Schulte Roth&Zabel

Public Company Hot Topics

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1. About the Speakers

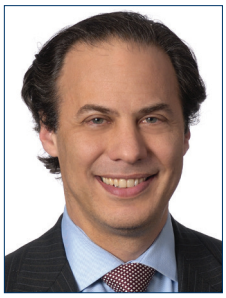
Michael R. Littenberg

Partner
Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
+1 212.756.2524 | michael.littenberg@srz.com

Michael R. Littenberg is a partner in Schulte Roth & Zabel's Business Transactions Group and heads the firm's public companies practice. His principal areas of focus are corporate finance — across a broad range of equity and debt products — and mergers & acquisitions. As a significant part of his practice, Michael also counsels both domestic public companies and foreign private issuers and their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank, Sarbanes-Oxley and the JOBS Act, and with exchange requirements, as well as on governance and executive compensation matters. His public company clients range from well-known large-cap companies to growing micro-cap companies and his experience spans every major industry.

Michael is a frequent speaker at conferences and seminars, has authored numerous articles and is frequently quoted as an expert in the business and specialty press on topics pertaining to his areas of expertise. Michael is listed in *Who's Who in Securities Law* and in *New York Super Lawyers* for securities and corporate finance. Michael was recently voted by his peers to New York Super Lawyers Top 100 Lawyers in the Metro New York area.

Michael received his J.D., *magna cum laude*, from Tulane University Law School, where he was an editor of the *Tulane Law Review* and a member of the Order of the Coif, and his B.S. from Indiana University.



Michael E. Swartz
Partner
Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
+1 212.756.2471 | michael.swartz@srz.com

Michael E. Swartz is a partner at Schulte Roth & Zabel, where he focuses his practice on complex commercial, securities and business litigation and antitrust law. His litigation practice includes class actions, proxy contests and other corporate-control disputes, professional liability, international litigation and arbitration, and executive compensation and "say on pay" issues — including his recent defense of H&R Block in a shareholder suit challenging disclosures made in the company's proxy statement with regard to say on pay and approval of a long-term incentive plan, pursuant to which additional shares of the company's common stock may be granted.

Michael's antitrust practice involves the representation of companies across a wide range of industries, including private equity firms, financial services firms, rating agencies, defense industry companies, payment card companies, auto manufacturers, car rental companies and supermarkets, among others.

Michael recently co-authored the article "In What Circumstances May Hedge Fund Investors Bring Proceedings in the Name of the Fund for a Wrong Committed Against the Fund, When Those in Control of It Refuse to Do So?" for *The Hedge Fund Law Report* and authored the chapter on "Information Sharing with Market Professionals" in the *Insider Trading Law and Compliance Answer Book*, published by Practising Law Institute. His work has been recognized by his peers and clients in *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys* and *New York Super Lawyers* in the area of business litigation, and he is the Regional Vice Chair for the Mid-Atlantic Region of the Lawyers' Committee for Civil Rights Under Law.

A former law clerk to the Hon. Irving R. Kaufman, Circuit Judge for the U.S. Court of Appeals for the Second Circuit, Michael obtained his J.D. from Columbia Law School, where he was editor of the *Columbia Law Review*, and his B.A., *magna cum laude*, from the University of California, Los Angeles, where he was elected to Phi Beta Kappa.

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2. About the SRZ Capital Markets Practice

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Capital Markets Practice

SRZ offers a full-service capital markets practice that provides transactional and ongoing advice through all stages for companies of all sizes. With extensive depth of experience and senior-level attention, we represent U.S. and non-U.S. issuers, investment banks and investors in connection with U.S. and global capital markets transactions, including SEC registered, Regulation D, Rule 144A and Regulation S offerings. Our expertise spans an extensive range of equity and debt products, including initial public offerings, investment grade and non-investment grade debt, SPACs, BDCs and other permanent capital vehicles, trust preferred securities, preferred stock, equity-linked securities, PIPEs, CMPOs, ATMs and registered direct offerings.

In addition to our transactional capital markets practice, we counsel public companies, their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank and Sarbanes-Oxley, and with exchange requirements, as well as on governance and executive compensation matters. We closely monitor and advise our public company clients on rule-making initiatives and evolving best practices.

We have experience in every major industry, including apparel, automotive, aviation, biotechnology, broadcasting, business services, computer hardware, consumer services, defense, energy, entertainment, financial services, food and beverage, government services, healthcare, information technology, insurance, manufacturing, media, natural resources, real estate, restaurant and hospitality, retailing, shipping and logistics, software, technology and telecommunications.

Our public company clients range from well-known large-cap companies to growing micro-cap companies. We are able to leverage our experience to efficiently advise companies of any size. In addition, we have been pre-cleared by the OTC Markets Group to act as an Attorney Designated Advisor for Disclosure/Principal American Liaison (DAD/PAL) for OTCQX companies.

We frequently publish *Alerts* and hold seminars on developments affecting public companies. To join our Public Companies mailing list, please visit our subscriptions page at **www.srz.com/news/subscription.aspx**.

Contact:
Michael R. Littenberg, Partner
+1 212.756.2524 | michael.littenberg@srz.com

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3. About the SRZ Litigation Practice

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Litigation

SRZ's litigation group serves a wide range of local, national and international clients, including public and private corporations and their officers and directors, investment banking firms, brokerage firms, commercial banks, investment advisers, public accounting firms, insurance companies, law firms, partnerships, individuals and public interest organizations. Our clients benefit from our extensive trial experience and proven track record of success in complex civil and criminal matters, as well as our negotiation and dispute resolution expertise.

There are more than 75 litigators in the firm, some in general litigation and others in highly specialized areas, including antitrust, securities law, internal investigations, complex corporate litigation, trust and estates litigation, real estate litigation, white collar criminal defense/regulatory enforcement, and bankruptcy, reorganization and creditors' rights litigation. Among our litigators are numerous former assistant U.S. attorneys, state prosecutors and senior members of the Enforcement Division of the Securities and Exchange Commission.

Securities Law Regulatory Enforcement

Schulte Roth & Zabel has earned an outstanding reputation for its work in securities regulatory and enforcement matters. The firm's deep bench of experienced partners includes three former members of the Securities and Exchange Commission's Division of Enforcement; seven former prosecutors from U.S. Attorney's Offices, including former chiefs of Appeals and Major Crimes Units; and a number of former regulatory counsel for major investment banking institutions. Clients have included many leading financial institutions, including hedge funds, funds of funds, private equity funds, investment advisers, investment banking firms and Nasdaq market-makers, institutional and retail brokerage firms and their registered representatives, trade execution and clearing firms, prime brokerage firms and national accounting firms, as well as numerous public and private companies and their senior officers, in investigations and enforcement actions brought by the U.S. Securities and Exchange Commission (SEC), Department of Justice (DOJ), Commodity Futures Trading Commission (CFTC), Financial Industry Regulatory Authority (FINRA), regional exchanges, and state attorneys general and securities regulators. These matters range from informal inquiries and formal investigations to administrative proceedings and judicial enforcement actions.

