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June 30, 2011

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee" or "we") of the Business Law Section (the "Section") of the American Bar Association ("ABA") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its December 15, 2010 proposing release referenced above (the "Proposing Release"). The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

OVERVIEW

The principal requirements of the conflict minerals provisions set forth in the Proposing Release were prescribed by Congress in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Section 1502 added new Section 13(p) to the Securities Exchange Act of 1934 (the "Exchange Act"). We note at the outset that while this Committee fully supports and endorses the humanitarian efforts to end the armed conflict in the eastern Democratic Republic of the Congo, we are of the view that such efforts are best effected outside the scope of the

federal securities laws – for example, under the U.S. trade laws.[1] The Commission's historical mandate, as framed by Congress itself during the New Deal era and thereafter, has been to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. All securities legislation enacted prior to the Dodd-Frank Act was intended to serve one or more of those purposes. However, neither the statutory language nor the relatively sparse legislative history underlying Section 1502 of the Dodd-Frank Act mentions any of these purposes. Although we fully understand that socially conscious investors may consider conflict minerals information to be relevant to their investment decisions (as well as their decisions as consumers), we also believe that costs and other burdens that the conflict minerals provisions will impose on companies may not, in many instances, be in the best interests of investors. We recognize that these observations might be better directed to Congress rather than to the Commission, which may have little discretion under this highly prescriptive statute. However, these basic principles inform the comments set forth in this letter and underpin our general position that, in its rulemaking, the Commission should neither lose sight of the primacy of its historical investor protection mandate, nor impose obligations beyond those specifically mandated by Congress, particularly where investors' informational interests may not be advanced.

In this regard, we are especially concerned about the burdens that the rulemaking may impose on smaller reporting companies and on companies that may use little or no conflict minerals in their products but may nonetheless be subject to significant obligations because of their need to confirm the composition of all the products they manufacture, as well as the materials used in the manufacturing processes associated with those products. In addition, we believe that the Commission should consider whether its adoption of rules that are more prescriptive or burdensome than those being considered by foreign governments and international bodies could lead foreign private issuers to determine not to list or publicly offer their securities in the U.S. or, if they are currently subject to reporting under the Exchange Act, to terminate such reporting and leave the U.S. markets.

We agree with the Commission that imposing a more prescriptive series of requirements, such as adding additional definitions and specifying the scope of an appropriate country of origin inquiry and due diligence process, could encumber, rather than promote, companies' reporting efforts. The more flexible, organic approach based on a "reasonableness" standard that the Commission has proposed will support the continuing efforts of governmental and nongovernmental organizations ("NGOs") and by industry groups (some of which are working with the NGOs to develop a consensus on what constitutes adequate due diligence) to develop rigorous yet workable compliance standards. That said, we believe the proposed rules can be improved upon. Specifically, we urge the Commission to consider the following comments in formulating the final version of the proposed rules:

1. The Commission should not extend the conflict minerals reporting obligations to nonreporting companies.

[1] See, *e.g.*, The Clean Diamond Trade Act, Pub. L. No. 108-19, April 25, 2003, 19 U.S.C. 3901 *et seq*. (implementing the Kimberley Process Certification Scheme in the United States to end trade in so-called "blood diamonds" believed to fund armed conflict in certain African countries).

2. The Commission should adopt a reasonable *de minimis* standard for companies whose involvement with conflict minerals is truly minimal.

3. The implementation of the final rule should be deferred for smaller reporting companies, and phased in over time for all affected companies to allow for completion of various global initiatives now underway (OECD, UN Group of Experts, etc.).

4. The Commission should consider exempting "legacy" conflict minerals from the scope of the disclosure.

5. If the Commission is of the view, following the rulemaking process, that the application of the conflict minerals provisions would lead more than an insignificant number of foreign private issuers to leave the U.S. markets or not to enter the U.S. markets, the Commission should either exempt foreign private issuers from the application of the final rule or permit a foreign private issuer that is subject to and in compliance with conflict minerals reporting procedures under home-country (and/or primary market) requirements to be deemed to be in compliance with the provisions of Section 13(p) of the Exchange Act.

6. The Commission should allow companies (or certain categories of companies) to state that all, or certain categories of their products, may not be DRC conflict free, without their being obligated to engage in country of origin or source and supply diligence.

7. The Commission should specify certain activities that are not encompassed by the term "manufacture."

8. The final rule should not include mining issuers as manufacturers.

9. The Commission should limit the scope and application of the term "contract to manufacture."

10. The Commission should reconsider the form and the location of the conflict minerals disclosure and any required Conflict Minerals Report.

11. The Commission should not expand the content of the Conflict Minerals Report beyond the scope of the statutory language.

12. We suggest that the Commission reconsider the time period in which conflict minerals disclosure must be made.

13. We suggest that the Commission include a sunset provision in the final rule.

We also note that we support many of the provisions set forth in the proposed rule. In addition to the comments made generally in this letter, we note the following, which are discussed in detail below:

14. We support the Commission's determination not to define whether conflict minerals are necessary to the functionality or production of a product.

