict Minerals Reports will be useful to users. Providing suitable criteria is also important so that each issuer is not left to creating its own criteria, as currently may be contemplated by the discussion in the Release.

Such criteria should be well understood and available to both issuers and users of the Conflict Minerals Reports. Common criteria for issuers will also provide a basis against which an auditor can measure the issuer's information provided in its Conflict Minerals Reports and is needed for independent private sector auditors to perform the IPSA regardless of whether through an examination attestation engagement or performance audit.

Sufficiency of Evidence to Support the Assertion

There could be inherent difficulties in tracing the conflict minerals and in obtaining sufficient appropriate evidence to opine on whether such minerals originated from the DRC or an adjoining country. This is especially critical if that evidence must consist of original supporting documentation and must extend through the supply chain to the lowest level of sourcing. For example, would it be acceptable for the issuer to obtain supplier certifications as to the source of the named minerals, or would the issuer need original shipping or other documentation from suppliers through to the sourcing country? The quality of the evidence that the issuer is able to obtain to support its findings as part of its due diligence process will affect the ability of the auditor to obtain sufficient appropriate evidence to support its opinion.

We would also like to point out a consideration related to situations in which an issuer is unable to determine that conflict minerals did not originate from the DRC or an adjoining country. The lack of clarity of what constitutes sufficient evidence may increase the likelihood that an independent private sector auditor may be unable to obtain sufficient appropriate evidence on which to base an opinion. In such circumstances, especially if the nature of the IPSA were on the content of the issuer's report and not the design of its process, we believe the independent private sector auditor may be required to issue a disclaimer of opinion stating that the auditor is unable to conclude whether the conflict minerals originated from DRC countries. We believe that such a report would be of little value to the reader.

We recommend that the Commission consider sufficiency of evidence when also considering the suitability of criteria and nature of the IPSA, as they are often interrelated.

¹⁴ 7.38 Government Auditing Standards, July 2007 Revision.

Who May Perform the IPSA Engagement

As discussed above, GAGAS state, “[a]uditors engaged to perform . . . attestation engagements should be licensed certified public accountants or persons working for a licensed certified public accounting firm or a governmental auditing organization.” In contrast, performance audits may be performed by other than licensed certified public accountants or persons working for a licensed certified public accounting firm, such as consulting firms. However, in all circumstances, each independent private sector auditor performing the attestation engagement or the performance audit in accordance with GAGAS is required to meet the continuing professional education (CPE) requirements of those standards, which includes CPE that directly relates to government auditing, the government environment, or the specific or unique environment in which the audited entity operates.¹⁵ This requirement currently also extends to experts¹⁶ who assist in the engagement. In addition, as a quality control measure, any organization performing attestation engagements or performance audits in accordance with GAGAS is also required to have an independent external peer review performed at least once every three years.¹⁷

Because the proposed rules would also apply to certain foreign issuers, a requirement that audits be performed in accordance with GAGAS and the related additional technical competence and peer review requirements would likely create a significant burden for audits of foreign issuers to which the conflict minerals provisions apply. Similarly, the peer review requirements could be burdensome to organizations that are not currently subject to peer review requirements.

We therefore urge the Commission to consider the impact of the GAO’s CPE, peer review, and other requirements that independent private sector auditors would be subject to under GAGAS to enable them to perform IPSAs under the Release.

Independence

We note that the proposed rule does not include discussion of independence matters related to the independent public sector auditor. We do not believe that the legislative intent was to preclude an issuer’s external financial statement auditor from performing its IPSA nor do we believe that independence would be impaired in this situation. We also believe that an independent private sector auditor should be subject to standards similar to those that currently exist under GAGAS, the AICPA, the PCAOB, and the SEC’s independence rules and regulations. Accordingly, we believe the final rule should clarify (1) the relevant independence standards applicable to IPSAs and (2) that the issuer’s external financial statement auditor’s independence would not be impaired if the external financial statement auditor were to perform the IPSA of the issuer’s Conflict Minerals Report.

¹⁵ 3.46 Government Auditing Standards, July 2007 Revision.

¹⁶ However, there are proposed revisions to Government Auditing Standards which, if approved, may eliminate this requirement for external experts that are engaged by the audit organization.

¹⁷ 3.55 Government Auditing Standards, July 2007 Revision.

Incorporation by Reference

We support the Release's proposal that an issuer furnish to the SEC, rather than file, the independent third-party audit report and that such report would not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act. We also support the proposition that the independent private sector auditor would not assume expert liability and that the issuer would not, therefore, have to file a consent from that auditor.

We thank you for your consideration of these matters and would welcome an opportunity to discuss these matters with the Commission and its staff. If you have any questions or would like to discuss these matters further, please do not hesitate to contact William Platt at (203) 761-3755 or John Fogarty at (203) 761-3227.

Very truly yours,

Deloitte & Touche LLP

cc: Mary L. Shapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
James L. Kroeker, SEC Chief Accountant