With several former government lawyers providing inside experience and enhanced credibility with regulators, and the firm's longstanding financial services focus, SRZ's securities regulatory and enforcement team combines a practical understanding of key government agencies with a commanding knowledge of the financial industry. To put the resources of the entire firm at our clients' disposal, our securities litigators regularly team with lawyers in the firm's investment management, white collar criminal defense and tax groups, among other areas of expertise within the firm. SRZ's securities regulatory litigators have substantial trial experience, including an impressive record of litigating to a successful conclusion numerous SEC enforcement actions, SRO proceedings and FINRA arbitrations. In fact, our lawyers were responsible for one of the most important securities enforcement trial victories in recent times: the exoneration of Kenneth Pasternak, the former CEO of Knight Securities, the largest Nasdaq market-making firm, in connection with an action brought by the SEC in New Jersey federal court. The SEC alleged that Joseph Leighton, one of Knight's institutional sales traders, overcharged the firm's institutional customers in executing their orders to purchase or sell Nasdaq securities, and that Mr. Pasternak, as CEO, and John Leighton, Joseph's brother and supervisor, participated in and aided and abetted Joseph's alleged violations of the securities laws. After a 14-day bench trial,

the court concluded that the SEC failed to prove that Joseph committed any fraud and completely cleared Mr. Pasternak of any wrongdoing.

In the past year alone, SRZ's lawyers have represented clients in connection with investigations, litigation and regulatory proceedings involving a wide variety of areas, including alleged insider trading, market manipulation through dissemination of rumors, "pay to play," sub-prime, auction rate securities, accounting restatements, potential liability from the provision of prime brokerage services, functioning as an unregistered broker-dealer, supervision of broker-dealer divisions and personnel, and securities registration issues arising out of private investments in public equity (PIPE) offerings, among other areas.

Securities Litigation

SRZ's litigators combine substantive knowledge of the financial markets and the securities industry with a practical understanding of key government agencies and self-regulatory organizations. With three former members of the Securities and Exchange Commission's Division of Enforcement and seven former members of United States Attorneys Offices, our lawyers bring valuable "inside" experience to all the matters we handle. Our attorneys also have extensive experience in securities regulatory investigations and enforcement actions and complex securities litigation, including defending clients in numerous class actions and shareholder derivative suits. Among the diverse group of clients for which we have handled such cases in federal and state courts throughout the country are some of the world's largest broker-dealers (Goldman Sachs, Merrill Lynch, Credit Suisse, J.P. Morgan, Morgan Stanley, UBS PaineWebber, Knight Securities), clearing firms (Bear Stearns/J.P. Morgan, Spear, Leeds & Kellogg, Pershing, LaBranche), investment companies (Vanguard, Federated), investment banks (Royal Bank of Scotland, Lehman Brothers, Citigroup), fixed-income trading firms (Cantor Fitzgerald, Greenwich Capital), private investment funds (hedge funds, funds of funds and private equity funds), Fortune 500 public companies (Duke Energy, Comverse Technology), numerous small- and medium-sized enterprises, and officers and directors.

Always on the lookout for opportunities to resolve cases early, we frequently succeed in obtaining dismissals, summary judgments and denials of class certification. We are, however, always prepared to take cases to trial, and often do so. In fact, our partners prevailed in two of the most high-profile securities trials in recent years: a fraudulent transfer case against Bear, Stearns Securities Corp. brought by the bankruptcy trustee for the collapsed hedge fund, Manhattan Investment Fund, Ltd., and a Securities and Exchange Commission action against Kenneth Pasternak, the former CEO of Nasdaq market maker Knight Securities, who was alleged to have aided and abetted a trader who was alleged to have overcharged institutional customers in executing their buy and sell orders. We also recently won arbitrations on behalf of Emmet A. Larkin Company Inc., a San Francisco broker-dealer that was sued by investors claiming they had been defrauded of their life savings, and Ridge Clearing & Outsourcing Solutions Inc. against Argent Capital Management involving a dispute over a clearing arrangement. We also recently represented the former chief financial officer of Paris-based media conglomerate Vivendi Universal SA in connection with various actions alleging securities and financial fraud. This was the largest federal securities class action to ever go to trial and resulted in a jury verdict completely exonerating our client.

Complex Commercial Litigation

Our representation of corporations and their officers and directors in complex litigation spans a wide range of substantive issues that we handle on a regular basis. These include claims of fraud, breach of fiduciary duty, or aiding and abetting; matters of ownership and governance, such as shareholder agreements, tender offers, proxy contests, consent solicitations and other activist strategies; disputes over the rights and obligations created by contracts to which a corporation may be a party, such as financing, joint venture, research and development, and licensing;

class actions and derivative suits challenging the manner in which officers and directors have conducted the business of publicly held corporations; fraudulent transfer actions challenging the validity of corporate transactions; and antitrust and other trade practices matters.

Antitrust & Trade Practices

Our antitrust and trade-practice experience includes the representation of clients who are the subject of merger reviews and/or antitrust investigations by the Federal Trade Commission (FTC), the DOJ's Antitrust Division and/or various state attorneys general. Armed with extensive knowledge of both federal and state antitrust laws and the unique issues that private equity funds face when making portfolio acquisitions or investing in club deals, our lawyers regularly counsel clients from a variety of industries on antitrust and trade-practice issues, and structure mergers and acquisitions to minimize any potential anticompetitive effects, decreasing the likelihood that the deal will be challenged by antitrust authorities. Lawyers from our various practice groups frequently collaborate in evaluating proposed business practices that might draw the unwanted attention of regulators or result in a civil antitrust action.

When litigation is inevitable, we are ready to do battle, with extensive experience representing clients across a wide variety of industries in antitrust cases involving a diverse mix of issues, both as plaintiff and defendant counsel, in federal and state courts, and in private suits as well as in criminal investigations and prosecutions brought by federal and state antitrust enforcement agencies.

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4. Presentation

Today's Topics

- The New Threat — Plaintiffs' Bar Targeting "Say on Pay" Proxy Disclosures to Enjoin Votes at Annual Meetings
- Do Your Social Media Policies Violate Regulation FD?
- The OECD's Final Downstream Pilot Program Report — Implications for Conflict Minerals Rule Compliance

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Notes:

The New Threat

Plaintiffs' Bar Targeting "Say on Pay" Proxy Disclosures to Enjoin Votes at Annual Meetings

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Notes:

Genesis of "Say on Pay" Suits

- The Dodd-Frank Act requires companies to put executive compensation before a shareholder vote at least once every three years
- This vote does not bind the company or its board of directors to approve the shareholder vote
- According to Dodd-Frank, this vote would not create, imply or change any existing fiduciary duties for the board

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Notes:

Plaintiffs' Response to "Say on Pay" Legislation

- The plaintiffs' bar has responded by bringing actions alleging breach of fiduciary duty under state law
- Even though arising from requirements imposed by Dodd-Frank, these claims typically do not allege violations of federal law
- These claims are brought in state courts other than the Delaware Chancery Court

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Notes:

The First Wave of "Say on Pay" Lawsuits

- The first wave of lawsuits were brought after shareholders voted against executive compensation plans when boards nevertheless approved those compensation plans
- Those claims were largely unsuccessful given that plaintiffs had difficulty establishing demand futility (reasonable doubt that the board would impartially consider a demand to bring suit on the company's behalf)

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Notes:

The Second Wave of "Say on Pay" Lawsuits

- The "say on pay" suits currently being filed attack proxy statements prior to the "say on pay" vote, alleging breach of fiduciary duty for inadequate disclosures concerning executive compensation
- Some of these cases also include claims relating to disclosures concerning equity compensation plans
- Plaintiffs file these suits shortly before the annual meeting in an effort to threaten disruption of the meeting and force settlement