15. We support the Commission's proposals regarding recycled and scrap minerals.

16. We support the Commission's proposed standard for the country of origin inquiry.

17. We support the Commission's proposal with respect to the due diligence standard applicable to the Conflict Minerals Report.

SPECIFIC COMMENTS

1. The Commission should not extend the conflict minerals provisions to nonreporting companies.

We support the Commission's proposal to apply the conflict minerals provisions only to issuers that file reports under Sections 13(a) or 15(d) of the Exchange Act. Although we acknowledge that the Dodd-Frank Act is ambiguous on this point, in the absence of clear Congressional intent to require non-public companies to report annually to the Commission, the Conflict Minerals Provision should not be interpreted to apply to private companies. We believe this conclusion is supported, not only by the "provision's legislative background, its statutory location, and the absence of Congressional direction to apply these provisions to companies not previously subject to those rules" (as cited by the Commission in the Proposing Release), but also by reason of Section 1502(d)(2)(C)(ii)(I) of the Dodd-Frank Act, which contemplates a report by the Comptroller General with respect to companies that are not required to file reports with the Commission pursuant to Section 13(p)(1)(A) of the Exchange Act, even though conflict minerals are necessary to the functionality or production of a product manufactured by such person.[2]

In this context, we also agree that the conflict minerals provisions should not be extended to foreign private issuers that are exempt from Exchange Act reporting pursuant to Exchange Act Rule 12g3-2(b), or to subsidiary issuers and subsidiary guarantors that are not required to file annual reports pursuant to the provisions of Exchange Act Rule 12h-5 in situations where the parent company periodic reports include modified financial information as permitted by paragraphs (b) through (f) of Rule 3-10 of Regulation S-X. We assume for this purpose that the

[2] We also note that the pre-rulemaking letter dated October 4, 2010 submitted to the Commission by Senator Durbin and Representative McDermott, the principal sponsors of Section 1502 of the Dodd-Frank Act, states that "To conclude, the conflict minerals provisions in Section 1502 have a clear intent. All companies registered with the SEC need to determine the sourcing of conflict minerals in their products and disclose those sourced from the Democratic Republic of Congo or adjoining countries."(underlining added). We also note that while private companies will not be obligated to report to the Commission, many private companies will likely be obligated to engage in their own country of origin and supply source diligence in order to provide this information to their public company customers or to their customers who directly or indirectly supply goods to public companies.

parent disclosure would include any disclosures that the subsidiary would otherwise have been required to provide.

2. The Commission should adopt a reasonable *de minimis* standard for companies whose involvement with conflict minerals is truly minimal.

As the Commission notes in the Proposing Release, Section 1502 of the Dodd-Frank Act does not provide for a *de mimimis* standard regarding the amount of conflict minerals a company must use in order to be subject to the reporting requirements. The Commission has sought comment, though, on the appropriateness of such as standard, and we appreciate the opportunity thus provided to respond. Although companies using a minimal amount of conflict minerals may have a correspondingly lesser obligation with respect to reporting (and may be able to avoid reporting at all by eliminating their use of conflict minerals), we believe that it would nonetheless be appropriate for the Commission to adopt a *de minimis* exception for such companies. At a minimum, we believe that the costs that will be imposed on companies in order to comply with the conflict minerals provisions should not exceed the value of the conflict minerals they purchase or that are used in the manufacturing process. In this connection, the groups that have promoted the conflict minerals legislation appear to have focused their efforts on large-scale users of conflict minerals rather than on very small or incidental users – perhaps because change on the part of the largest users would have the most direct and immediate ameliorative impact on the DRC conflict, thus furthering the statute's core humanitarian objective.[3] We would therefore suggest that the Commission consider exempting from the scope of the proposed rules any company with respect to which the fair market value of the conflict minerals necessary for the functionality or production of its products is less than a specified *de minimis* amount, on an annual basis, or represents not more than a specified *de minimis* percentage of its annual revenues, whichever is greater.

3. The implementation of the final rule should be deferred for smaller reporting companies, and phased in over time for all affected companies to allow for completion of various global initiatives now underway (OECD, UN Group of Experts, etc.).

We strongly encourage the Commission, to the extent it believes it may have statutory authority to do so, to provide transition and liability relief to smaller reporting companies in order to lessen the burden and potential competitive harm of this new mandate. Even though the final rules the Commission adopts will be effective only for fiscal years beginning after the adoption date, as the Commission notes, the diligence and other standards that will apply to the reporting obligations are in effect in place now, and such standards will be in the process of development for some time. Although various industries and industry groups are making considerable progress in the development of standards, this progress is not universal. We believe there would be of significant benefit were the Commission to defer the implementation date of the conflict minerals provisions for smaller reporting companies at least for one reporting cycle, until the mechanisms for country of origin inquiries and source and supply reporting are

[3] See, for example, http://www.enoughproject.org/files/publications/Company%20Rankings%20summary%2012.13.pdf

sufficiently established to permit smaller companies to avail themselves of the diligence paradigms that will have been created. If the Commission does not defer the implementation, smaller reporting companies, with considerably fewer resources than larger companies, may be required to "go it alone" in designing and implementing their diligence activities. The cost of compliance could therefore represent a disproportionate burden on such companies (as a percentage of revenues) and such companies may be required to incur the cost of changing their procedures once more advanced compliance procedures are developed.