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Notes:

The Types of Allegations: "Say on Pay" Votes

- Plaintiffs allege the following types of disclosure omissions, among others, when seeking to enjoin "say on pay" votes:
  - Information about the company's compensation consultant and a description of any changes
  - Why different executive officers are compensated differently
  - Compensation information about the company's peer group, including the peer group companies' "key data"
  - The addition or removal of references to peer companies

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Notes:

The Types of Allegations: Equity Plans

- Plaintiffs allege the following types of disclosure omissions, among others, when seeking to enjoin votes concerning equity plans:
  - Failure to disclose projections provided to the board of future stock grants and share repurchases
  - Failure to disclose the dilutive impact of shares issued pursuant to stock plans
  - Failure to provide a fair summary of various analyses considered by the board

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Notes:

How These Suits Are Initiated

- A plaintiff firm generally first issues a press release, explaining that it is "investigating" potential disclosure violations
- After issuing the press release, plaintiffs' counsel sometimes privately contacts the company
- The filing of the complaint typically follows

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Notes:

Knee v. Brocade: Court Enjoins Shareholder Vote at Annual Meeting

- *Knee v. Brocade* involved a challenge to disclosures concerning the company's stock plan but not say on pay
- The plaintiffs claimed that the board attempted to dilute the shareholders' holdings without full disclosures of the dilutive impact in the proxy
- The California state court granted the preliminary injunction, enjoining the vote given the inadequate disclosures

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Notes:

The Effect of *Knee v. Brocade* on Other Companies

- *Brocade* put pressure on other companies to settle disclosure claims to avoid the risk that votes would be enjoined in advance of the annual meeting
- It has become clear since *Brocade* that these suits are stronger when they attack disclosures relating to stock plans in addition to disclosures relating to "say on pay"

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Notes:

Game Plan: Settle or Fight?

- Settlements require supplemental proxy disclosures and the payment of counsel fees, but no payment of damages
- Counsel fees paid in settlements have ranged from $225,000 to $625,000
- Companies include Martha Stewart Omnimedia, H&R Block, WebMD and Brocade
- More recently: plaintiffs have made non-public, pre-suit demands for companies to make supplemental proxy disclosures and have entered into confidential settlement agreements

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Notes:

Game Plan: Settle or Fight?
Recent Examples of Successful Defenses

- Recently, companies have had success defending themselves against motions for preliminary injunctions
- Companies have attacked both
  - The plaintiff's likelihood of success on the merits, and
  - The absence of irreparable harm
- Successful defenses have come in cases alleging disclosure violations concerning both "say on pay" and equity plans

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Notes:

Game Plan: Settle or Fight?
Plaintiffs' Responses

- Although companies have been successful in recent cases in avoiding injunctions of shareholder votes, the new threat is for plaintiffs to continue pursuing their cases after the annual meeting
- We understand that *The Clorox Company* case is set for a trial on the merits in June 2013

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Notes:

Minimizing Litigation Exposures

- Keep the compensation committee informed about developments in these types of lawsuits
- Consult with counsel about proxy disclosures
- Avoid promising that certain actions will be taken in response to "say on pay" votes
- Obtain approval for equity compensation plans well in advance of their expiration or the need to expand them
- Describe the methodology used to determine the requested number of additional shares, the dilutive impact and expected/historical usage rates, and number of shares currently available under the plan

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Notes:

Eliminating the Risk Completely?

- These are strike suits, so there may be nothing that can be done to completely eliminate the risk of suit
- The chance for plaintiffs' lawyers to recover fees means that these suits will continue to be brought until they are no longer economical
- Such cases could become uneconomical if plaintiffs' lawyers lose far more cases than they win

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Notes:

Do Your Social Media Policies Violate Regulation FD?

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Notes:

Regulation FD Overview

When an issuer discloses material non-public information to certain persons — generally securities market professionals, such as analysts, and security holders who may trade on the basis of the information — it must, in most cases, first publicly disclose that information

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Notes:

Social Media Requires Additional Scrutiny

- Most companies and their executives use at least one social media platform
- CEO participation in social media is increasing

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Notes:

The 2008 Guidance

- Addresses disclosure through company websites
- Website disclosures may be public for Reg. FD if:
  - The website is a recognized channel of distribution
  - The posting makes the information available to the securities marketplace in general
  - There has been a reasonable waiting period for investors and the market to react to the information

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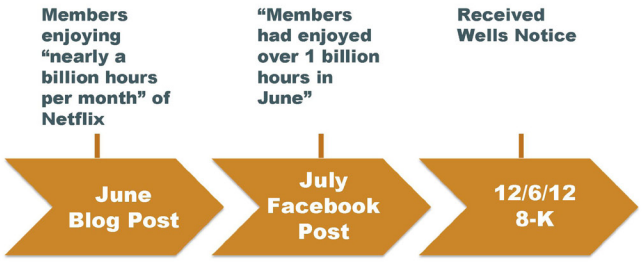
Notes:

Netflix



Netflix 8-K:

- A posting to over 200K people "is very public," especially because it includes many reporters and bloggers
- The information was not material

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Notes:

Notes:

Overview of the OECD Guidance

- The OECD Due Diligence Guidance provides due diligence recommendations for responsible global supply chains of minerals
- Contains a five-step, risk-based due diligence framework of steps to identify, prevent and address sourcing issues
- The OECD Guidance is currently the only internationally recognized due diligence framework for purposes of the Conflict Minerals Rule

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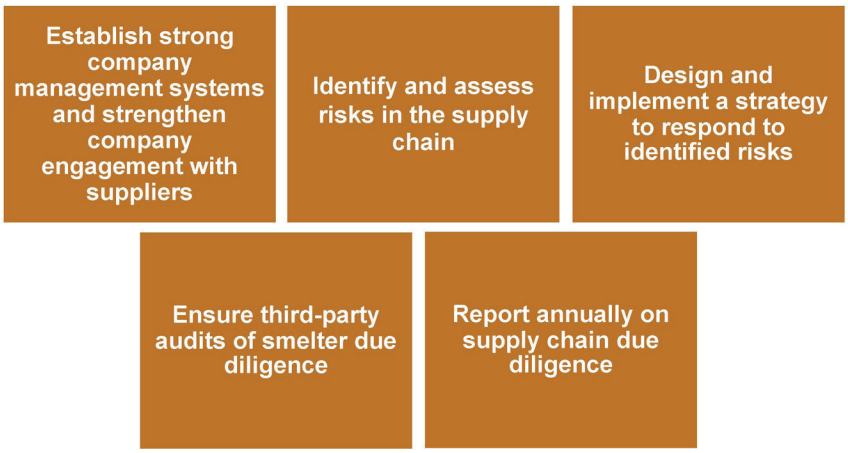
Notes:

The Five-Step Framework



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Notes:

Downstream Pilot Program Overview

- One-year program; ended November 2012
- Participants: 30 companies; 4 industry associations
- Three cycles:

Cycle 1	Cycle 2	Cycle 3
Baseline report of current practices and challenges	Deeper insights into current practices and experiences in implementing the OECD framework	Focused on understanding the evolution of due diligence over the pilot program

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Notes:

Key Pilot Program Take-Aways

Determining Outreach Strategy

- Efforts are being focused on Tier-1 suppliers
- High-risk suppliers are being prioritized
  - At-risk products are first being identified to help target suppliers
  - Material content data forms, company declaration forms, bills of material and product part codes are being used to identify 3TG

Eliciting Supplier Responses

- Participants used various strategies:
  - Templates to collect information
  - Reminding suppliers of contractual obligations
  - Capacity-building through regular communications, training sessions and meetings

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Notes:

Key Pilot Program Take-Aways (continued)

Conducting Due Diligence

- **Accountability for supply chain due diligence is most frequently with a senior manager in the procurement department; most commonly cited methods of accountability:**
  - **Monthly reporting of key performance indicators**
  - **Internal auditing of due diligence results and procedures**
- **Many participants are relying on industry initiatives (CFS) to obtain smelter and country of origin information, conduct spot-checks, assess diligence information and respond to identified risks**

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Notes:

Key Pilot Program Take-Aways (continued)

Other Take-Aways

- Most participants do not ban DRC-sourced conflict minerals
- Participants have tailored the OECD's Model Policy to their position in the supply chain, focusing on elements they can implement with their direct suppliers
- Use of contract provisions increasing; suppliers required to
  - Adopt a policy
  - Implement due diligence
  - Provide smelter information
- Most SMEs do not yet have a policy or approach to minerals sourcing in place

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Notes:

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5. Additional Materials: The New Threat — Plaintiffs' Bar Targeting "Say on Pay" Proxy Disclosures to Enjoin Votes at Annual Meetings

- Shareholder Lawsuits: Where is the Line Between Legitimate and Frivolous?

Shareholder Lawsuits: Where is the Line Between Legitimate and Frivolous?

ROCK CENTER
for CORPORATE GOVERNANCE

CLOSER LOOK SERIES NO. CGRP-29

Shareholder Lawsuits: Where Is the Line Between Legitimate and Frivolous?

David F. Larcker
Stanford University - Graduate School of Business

Brian Tayan
Stanford University - Graduate School of Business

November 27, 2012

ROCK CENTER FOR CORPORATE GOVERNANCE STANFORD UNIVERSITY

Crown Quadrangle • 559 Nathan Abbott Way • Stanford, CA 94305
rockcenterinfo@law.stanford.edu • http://www.law.stanford.edu/

STANFORD CLOSER LOOK SERIES
Topics, Issues, and Controversies in Corporate Governance and Leadership

Shareholder Lawsuits: Where Is the Line Between Legitimate and Frivolous?

By David F. Larcker and Brian Tayan
November 27, 2012

EXECUTIVE COMPENSATION AND PROXY VOTING

Shareholders of public companies "hire" a board of directors to represent them in corporate matters because shareholders do not and cannot have sufficient information to monitor all business decisions made by executives and directors. This includes not only decisions regarding corporate strategy and operations but also the design of executive compensation contracts. Because shareholders are a heterogeneous group—with different time horizons, objectives, and levels of activity—they are likely to have conflicting opinions about how pay should be structured. Furthermore, even if shareholders could agree on a rational determination, the process of seeking their input and gaining consensus would be highly inefficient relative to the process of delegating such decisions to a board of representatives. As a result, the design of executive compensation contracts is recommended by the compensation committee of the board of directors and approved by a vote of the independent directors of the full board.

Although the board is responsible for determining executive compensation level and structure, a vote of shareholders is required under two circumstances. First, shareholders must generally approve equity-based compensation plans (such as stock option plans and restricted stock awards) because the issuance of new equity dilutes the ownership interest of existing shareholders. If an equity-compensation program is not approved, the board of directors must amend and resubmit it to shareholders. Second, the Dodd-Frank Act of 2010 requires that shareholders be granted an advisory vote (usually held every year) on the compensation of the CEO and other named executive officers in the annual proxy. Because such "say-on-pay" votes are advisory (non-binding), the board of directors is not required to make changes if the plan does not pass.

Shareholders rely on disclosure made in the annual proxy (form DEF 14A) to inform their votes. The information included in the proxy is specified by the SEC.[1]

Executive compensation proposals generally receive shareholder approval. Between 2001 and 2010, only 2 percent of equity-compensation plans failed to receive majority support from shareholders.[2] Similarly, in the two years since Dodd-Frank was enacted, only 1.5 percent of companies failed their say-on-pay votes.[3]

SHAREHOLDER LAWSUITS ON COMPENSATION

In recent years, some shareholder groups have responded to failed votes by filing lawsuits. For example, after failing to garner majority support for their advisory say-on-pay votes, shareholder groups sued Beazer, Cincinnati Bell, Citigroup, DexOne, Occidental Petroleum, and others. The suits alleged that directors breached their fiduciary duties of loyalty, good faith, and candor by granting compensation packages that were excessive, not appropriately tied to performance, and not in the interest of shareholders (see Exhibit 1). Although the majority of these cases have been dismissed, a few remain pending.[4]

While say-on-pay litigation following a failed vote has generally not been successful, shareholder groups have found a new approach in suing companies for inadequate disclosure. In these cases, shareholders allege that the company has provided insufficient disclosure to inform shareholders how to vote on executive compensation. Broc Romanek

of *The Corporate Counsel* has referred to such suits as "Say-on-Pay Litigation 2.0." He explains:

> *The latest lawsuits include allegations of insufficient disclosure… These Say-on-Pay Litigation 2.0 complaints claim breach of fiduciary duty by various members of an issuer's board of directors and management and seek to enjoin the say-on-pay vote until additional information is disclosed… The tactical advantage that the plaintiffs have in this latest round of litigation is the fact that the lawsuit is filed after the proxy statement is filed and before the annual meeting, thus providing only a very short time before the merits of the request for injunctive relief is determined or the issuer seeks to settle the case.*[5]

Because companies generally do not want to hold a shareholder vote while a lawsuit is pending that questions the reliability of the information used for that vote, they face pressure to settle to avoid postponing their annual meeting.

Given the potential payoff from this approach, some law firms have filed multiple lawsuits or launched an investigation into say-on-pay disclosure. For example, in 2012 alone, the law firm Faruqi & Faruqi has filed over 33 lawsuits for inadequate disclosure (Exhibit 2). In one such case against Microsoft, the firm alleges that the company's proxy is "materially misleading and incomplete" and that directors "violated fiduciary duties of care, loyalty, candor, and good faith… and have acted to potentially put their personal interests ahead of the interests of Microsoft shareholders" (see Exhibit 3). The lead plaintiff in the case, Natalie Gordon, is involved in similar lawsuits against Cisco Systems and Symantec, and has a long history of shareholder lawsuits against companies (see Exhibit 4).