As discussed below, we urge the Commission to consider the adoption of a calibrated phase-in period for all affected issuers, regardless of size, to permit the development and implementation of global diligence standards. Such a period would also allow the U.S. Department of State and the Government Accountability Office ("GAO") sufficient time in which to publish the statutorily-prescribed guidance on appropriate diligence mechanisms, including the core independent third-party audit requirements applicable to Conflict Minerals Reports.

4. The Commission should consider exempting "legacy" conflict minerals from the scope of the disclosure.

The status of "legacy" conflict minerals provides additional challenges. As a result of the enactment of Section 1502 of the Dodd-Frank Act, significant attention is now being devoted to understanding and diligencing the conflict mineral supply chain. It is therefore possible that, for example, the provenance of a conflict mineral mined in, say, February 2012, will be reasonably traceable, from the mine, through the smelter, through the distribution chain to the supplier and finally to the manufacturer. However, the vast proportion of conflict minerals now in circulation do not have a provable provenance. What therefore may be possible in a few years, due to the availability of provenance information and certification systems, is now virtually impossible. We strongly urge the Commission to recognize this issue in its final rules, and provide that the conflict minerals to which the reporting obligation applies are only those conflict minerals mined after January 1, 2012. Insofar as the purpose of the conflict mineral provision is to decrease the demand for conflict minerals hereafter being mined in the DRC countries, the use of "legacy" conflict minerals will not be inconsistent with the humanitarian purpose of Section 1502. We suggest that issuers that use conflict minerals which they have a reasonable basis to believe were mined prior to January 1, 2012 be permitted either to omit disclosure with respect to such minerals, to state simply that the provenance of such conflict minerals is uncertain or to state that all the conflict minerals used in their products were mined prior to January 1, 2012.[4] Such issuers would be entitled to state that their products contain "legacy" conflict minerals, and would be under no further responsibility to address the source of such "legacy" minerals, or the products that used them, regardless of the date of manufacture.[5] Such issuers should not be obligated to furnish a Conflict Minerals Report. We believe this approach is consistent with the

[4] A reasonable basis may include, for example, a certification from the source of the conflict minerals that it held such conflict minerals in inventory prior to January 1, 2012, and has segregated from such legacy inventory all conflict minerals it received after such date.

[5] The accommodation for legacy conflict minerals would not, however, relieve issuers of the obligation to make full disclosure with respect to their use of conflict minerals mined after January 1, 2012.

statutory purpose of Section 1502, which is to encourage companies not to purchase minerals that fund armed groups in the DRC countries.[6]

5. If the Commission is of the view, following the rulemaking process, that the application of the conflict minerals provisions would lead more than an insignificant number of foreign private issuers to leave the U.S. markets or not to enter the U.S. markets, the Commission should either exempt foreign private issuers from the application of the final rule or permit a foreign private issuer that is subject to and in compliance with conflict minerals reporting procedures under home-country (and/or primary market) requirements to be deemed to be in compliance with the provisions of Section 13(p) of the Exchange Act.

Although we recognize that Section 1502 of the Dodd-Frank Act does not draw any distinction between domestic and foreign registrants, we believe that the Commission should consider in its final rulemaking the likely effect of the conflict minerals provisions on the willingness of foreign private issuers to enter into or remain in the U.S. securities markets. We believe strongly that the presence of foreign private issuers in the U.S. markets is beneficial to U.S. investors, who would be significantly disadvantaged were such issuers to cease their reporting obligations.7 If the Commission is of the view, following the rulemaking process, that the application of the conflict minerals provisions would lead more than an insignificant number of foreign private issuers to leave the U.S. markets or not to enter the U.S. markets, the Commission should consider exempting foreign private issuers (or specified categories of foreign private issuers) from the application of the final rule.

In this latter regard, we note that foreign governments or securities regulators may impose requirements that are comparable, even if not identical, to the Section 1502 provisions. We believe that the final rules should provide that a foreign private issuer that is subject to and in compliance with conflict minerals reporting procedures under home-country (and/or primary market) requirements would be deemed to be in compliance with the provisions of Section 13(p) of the Exchange Act, without the need to provide additional disclosure.

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[6] As difficult as it may be to determine the mining date of conflict minerals used in products, it could be even more difficult to determine the mining date of conflict minerals used in various manufacturing processes. The Commission should be sensitive to these considerations in its final rules.