According to a publication by DLA Piper:

> *The rationale for the nascent claims in these lawsuits is troubling. Such suits suggest a bottomless demand. Regardless of the amount and detail of information a company may disclose in its proxy statement, a plaintiff may assert that even more disclosure is required. Indeed—paradoxically—a company that chooses to disclose more rather than less may be penalized for its candor, because every piece of information it discloses may provoke a plaintiff to argue that yet more backup information is required.*[6]

Expert witness testimony by Cornerstone Research and Robert Daines finds that the information plaintiffs requested in one such lawsuit is not disclosed by industry peers, suggesting that the disclosure being challenged as insufficient is no different from the industry standard.[7]

WHY THIS MATTERS

1. The shareholder disclosure lawsuit against Microsoft alleges that the company's proxy is "materially misleading and incomplete." However, the deficiencies identified by the plaintiffs in Exhibit 3 include information that is often considered proprietary and extreme in its detail. How much disclosure is too much disclosure? If a company follows SEC guidelines, why is this not sufficient?
2. The Microsoft lawsuit calls for the release of the report prepared by the compensation consultant and all internal memos regarding discussions about executive compensation. Are there any other board decisions that have this level of disclosure? Would the release of this information improve shareholder judgment about the quality of the board's decision on compensation?
3. Shareholder lawsuits against a company are an important mechanism in corporate governance. The threat of lawsuit provides strict incentive to directors to fulfill their fiduciary duty. At the same time, frivolous lawsuits impose an unnecessary cost on the corporation and its shareholders because they must be defended without any corresponding improvement in governance quality. When do lawsuits cross the line from legitimate to frivolous?
4. If compensation litigation alleging misconduct by the board of directors is successful, what other board decisions would be subject to potential suits? ■

[1] This includes the company's compensation philosophy, elements of the pay package, total compensation awarded, the peer groups used

for comparative purposes in designing compensation and measuring performance, performance metrics used to award variable pay, pay equity between the CEO and other senior executives, stock ownership guidelines, clawback policies, severance agreements, golden parachutes, and post-retirement compensation.

[2] Christopher Armstrong, Ian Gow, and David Larcker, "Consequences of Shareholder Rejection of Equity Compensation Plans," Rock Center for Corporate Governance at Stanford University Working Paper No. 112 (2012). Available at SSRN: http://ssrn.com/abstract=2021401.

[3] Glass, Lewis & Co., "Say on Pay 2011: A Season in Review;" and Semler Brossy, "2012 Say on Pay Results, Russell 3000," (May 16, 2012).

[4] For a list of cases, see: Executive Pay and Loyalty, available at: http://executiveloyalty.org/XC-_SOP_Lit_Digest.html.

[5] Broc Romanek, "Say-on-Pay Litigation 2.0," The Corporate Counsel (Sep.-Oct. 2012).

[6] Ed Batts and David A. Priebe, "Annual meeting proxy lawsuits: a new twist on purportedly deficient disclosure?" DLA Piper (Oct. 10, 2012).

[7] See: http://www.cornerstone.com/services/xprServiceDetail-Cornerstone.aspx?xpST=ServiceDetail&casestudy=459&service=32&op=CaseStudyDetail.

David Larcker is the Morgan Stanley Director of the Center for Leadership Development and Research at the Stanford Graduate School of Business and senior faculty member at the Rock Center for Corporate Governance at Stanford University. Brian Tayan is a researcher with Stanford's Center for Leadership Development and Research. They are coauthors of the book *Corporate Governance Matters.* The authors would like to thank Michelle E. Gutman for research assistance in the preparation of these materials.

The Stanford Closer Look Series is a collection of short case studies that explore topics, issues, and controversies in corporate governance and leadership. The Closer Look Series is published by the Center for Leadership Development and Research at the Stanford Graduate School of Business and the Rock Center for Corporate Governance at Stanford University. For more information, visit: http://www.gsb.stanford.edu/cldr.

EXHIBIT 1 — DUTIES OF THE BOARD OF DIRECTORS

STATE CORPORATE LAW

The board has an obligation to act in the interest of the corporation and its shareholders when making corporate decisions. Under state law, this is referred to as *fiduciary duty*. Fiduciary duty has three components:

- The *duty of care* requires that directors make decisions with due deliberation. Even if the decision of the board turns out to be wrong, the courts will generally defer to the board's judgment so long as the company can demonstrate that the board took appropriate measures to inform itself and that it made its decision in good faith (i.e., without conflict of interest or turning a blind eye to issues within its responsibility). This is known as the business judgment rule.

- The *duty of loyalty* requires that directors make decisions without conflict of interest. For example, if a director discovers a business opportunity in the course of his or her service to the company, the duty of loyalty requires that the director refrain from taking the opportunity without first determining whether the company will take it.

- The *duty of candor* requires that management and the board inform shareholders of all information that is important to their evaluation of the company and its management.

Shareholders can sue a board of directors in state court for violation of these duties, seeking damages for losses sustained as a result of the alleged violation.

FEDERAL SECURITIES LAW

Federal securities laws require companies to disclose information to the public through filings with the Securities and Exchange Commission (SEC). The SEC specifies in considerable detail the information that these filings must contain. A failure to comply with these rules also exposes a company to liability.

LIABILITY

In practice, directors rarely make out-of-pocket payments as a result of corporate lawsuits, because they are either indemnified by the company or covered by directors' and officers' insurance (D&O insurance) purchased by the company on their behalf.

Source: David Larcker and Brian Tayan, *Corporate Governance Matters: A Closer Look at Organizational Choices and Their Consequences* (FT Press: 2011).

EXHIBIT 2 — EXECUTIVE COMPENSATION DISCLOSURE CASES BY FARUQI & FARUQI

Company	Status
Lifevantage	Investigation
Emulex	Investigation
Applied Minerals	Filed 10/16/2012
Microsoft	Filed 10/11/2012
The Clorox Company	Filed 10/10/2012
Hain Celestial Group	Filed 10/11/2012
Globecomm Systems	Filed 10/12/2012
Corinthian Colleges	Investigation
JDS Uniphase	Investigation
Ethan Allen Interiors	Investigation
Zygo	Investigation
Symmetricom	Investigation
Cisco Systems	Filed 9/28/21012
Buckeye Technologies	Investigation
EchoStar	Investigation
Sparton	Investigation
AAR	Filed 10/2/2012

Company	Status
Brinker International	Investigation
Electro Rent	Investigation
Cintas	Investigation
NeoStem	Filed 9/20/2012
Applied Industrial Technologies	Investigation
Marcus Corporation	Investigation
AngioDynamics	Filed 9/27/2012
Synaptics	Investigation
Symantec	Filed 9/4/2012
H&R Block	Filed 8/8/2012
Plantronics	Filed 7/13/2012
WebMd Health	Filed 6/21/2012
Ultratech	Filed 6/14/2012
Martha Stewart Living Omnimedia	Filed 4/17/2012
Brocade	Filed 3/7/2012
Amdocs	Filed 1/13/2012

Note: Status as of October 24, 2012.

Source: Faruqi & Faruqi press releases; Westlaw.

EXHIBIT 3 — EXECUTIVE COMPENSATION DISCLOSURE CASE V. MICROSOFT CORP (EXCERPTS)

NATALIE GORDON on behalf of herself and all others similarly situation, Plaintiff,
v.
MICROSOFT CORPORATION, Steven A. Ballmer, Dina Dublon, William H. Gates, III, Raymond V. Gilmartin, Reed Hastings, Maria M. Klawe, Stephen J. Luczo, David F. Marquardt, Charles H. Noski, Helmut Panke and John W. Thompson, Defendants.

Nature of the Action

1. This is a shareholder class action brought by Plaintiff individually and on behalf of shareholders of Microsoft Corporation ("Microsoft" or the "Company") to enjoin the shareholder vote scheduled to be held at the annual meeting of Microsoft shareholders on November 28, 2012…

2. On October 9, 2012, Microsoft filed with the Securities and Exchange Commission (the "SEC") a Definitive Proxy Statement on Schedule 14A (the "Proxy") in connection with the Shareholder Vote on five proposals.

3. In the Proxy, the board of directors of Microsoft (the "Board") recommends that its shareholders approve the Company's executive compensation (the "Executive Compensation Proposal") in Proposal 2. The Proxy, however, fails to provide adequate disclosure as to what information the Board considered in making this recommendation.

4. The Board also recommends in the Proxy that Microsoft shareholders vote to approve the Employee Stock Purchase Plan ("ESPP"), a proposed amendment and restatement of the Company's 2003 Employee Stock Purchase Plan which will reserve 200,000,000 shares of Microsoft common stock for issuance under the ESPP (the "ESPP Proposal") in Proposal 4 (together, with the Executive Compensation Proposal, the "Proposals"). However, the Proxy contains severe and material disclosure violations regarding the reasons for, and effects of, the ESPP Proposal and why it is in the best interest of shareholders.

5. The Individual Defendants have violated fiduciary duties of care, loyalty, candor, and good faith owed to the public shareholders of Microsoft, and have acted to potentially put their personal interests ahead of the interests of Microsoft shareholders.

6. The dissemination of a materially misleading and incomplete Proxy in connection with the Shareholder Vote on the Proposals, and the acts of the Individual Defendants, as more particularly alleged herein, constitute a breach of Defendants' fiduciary duties to Plaintiff and the Class, as well as a violation of applicable legal standards governing Defendants herein. As a result, Plaintiff alleges that she, along with all other public shareholders of Microsoft common stock, is entitled to enjoin the Shareholder Vote on the Proposals, unless and until Defendants remedy their breaches of fiduciary duty.

EXHIBIT 3 — CONTINUED

[Allegations Regarding Say-on-Pay Disclosure]

The proxy fails to disclose the following regarding the Executive Compensation Proposal.

- The Proxy fails to disclose a fair summary of the advice, counsel and analyses performed and provided to the Board and/or the Compensation Committee by Semler Brossy Consulting Group, LLC ("Semler"), the Compensation Committee's compensation consultant;

- The Proxy fails to disclose how the Board's Compensation Committee selected Semler as its independent compensation consultant in connection with determining executive compensation and the amount of fees the Company paid to Semler in connection with its engagement as the Compensation Committee's independent compensation consultant for Fiscal 2012;

- While the Proxy discloses the comparable companies observed in the peer groups used by the Compensation Committee, it fails to disclose compensation data for the named executive officers of the peer companies, including even the median, mean, and range for the peer group data set;

- The Proxy fails to disclose (i) the base salary, (ii) annual incentive awards, (iii) long-term incentive awards, and (iv) total direct compensation data for each of the companies in the Company's peer groups;

- Although the Proxy discloses that the Compensation Committee and independent directors review an array of measures before applying their judgment to determine named executive officers' ("NEO") pay, it fails to disclose how much weight the listed factors have in determining NEO pay for the year; and

- While the Proxy discloses that the Compensation Committee, in response to certain market changes, increased target Incentive Plan awards for the to the NEOs (Mr. DelBene, 32%; Mr. Klein, 58%; Mr. Sinofsky, 21%; Mr. Turner, 14%), it fails to provide the underlying criteria used to determine these percentages.

EXHIBIT 3 — CONTINUED

[Allegations Regarding the Employee Stock Purchase Program]

The Proxy, however, is deficient in its disclosure regarding the ESPP Proposal, as follows:

- The Proxy fails to disclose the fair summary of any expert's analysis or any opinion obtained in connection with the ESPP Proposal

- The Proxy fails to disclose the criteria utilized by the compensation Committee and the Board to implement the ESPP and why the ESPP Proposal would be in the best of interest of shareholders;

- The Proxy fails to disclose the dilutive impact that issuing additional shares may have on existing shareholders; and

- The Proxy fails to disclose how the Board determined the number of additional shares requested to be authorized.

Plaintiff and the Class will suffer irreparable damage unless Defendants are enjoined from continuing to breach their fiduciary duties by carrying out the Shareholder Vote on the Proposals without fully and accurately disclosing all information concerning the Proposals.

Source: Superior Court of Washington, County of King, *Natalie Gordon v. Microsoft*, No. 12-2-33448-0 SEA.

EXHIBIT 4 — SELECTED SHAREHOLDER AND OTHER LAWSUITS: NATALIE GORDON PLAINTIFF

Date	Defendant	Summary of Case
10/11/2012	Microsoft	Class action shareholder complaint for injunctive relief. Plaintiff seeks to stop a shareholder vote scheduled for November 28 due to proxy failing to provide adequate disclosure as to what information the board considered in making the recommendations to vote on five proposals, including executive compensation.
9/28/2012	Cisco Systems	Securities class action. Defendants are breaching their fiduciary duties by carrying out a shareholder vote on two proposals without accurately disclosing information regarding the proposals.
9/5/2012	Symantec	Class action securities fraud. Defendants did not provide adequate disclosures in regards to recommendations of a shareholder vote.
6/18/2012	CVS Caremark	Breach of fiduciary duty complaint. The defendants did nothing to stop or curb the excessive sales of oxycodone and known ingredients for methamphetamine production.
2/13/2012	Netflix	Securities fraud. Defendant Netflix announced a partnership with cable movie channel Starz in 2011. As a result of that partnership, Netflix increased its fees, which led to the defection of hundreds of thousands of subscribers. Negotiations with Starz to renew the partnership agreement broke down and defendants were aware that the negotiations would cease.
1/18/2012	Navigant Consulting	Shareholder derivative action for breach of fiduciary duty and unjust enrichment. Defendants approved millions of dollars in excessive executive compensation despite negative shareholder return, "dismal" financial results and an adverse shareholder vote. They acted against shareholders' best interests and in violation of Navigant's pay-for-performance policy.
8/20/2010	McAfee	Shareholder class action. Defendant McAfee board of directors are breaching their fiduciary duty to the company's shareholders by entering into a proposed acquisition by Intel for $7.7 billion. The minority shareholders will get $48 per share in cash for their McAfee shares, which represents a meager premium to the company's 52-week high of $45.68 per share.
3/8/2010	The Coca-Cola Company	Class action in which Coke, by virtue of its stock ownership and business dealings with CCE, controls and dominates the company. As a controlling shareholder, Coke owes to CCE's public shareholders a duty of entire fairness. By virtue of the challenged transaction, Coke has breached this duty. The asset/share exchange is unfair both as to price and process. The directors of CEE, owed duties of due care, loyalty and good faith to CCE's shareholders, but they have breached those duties by their conduct.
1/26/2009	Royal Bank of Scotland	Class action brought on behalf of all purchasers of the American Depositary Shares (ADS) of The Royal Bank of Scotland Group plc who purchased said ADS pursuant to defendants' wrongful dissemination of a false and misleading registration statement and prospectus, which were issued in connection with The Royal Bank of Scotland Group's June 2007 IPO of its 38 million Non-Cumulative Dollar Preference Shares, Series S.
12/15/2008	Tropicana Casino & Resort	Personal injury. "Early in the morning of May 6, 2007 Natalie stepped into the bathroom of her room and slipped across a wet slippery floor, and fell to the ground. While getting up she felt water dripping on her shoulder and as she looked up to discover the source of the drip she was struck by a piece of plaster that fell off the ceiling."
9/18/2008	Constellation Energy Group	Class action. Breach of fiduciary duty. Individual defendants sold Constellation Energy Group without allowing for proper competitive bidding which, during a period of market instability, drove down Constellation stock. Plaintiff and class members want the merger to be voided.