[7] Were foreign private issuers to leave the U.S. markets, U.S. investors may not have the same quality of disclosure they would receive were the issuers reporting to the Commission on Forms 20-F or 40-F, may not be able to execute purchases and sales of the securities as efficiently, and may not have the same rights to bring claims against such issuers under the antifraud provisions of the U.S. securities laws. If the only trading market for the foreign private issuer's securities is outside the United States, pursuant to the Supreme Court's 2010 decision in *Morrison v. National Australia Bank*, plaintiffs may have no cause of action under Section 10(b) of the Exchange Act. The *Morrison* decision is available at http://www.supremecourt.gov/opinions/09pdf/08-1191.pdf

6. The Commission should allow companies (or certain categories of companies) to state that all, or certain categories of their products, may not be DRC conflict free, without their being obligated to engage in country of origin or source and supply diligence.

We suggest that the Commission consider permitting companies (or certain categories of companies) to state that all, or various categories, of their products may "not be DRC conflict free," without requiring country of origin or source and supply diligence and reporting. Our basis for this request is practical: notwithstanding their efforts, many reporting companies may be unable to obtain the required information. If, for example, a public company purchases goods that include conflict minerals from a supplier pursuant to a long-term supply agreement, the supplier may simply be unwilling to provide the requested information, and the public company may be unable to terminate the supply agreement without significant cost. Moreover, even absent a supply agreement, in situations where the supplier acquires its goods containing conflict minerals from sub-suppliers, the sub-suppliers may be unwilling to furnish such information (and the supplier may be unwilling to identify to the public company customer all its sources of supply). The stream would work back many levels, to the smelter or the mine. Although larger companies may have considerable influence over their supply chain, smaller companies may not.

If the Commission is unwilling to permit all issuers to state that all, or various categories of their products may not be DRC conflict free, it should consider permitting companies meeting certain criteria to do so. The categories might, for example, include companies having a market capitalization of less than a specified amount, companies whose use of conflict minerals does not exceed a specified amount, or foreign private issuers.

7. The Commission should specify certain activities that are not encompassed by the term "manufacture."

We concur with the Commission's decision not to define the term "manufacture" but instead to permit companies to rely on the common understanding of the term. Nonetheless, we believe the Commission should, either in the final rule or in the corresponding adopting release, provide additional guidance as to activities that will not be considered to be the manufacturing of a product for the purposes of the rule. In our view, the disclosure obligation should arise only where a registrant has sufficient involvement in the manufacturing process so as to influence the sourcing of components or raw materials that contain or consist of conflict minerals.

Manufacturing generally involves a number of discrete elements, including product planning, design and engineering, sourcing and procurement of raw materials and other components, assembly, testing, packaging, and shipping and distribution. An issuer that is engaged directly in all of these activities would clearly be considered to be engaged in the manufacture of its products. However, an issuer that is responsible for only some of these elements may not have a sufficient level of influence, involvement or control over the process to be able to control, in a meaningful manner, the use of conflict minerals, or to evaluate and influence the use of conflict minerals. For example, an issuer whose business involves only the final assembly of components provided by one or more third parties that it does not control may have no involvement in the sourcing or procurement of the components that it assembles, making

it difficult (if not impossible) for the issuer to reasonably ascertain the composition of the materials it assembles, the source of any conflict minerals used in the such materials, or the conflict minerals necessary to their manufacture. In a similar vein, companies involved only in product planning, design, engineering, testing, packaging, shipping and distribution would not be involved in determinations regarding the source of the conflict minerals.

In our view, companies that do not, directly or indirectly, have substantial influence, involvement or control over the sourcing or procurement of raw materials contained in or used in the production of a product should not be deemed to be manufacturers under the rule.[8] As such, the entity responsible for manufacturing the entire product would be deemed to be a manufacturer, and any contractor engaged by that manufacturer whose duties involve the sourcing or procurement of raw materials would also be a manufacturer. The host of entities that are engaged in other activities involved in the manufacturing process would not be so deemed. Conceptually, the ability of such companies to comply with the conflict minerals provisions would be no greater than the ability of the advertising agency that advertises the product, for example, to do so. Too broad a definition risks imposing unrealistic burdens on companies, and we therefore strongly encourage the Commission to specify the activities that would not be deemed to be manufacturing under the rule.

On the basis of the foregoing, we strongly encourage the Commission to revise proposed Instruction 1 to Item 104 and Item 16 to Forms 20-F and 40-F to specify that a registrant would not be considered to have manufactured or contracted to manufacture a product unless the registrant has substantial influence, involvement or control over the aspects of the manufacturing process, directly or pursuant to the terms of a contract, involving the sourcing or procurement of raw materials contained in the product or used in its production.

Further, although we acknowledge that the Commission has determined not to define the term "manufacture" because it has a common-sense meaning, certain classes of issuers may inquire as to the application of the scope of Section 13(p) to their activities. Accordingly, we believe that it would be helpful for the Commission to clarify in the final rule or accompanying release that the term "manufacturer" does not (absent special circumstances) apply to asset-backed issuers or such other categories of companies that the Commission acknowledges are not intended to be within the scope of the conflict minerals provisions.