Source: Westlaw.

Schulte Roth&Zabel

Public Company Hot Topics

6. Additional Materials: Do Your Social Media Policies Violate Regulation FD?

- Netflix Form 8-K
- Are Your Regulation FD Compliance Procedures Sufficient?
- SRZ Alert — SEC Provides New Guidance on the Use of Company Websites
- Insider Trading Law & Compliance Answer Book 2013 — Chapter 11: Regulation Fair Disclosure

Netflix Form 8-K

8-K 1 a8-kfacebook.htm 8-K

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

Current Report

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): December 5, 2012

NETFLIX, INC.

(Exact name of registrant as specified in its charter)

Delaware	000-49802	77-0467272
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)

100 Winchester Circle
Los Gatos, CA
95032
(Address of principal executive offices)
(Zip Code)

(408) 540-3700
(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 7.01 Regulation FD Disclosure.

On December 5, 2012, Netflix, Inc. ("the Company") and its Chief Executive Officer Reed Hastings each received a "Wells Notice" from the Staff of the Securities and Exchange Commission ("SEC") indicating its intent to recommend to the SEC that it institute a cease and desist proceeding and/or bring a civil injunctive action against Netflix and Mr. Hastings for violations of Regulation Fair Disclosure, Section 13(a) of the Securities Exchange Act and Rules 13a-11 and 13a-15 thereunder. A copy of a statement that will be made by Mr. Hastings to subscribers on his publicly available Facebook page is attached as Exhibit 99.1.

(d) Exhibits

99.1 Facebook statement dated December 6, 2012.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

NETFLIX, INC.

Date: December 6, 2012

/s/ David Hyman

David Hyman
General Counsel

EXHIBIT INDEX

Exhibit No.	Description of Exhibit
99.1	Facebook statement dated December 6, 2012.

EX-99.1 2 a991exhibitstatement.htm EXHIBIT

Exhibit 99.1

SEC staff questions a Facebook post. Fascinating social media story.

We use blogging and social media, including Facebook, to communicate effectively with the public and our members.

In June we posted on our blog that our members were enjoying “nearly a billion hours per month” of Netflix, and people wrote about this. We did not also issue a press release or 8-K filing about this.

In early July, I publicly posted on Facebook to the over 200,000 of you who subscribe to me that our members had enjoyed over 1 billion hours in June, highlighting how strong our content was. There was press coverage as there are many reporters and bloggers among you, my public followers. Some of you re-posted my post. Again, we did not also issue a press release or file an 8-K about this.

SEC staff informed us yesterday that they are recommending that the SEC bring a civil action against us for my July 1 billion hour public post, asserting we violated “Reg FD”. This rule is designed to ensure that individual investors have equal access to information as large institutional investors, by prohibiting selective disclosure of material information. The SEC staff believes that I gave you all “material” investor information in my post and that we needed to instead release the June viewing fact “publicly” with an 8-K filing or press release.

I want to note a few things.

First, we think posting to over 200,000 people is very public, especially because many of my subscribers are reporters and bloggers.

Second, while we think my public Facebook post is public, we don't currently use Facebook and other social media to get material information to investors; we usually get that information out in our extensive investor letters, press releases and SEC filings. We think the fact of 1 billion hours of viewing in June was not “material” to investors, and we had blogged a few weeks before that we were serving nearly 1 billion hours per month.

Finally, while our stock rose the day of my public post, the increase started well before my mid-morning post was out, likely driven by the positive Citigroup research report the evening before.

We remain optimistic this can be cleared up quickly through the SEC's review process.

-Reed

Are Your Regulation FD Compliance Procedures Sufficient?

Keeping current: securities

By Michael R. Littenberg

Are your Regulation FD compliance procedures sufficient?

During late September, the Securities and Exchange Commission settled a civil action relating to a violation of Regulation FD, which prohibits selective disclosure by public companies of material nonpublic information. Regulation FD actions are fairly infrequent, this being the first since 2007, and one of only a handful since Regulation FD was adopted in 2000. The moral of this particular tale is that thoughtful Regulation FD compliance policies and procedures can help to mitigate the consequences of a violation, which in this case avoided making a bad week even worse.

In this particular action, Christopher Black, at the time the chief financial officer of American Commercial Lines, Inc. (ACL), an operator of barges and tow boats, was alleged to have intentionally selectively disclosed a revised earnings forecast to a limited group of analysts. As the CFO, Black was one of ACL's two designated investor relations contacts. In that role, he put together ACL's investor relations policy, which included a section on Regulation FD, and, on at least two occasions, received training from ACL's counsel that included material addressing Regulation FD.

ACL's policy was to offer forward-looking guidance only once each year during its February investor conference call. During its February 2007 call, ACL projected full-year earnings per share of between $1.75 and $1.95. However, by May 2007, ACL management concluded that 2007 earnings would be significantly below previous publicly announced guidance. Second quarter 2007 earnings also were expected to fall far short of analyst expectations. Like many companies facing a similar set of circumstances, ACL decided to put out revised full-year guidance and a forecast for the second quarter.

And now we get to the beginning of Black's bad week.

On June 11, 2007, ACL put out a press release projecting annual EPS of between $1.45 and $1.65 and indicated that second quarter 2007 earnings would look "similar to the first quarter," during which EPS was $0.20.

Over the next few days, Black and the CEO went on a previously scheduled trip to meet with analysts who covered ACL. Among other things, they answered questions concerning the guidance contained in the June 11th press release. Upon returning from the trip, Black proposed sending an e-mail to all of the analysts summarizing the information discussed in the various meetings, since Black and the CEO had not been able to meet with all of the analysts as a single group. ACL's CEO agreed. He asked Black to send the e-mail by the close of business on Friday, June 15th, after first providing a draft to outside counsel to review. However, Black was unable to finish the e-mail by then and sent a draft to his personal e-mail address so that he could finish it over the weekend.

And then things started to go off the skids . . .

At some point before leaving work that Friday, Black received an updated internal analysis indicating that second quarter EPS could be as low as $0.13, which was significantly below the projection contained in the press release from earlier that week. On Saturday, Black sent an e-mail from his home account to the eight sell-side side analysts who covered ACL indicating that ACL expected "EPS for the second quarter will likely be in the neighborhood of about a dime below that of the first quarter," or approximately $0.10 per share. Before sending out the e-mail, Black did not circulate it internally within ACL or to outside counsel.

When trading opened on Monday, ACL's stock dropped significantly, by 9.7 percent, on heavy volume that represented almost a threefold increase in average trading volume up to that point in June.

ACL's CEO learned of Black's e-mail that Monday morning and ACL put out a Form 8-K disclosing the contents of his e-mail at the end of the trading day.

The SEC concluded that Black understood the requirements of Regulation FD and was aware that Regulation FD covered his communications with analysts and investors, that the earnings guidance information was material, and that the analysts had no duty to keep the information confidential. As part of the settlement, Black agreed to pay a fine of $25,000.

More importantly, from the company side, the action underscores the importance of having in place effective

Littenberg is a partner in the New York office of Schulte Roth & Zabel LLP, where he specializes in representing public companies in transactional and ongoing compliance matters. He can be reached at michael.littenberg@srz.com or through LinkedIn.