8. The final rule should not include mining issuers as manufacturers.

Notwithstanding the Commission's statement in the Proposing Release that it is not defining the term "manufacturing" because its meaning is understood, the Commission states that a registrant that mines conflict minerals would be considered to be manufacturing those minerals. We do not concur with this view. Section 1502 of the Dodd-Frank Act refers only to manufacturers, and in our view a company engaged in mining ores is only extracting, and not engaged in manufacturing. Our comment is not merely technical, however. As one of the more prominent groups that have promoted (and been responsible for) the Conflict Minerals Provision

[8] These comments are also relevant to our discussion in Section 9 below regarding companies that "contract to manufacture" goods containing conflict minerals.

has stated, "Our objective was to have companies at the top of the minerals supply chain use their buying power to influence their suppliers, exerting pressure down the supply chain…"9 As should be clear, mining companies are not at the top of the minerals supply chain, but are at the very bottom. In the absence of clear Congressional authorization for such entities to be deemed to be "manufacturers," we do not believe that the Conflict Minerals Provision should apply to such entities.

If the Commission determines that mining companies are within the scope of manufacturers, we suggest that the Commission should make clear that companies that acquire and sell royalty interests in mines or mining companies, but which do not themselves operate or control mines, would not be deemed to be manufacturers. Such companies are only acquiring and trading rights to potential revenues, and not engaged in mining operations. This clarification would be important to such companies.

9. The Commission should limit the scope and application of the term "contract to manufacture."

We understand that the purposes of Section 13(p) could be easily subverted if a company could avoid disclosure merely by outsourcing production of a product to a third party. We therefore do not object, in principle, to the inclusion of a requirement that companies that "contract to manufacture" products containing conflict minerals should be subject to the statutory disclosure regime. We believe, however, that the scope of the proposed provision is overly broad, and recommend that the Commission limit the application of "contract to manufacture" in the final rule.[10]

First, we believe an issuer should only be deemed to be subject to the disclosure requirement if, pursuant to the contract with the entity that will engage in the manufacturing process, the issuer has a substantial level of influence, involvement or control over the manufacturing process itself. An issuer that specifies that a contractor will include tungsten, for example, in the product the contractor is to manufacture for the issuer would clearly be influencing the inclusion of a conflict mineral in its product. In addition, if the issuer can be reasonably expected to know that the product it contracts for will contain a conflict mineral, the issuer may be required to provide the conflict minerals disclosure with respect to that product. On the other hand, many issuers may purchase items pursuant to contract (including private brand items) under circumstances where they neither know nor should reasonably be expected to know the mineral composition of those items. This may include, for example, ordering goods from a catalog or other source where the only customization is the name (or brand) of the retailer. In our view, merely providing that an item that will be labeled with the issuer's name or a brand name used by the issuer should not, without more, be sufficient to deem the issuer to be engaged in a contract to manufacture – in this instance, the retailer it is essentially only purchasing the goods, rather than causing them to be manufactured. This may be the case even if

[9] Enough Project, "Getting to Conflict-Free: Assessing Corporate Action on Conflict Minerals", December 2010, available at http://www.enoughproject.org/files/publications/corporate_action-1.pdf

[10] We are assuming for the purpose of this discussion that any conflict minerals referred to are necessary for the functionality or production of a product.

the issuer has some involvement in the design of the item, so long as the design does not involve the exercise of substantial influence or control over the manufacturing process itself. Because such limited involvement should not, in our view, be equated with contracting to manufacture, we believe that the Commission should adopt more flexible standards in connection with the "contract to manufacture" prong of the disclosure obligation, that focus on the influence or involvement of the public company in the manufacturing process. Imposing these obligations on companies with little or not involvement in the manufacturing process will place considerable burdens on many companies that would not conventionally be considered to be contracting for the manufacture of goods.[11]

We recognize that, in enacting Section 1502, Congress expected that affected companies that may previously have been unconcerned with the provenance of the conflict minerals in their products or used in their manufacture, would use their market power to influence the sourcing of conflict minerals by their suppliers. We believe, however, that many manufacturers, either because they are party to existing binding agreements with suppliers, or because they do not have sufficient economic leverage over their suppliers (or their suppliers do not have sufficient economic leverage over their suppliers), may not be able to influence the process in the manner that Congress intended.

10. The Commission should reconsider the form and the location of the conflict minerals disclosure and any required Conflict Minerals Report.

We do not believe the conflict minerals disclosure or the Conflict Minerals Report, should be required to be submitted in the annual report. Regardless, however, where such information is provided, we concur with the Commission's proposal that the conflict minerals disclosure and the Conflict Minerals Report should be furnished rather than filed.

Section 13(p) of the Exchange Act only requires that the disclosure be provided annually, and does not state that the disclosure must be provided in the company's annual report. We are concerned that an issuer that is unable to obtain the necessary conflict minerals information in a timely manner (and to complete an audit of its supply chain and its Conflict Minerals Report, if necessary), would fail to file its annual report by the applicable filing deadline. Even if the issuer were able to provide this information, its preparation may delay (perhaps significantly) the date on which a filing would be made. Either a failure to file an annual report by the required deadline, or a delay in filing due to the time involved in preparing the required conflict mineral disclosures, would operate to the disadvantage of all investors. We therefore suggest that the Commission permit the conflict minerals information to be set forth in a furnished (i.e., not a filed) Report on Form 8-K (or Form 6-K in the case of a foreign private issuer), and that the filing deadline for the Report should provide an issuer a reasonable period of time in which to collect and analyze, under the requisite diligence standards, all required information with respect

[11] We also believe that it may be significantly less likely that an issuer that contracts with a third party for the manufacture of goods that do not themselves contain conflict minerals will know whether conflict minerals are necessary in connection with the manufacturing process.

to the use of its conflict minerals and their source, and to prepare all necessary reports.[12] We suggest that the Commission permit an issuer to furnish a Form 8-K (or Form 6-K) setting forth the disclosure that the Commission has proposed be included in the annual report not later than the end of the fiscal year following the fiscal year under review. If the Commission is not willing to permit the deferral of the annual report disclosure for this period of time, we request that the Commission consider permitting the Conflict Minerals Report, if required, to be furnished as an exhibit to an amended Form 8-K (or Form 6-K) submitted not later than the end of the fiscal year following the end of the year under review. Whether or not the Commission determines to adopt an extended time period as part of the general rule, we suggest that the Commission consider such an extended time period during the first year or two of the new rule's implementation, to permit companies an additional period in which to prepare their disclosures and to obtain (if required) an independent third party audit.

Further, we have the following additional observations:

(a) We do not see any particular benefit to grouping the conflict mineral disclosures together with the various specialized industry disclosures contained in Section 1503 and 1504 of the Act. Aside from dealing with minerals, these disclosures are unrelated to each other. A vastly greater number of companies is likely to be subject to the conflict minerals provisions than to either of the other two provisions. We therefore believe that the Commission's determination as to how the Section 1503 and 1504 disclosures are to be made should be unrelated to the determination as to where the Section 1502 disclosure should be provided.

(b) We do not believe that a company should be obligated to describe its reasonable country of origin inquiry in its annual report or in any other public document, other than in its Conflict Minerals Report, if it is required to provide one. The disclosure of the country of origin inquiry is not required by Section 13(p) and goes beyond the scope of the statutory mandate. We note that there is inconsistent language in the Proposing Release regarding whether additional disclosure would be required. For example, page 30 of the Proposing Release states: "Our proposed rules would not require an issuer who determines that its conflict minerals did not originate in the DRC countries, based on its reasonable country of origin inquiry, to provide any further disclosures." In contrast, page 28 of the Proposing Release says: "Further, the issuer would be required to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to determine that its conflict minerals did not originate in the DRC countries and maintain reviewable business records to support its determination."

[12] In addition, we see no basis in Section 13(p) to subject an issuer's principal executive officer and principal financial officer to potential civil or criminal liability with respect to the conflict minerals disclosure, which would be the effect pursuant to Sections 13a-14(a) or 15d-14(a) under the Exchange Act and 18 U.S.C. Section 1350 were such disclosures to be included in a Form 10-K , 20-F or 40-F. Such liability would not apply were the disclosures made on Form 8-K or 6-K.

(c) In addition, we do not believe that the Commission should impose any special recordkeeping requirements in this area. All public companies are responsible for having in place appropriate disclosure controls and procedures and may be called upon to substantiate their disclosure determinations. In our view, there is no appropriate basis for the Commission to single out this one matter for the purpose of imposing special recordkeeping requirements.

(d) The final rules should not require companies to provide any conflict minerals information in an interactive data format. The information regarding conflict minerals and the products containing them will, to a very large degree, be narrative rather than quantitative. Creating a new taxonomy and requiring companies to provide interactive disclosure based on such taxonomy would represent an unnecessary burden to companies. The purpose of the conflict minerals provisions is not to assist with financial or quantitative analysis, but to permit the general public (whether or not investors) to inform their purchasing and investment decisions based on the issuer's disclosures as to whether the products it manufactures contain conflict minerals sourced from the DRC countries. Such information will also be of interest to the NGOs involved in conflict minerals issues. The information relevant to these users will likely be the narrative descriptions, rather than information that can be captured in an interactive data format.

11. The Commission should not expand the content of the Conflict Minerals Report beyond the scope of the statutory language.

We support the Commission's proposal that each company should be allowed to describe its products that are not DRC conflict free in a way that is, in the company's judgment, most appropriate given the company's particular facts and circumstances. We also support the Commission's proposal to permit companies to refer to products that they cannot conclude are DRC conflict free using any wording they choose so long as the description is not misleading. However, we do not believe the Commission should expand upon the requirements set forth in the Act.

Accordingly,

- in specific response to Question 39, we do not support requiring issuers to disclose the facilities, countries or origin, and efforts to find the mine or location of origin for all conflict minerals, including those that are DRC conflict free – the obligation should be limited only to products that are "not DRC conflict free";

- in specific response to Question 40, we do not support requiring issuers to disclose the mine or location of origin of their conflict minerals with the greatest possible specificity (as the Act only calls for identification of the country of origin); and

- in specific response to Question 41, we do not support requiring issuers to include information on the capacity of each mine they source from or the weights and dates of individual mineral shipments.

We agree with the Commission's proposal to require that the audit be furnished as part of the Conflict Minerals Report. As proposed, for liability purposes, the audit report should be considered to be furnished (and not filed). We believe that Section 13(p)(1)(C) of the Act (entitled "Unreliable Determination") is sufficient to ensure audits are of a high quality, and accordingly do not believe the Commission should adopt any other specific requirements regarding the audit report.[13] We agree with the Commission that the audit report should not automatically be incorporated by reference into Securities Act filings, periodic reports or other filings. In this regard, we note that this audit report is different from other expertized reports due to the focus of this requirement. As the Commission has itself said, the "nature and purpose" of the conflict minerals disclosure is principally humanitarian, "which is qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act."[14] Further, we agree that the proposed certification of the audit should be provided in the name of the company, and believe that any authorized officer of the company should be allowed to sign on behalf of the company. We also believe the Commission should expressly provide that there is no private right of action against the auditor or the issuer with respect to the conflict minerals disclosures, the Conflict Mineral Report, the audit report or the certification.

12. We suggest that the Commission reconsider the time period in which conflict minerals disclosure must be made.

(a) Timetable for the submission of conflict minerals disclosure and the Conflicts Mineral Report.

We recommend that the Commission consider requiring that the prescribed conflict minerals disclosures be furnished pursuant to a Form 8-K or 6-K, with a deadline that is not tied to the deadline for filing an annual report on Form 10-K, 20-F or 40-F. An extension would provide companies sufficient time to prepare any necessary disclosure and to procure an independent third party audit (if required) of such disclosure, without risking delay in the filing of the annual report. This is especially important because the disclosure obligation entails the collection of information from unaffiliated third parties, which may include multiple levels of suppliers (many of which may not be in contractual privity with the issuer). This obligation will extend through the entire supply chain to the smelter, refiner or the mine, the requested additional time would enable companies to seek, and hopefully to obtain, the required

[13] We recommend that the Commission provide some guidance, either in the final rules or the accompanying adopting release, as to what factors the Commission might consider in determining whether a particular audit is "unreliable." It may also be helpful for the Commission to consult with the GAO and ask the U.S. Comptroller to state specifically which GAO audit and/or attestation standards apply in this context, and how the "independence" of the auditor should be defined.

[14] Proposing Release at 51, footnotes omitted.

information, as well as enable the performance of any required audits. As noted above, the purpose of the conflict minerals provisions is humanitarian and different in nature and purpose from the information the Commission has required under the periodic reporting provisions of the Exchange Act. Imposing a reasonable annual disclosure obligation would be consistent with the statutory mandate; imposing a more stringent obligation than is required by Section 1502 would only further burden reporting companies, causing them to redeploy resources that might otherwise be necessary to permit them to meet their existing annual report obligations.

(b) Phase-in of the conflict minerals requirements

(i) Availability of Diligence and Auditing Standards

The Conflict Minerals Report is required to describe the measures taken by the issuer to exercise due diligence on the source and chain of custody of conflict minerals, which includes an independent private audit as a "critical component" of the diligence process. The audit is to be conducted in accordance with standards established by the Comptroller General of the United States in accordance with rules promulgated by the Commission in consultation with the Secretary of State. It would be highly desirable for the GAO guidance on these standards to be issued on or prior to the adoption of the final rules by the Commission. However, if such guidance is not issued prior to the date the Commission adopts its final rules, we believe it would be appropriate for the Commission to either defer the audit requirement until such time as the auditing standards are adopted and can reasonably be implemented, or deferred until an issuer's subsequent fiscal year commencing not less than a reasonable period of time after the standards provided for in Section 13(p) have been established.

Additionally, establishing known, auditable supply lines may require significant changes by issuers, and within the relevant industries, and may take a substantial period of time. Among other things, existing supply agreements may need to be revised or new agreements entered into. We therefore strongly encourage the Commission, prior to the adoption of its final rules, to consult with relevant industry groups to confirm that the standards the Commission will adopt are in fact able to be complied with. The adoption of requirements that may not be achievable will neither be in the interests of the proponents of the conflict minerals provisions, nor of the public companies which would be subject to such standards.

(c) Relationship to Department of State Obligations

Among the requirements that Section 1502 imposes on the U.S. Department of State are the following (both of which were required to be completed within 180 days of enactment of Dodd-Frank) are the following:

a. The Secretary of State shall submit to Congress a strategy that includes "[a] plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations."

b. The Secretary of State shall produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries.

This information produced by the Department of State will be extremely important in the efforts of issuers to understand and comply with their conflict minerals obligations. We therefore recommend that the Commission consider deferring the implementation of its rules until a reasonable period of time after the Department of State has published the mandated strategy and map, and related guidance.

(d) Phase In Period After an Acquisition

We suggest that Commission consider providing in its final rules that if a reporting person has acquired a company that manufactures (or contracts for the manufacture of) products that may use conflict minerals, the issuer should not be obligated to report with respect to the products manufactured by or for the acquired entity until the first fiscal year beginning after the fiscal year in which the acquisition is consummated. Imposing an earlier requirement would be unnecessarily burdensome on such an issuer, which likely will not have adequate time to diligence the acquired entity's use of conflict minerals and include such information in its annual report. Our recommendation with respect to this accommodation should be broadly drafted to include all forms of acquisitions and business combinations, whether or not they involve the parent issuer as a constituent entity.[15]

13. We suggest that the Commission include a sunset provision in the final rule.

In view of the clear statutory provisions with respect to the termination, revision and waiver of the Conflict Minerals Provision, we do not believe that the Commission needs to adopt rules specifically addressing these circumstances, other than perhaps a sunset provision to automatically terminate or revise the rule-based disclosure under paragraph (4) of Section 13(p) should the President exercise his statutory authority to terminate the conflict mineral disclosure requirements. A provision of this nature would eliminate the need for additional Commission rulemaking to implement any Presidential order.

14. We support the Commission's determination not to define whether conflict minerals are necessary to the functionality or production of a product.

We support the Commission's proposal to not define "necessary to the functionality or production" of a product. We believe that this determination should be made by each issuer, which is most familiar with its own products and their manufacturing processes. In this regard, we believe there is a reasonable basis to interpret the term "necessary to the functionality" as referring to situations where conflict minerals are both (i) intentionally incorporated into a company's manufactured products and (ii) necessary to the product's functioning, and the term

[15] For a somewhat analogous situation involving the application of the disclosure requirements relating to internal control over financial reporting in the context of an acquisition, please see Question 3 of the "frequently asked questions" relating to internal control, published by the Office of the Chief Accountant and by the Division of Corporation Finance, available at http://sec.gov/info/accountants/controlfaq.htm

"necessary to the production" as referring to conflict minerals that are used and consumed in the process of manufacturing a company's products (and therefore are not an actual component of the finished product). Although some commenters have urged the Commission to adopt a very expansive view of the phrase "necessary to the functionality," we believe the Commission should prudently demur from doing so, and instead permit issuers to consider the reasonable application of the statutory language in the context of their own products.

15. We support the Commission's proposals regarding recycled and scrap minerals.

We support the Commission's proposal to provide special consideration to issuers whose products use recycled or scrap minerals by permitting these minerals to be deemed to be "DRC conflict free." As the Commission stated in the Proposing Release, "Given the difficulty of looking through the recycling or scrap process, we expect that issuers generally will not know the origins of their recycled or scrap conflict minerals, so we believe it would be appropriate for our proposed rules to require that issuers using recycled or scrap conflict minerals furnish a Conflict Minerals Report subject to special rules." Absent this accommodation, the disclosure regime would place an undue burden on issuers using recycled or scrap minerals. Further to this point, in our view, an issuer whose products use conflict minerals that are exclusively recycled or scrap should not be required to provide a Conflict Minerals Report, but should be able to satisfy its disclosure obligations by stating that the only conflict minerals used by the issuer in the manufacture of its products are obtained from processors of recycled or scrap minerals. We agree that companies should be required to make appropriate inquiries, as part of its due diligence process, to support this determination.

16. We support the Commission's proposed standard for the country of origin inquiry.

We concur with the Commission's view not to define what would constitute adequate diligence in connection with the country of origin inquiry. Companies should have the ability to make their own determinations as to what constitutes a reasonable country of origin inquiry based on all relevant facts and circumstances and the evolution of standards over time. For example, we believe that in many cases it may be reasonable for companies to rely on representations from their business partners that they believe in good faith to be truthful. We commend the Commission for not taking a more prescriptive approach to defining what constitutes a reasonable inquiry in this context.

As the Commission notes in the Proposing Release, a reasonable inquiry does not require absolute certainty about the conclusion and, therefore, a company's statement of its conclusion should not be required to be presented as if absolute certainty exists. Accordingly, a company should be allowed to state that its disclosure is based on the company's knowledge following a reasonable inquiry.

17. We support the Commission's proposal with respect to the due diligence standard applicable to the Conflict Minerals Report.

Consistent with our recommendation that the Commission not attempt to define what constitutes a reasonable country of origin inquiry, we support the Commission's determination

not to prescribe a due diligence standard with respect to the Conflict Minerals Report. As with other disclosure requirements and situations where due diligence is required, companies should have the ability to make their own reasonable determinations as to what constitutes a reasonable due diligence investigation based on all relevant facts and circumstances and the evolution of standards over time.

In addition, we encourage the Commission to provide some guidance, either in the adopting release or in some other form, with respect to the factors the Commission may consider relevant to deeming an audit, described as a "critical component" of the diligence process, to be "unreliable" within the meaning of Section 13(p)(1)(C).

Subject to the comments above which encourage the Commission to consider certain exceptions to the requirement to provide a Conflict Minerals Report, we believe the proposed approach, requiring issuers that are unable to determine that the conflict mineral in their products did not originate in the DRC countries to submit a Conflict Minerals Report providing the required information that is available to them, is reasonable.

* * *

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
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Chair of the Federal
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