Published in *Business Law Today*, Volume 19, Number 3, Jan./Feb. 2010.

Regulation FD compliance policies and procedures. In this instance, the SEC declined to institute enforcement proceedings against the company—which is atypical when there is a Regulation FD violation—because it had "cultivated an environment of compliance" and took remedial measures to address the Regulation FD violation.

The compliance measures highlighted by the SEC included the following:

- A written investor relations policy that included a section addressing the requirements of Regulation FD.
- Periodic Regulation FD compliance training by counsel.
- The existence of an earnings guidance policy.
- Review by counsel of proposed written communications to analysts.
- Prompt corrective disclosure upon learning of the Regulation FD violation and self-reporting of the violation to the SEC.
- Adoption of remedial measures to address the violation and to prevent it from recurring.

Public companies of course need to tailor their Regulation FD compliance procedures to their own particular circumstances. However, all public companies should use this most recent action as a catalyst for evaluating the sufficiency of their Regulation FD compliance procedures and whether those procedures are followed in day-to-day practice. This action also underscores the importance of having in place, in advance, a crisis management plan that enables the company to quickly address both intentional and nonintentional Regulation FD violations.

SRZ Alert — SEC Provides New Guidance on the Use of Company Websites

Schulte Roth&Zabel LLP

Alert

SEC Provides New Guidance on the Use of Company Websites

September 26, 2008

During August, 2008, the Securities and Exchange Commission provided new guidance, in the form of an Interpretive Release, on the use of company websites. The new guidance focuses on four main topics: (1) whether and when information posted on a registrant's website is public for purposes of Regulation FD and sufficient to satisfy Regulation FD's public disclosure requirement; (2) registrant liability for website content under the anti-fraud provisions of the federal securities laws; (3) the applicability of disclosure controls and procedures to website content; and (4) formatting of posted information.

The SEC's last significant Internet-related guidance was in 2000. Since that time, investors have become more Internet savvy and corporate use of electronic media for investor relations has grown in both popularity and sophistication. In addition, the SEC has moved more towards a real time disclosure regime.

Websites and Regulation FD
Regulation FD is the SEC rule that limits selective disclosure of material non-public information. Subject to a few narrow exceptions, in order to comply with Regulation FD, prior to a selective disclosure, a registrant must disseminate the information through a method or combination of methods that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. The Release addresses two issues under Regulation FD. First, whether and when information contained on a registrant's website is public for purposes of Regulation FD. Second, whether website disclosure alone is a sufficient means of complying with Regulation FD.

Website Postings as Public Information
The SEC has not gone so far as to take the position that a website posting always will be sufficient to make information public for purposes of Regulation FD. Recognizing that no two websites are exactly the same, the SEC has instead taken a facts and circumstances approach. In the Release, the SEC indicates that information posted on a registrant's website may be public for purposes of Regulation FD if it meets three criteria: (1) the website is a recognized channel of distribution; (2) the posting disseminates the information in a manner that makes it available to the securities marketplace in general; and (3) a reasonable waiting period has elapsed allowing investors and the market to react to the posted information.

Recognized Channel of Distribution. Whether a website is a recognized channel of distribution will depend on the steps that the registrant has taken to alert the market to its website and disclosure practices, as well as the use by investors and the market of the website.

Availability to the Marketplace. Whether a website posting results in dissemination to the securities marketplace in general depends upon the manner in which information is posted on the registrant's website and the timely and ready accessibility of the information to investors and the markets. The Release cites the following non-exclusive factors to be taken in to account in making this determination:

- Whether and how the registrant lets investors and the market know of the existence of the website and that they should look there for information

- Whether the registrant has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of doing so

- Whether the website is designed to lead investors and the market efficiently to information about the registrant, whether the information is prominently disclosed in an appropriate location and whether the information is presented in a readily accessible format

- The extent to which information posted on the website is regularly picked up by the market and readily available media, and reported in the media, or the extent to which the registrant has advised newswires or the media about the information, and the size and market following of the registrant

- The steps that the registrant has taken to make its website and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels either to widely distribute the information or to advise the market of its availability

- Whether the registrant keeps its website current and accurate

- Whether the registrant uses other methods to disseminate the information and whether and to the extent those other methods are the predominate methods used to disseminate information

- The nature of the information

Reasonable Waiting Period. The third criterion is whether a reasonable time has elapsed to allow investors and the market to react to the information. What constitutes a reasonable waiting period will depend upon the particular circumstances of the dissemination, which, in the context of disclosure on a website, may include:

- The size and market following of the registrant

- The extent to which investor-oriented information on the registrant's website is regularly accessed

- The steps that the registrant has taken to make investors and the market aware that it uses its website as a key source of important information about the registrant, including the location of the posted information

- Whether the registrant has taken steps to actively disseminate the information, including through other channels, or the availability of the information on its website

- The nature and complexity of the information

What constitutes a reasonable waiting period will differ among registrants. For example, a large registrant that frequently uses its website as a key information resource, has taken steps to make the market and investors aware of this and believes that its website is well-followed may be comfortable with a shorter waiting period than a registrant whose website does not have the same degree of prominence.

The Release indicates that, if the information is important, the registrant should consider taking additional steps to alert investors and the market that important information will be posted, such as by filing or furnishing a Form 8-K or issuing a press release with the information.

Using Website Disclosure to Comply With Regulation FD

When the SEC adopted Regulation FD in 2000, it took the position that website disclosure alone was not sufficient to satisfy the broad-based dissemination requirement of Regulation FD. At the time, the SEC felt that Internet penetration wasn't yet deep enough. As a result of the technological sea change that has occurred over the last eight years, the SEC has now modified this position. In the Release, the SEC

acknowledges that technology has evolved and the use of the Internet has grown such that, for some registrants in certain circumstances, posting information on the registrant's website may by itself be a sufficient method of public disclosure to comply with Regulation FD.

The registrant will need to consider whether and when postings on its website are reasonably designed to provide broad, non-exclusionary distribution of the information to the public. For purposes of this analysis, the Release indicates that registrants can look to the first two elements of the analysis above. In addition, as part of the evaluation, the registrant must consider its website's capability to meet the timing requirements for disclosing information pursuant to Regulation FD.

Liability for Website Content under the Anti-Fraud Provisions
The anti-fraud provisions of the federal securities laws apply to statements made by a registrant on its website in the same fashion as they apply to other statements made by or attributable to the registrant. Two areas of online content that are of perennial concern to registrants are archived information and hyperlinked information.

Archived Information. The Release clarifies that, absent an affirmative restatement or reissuance, maintaining previously posted materials on a website does not constitute reissuance or republication of those materials each time that they are accessed, and that there generally is no duty to update the posted information. To the extent that it is not apparent that the posted materials are as of a certain date, the Release indicates that the materials should be separately identified as historical materials, including by dating the materials, and they should be placed on a separate section of the website that contains previously posted information.

Hyperlinked Information. Under the anti-fraud rules, a registrant can be held liable for third-party information to which it hyperlinks from its website to the extent that the information is attributed to the registrant. This can occur if the registrant is involved in the preparation of the information (entanglement) or if it endorses or approves the information (adoption). The Release provides additional guidance on when a registrant may be deemed to have adopted third-party information.

The SEC indicates in the Release that it believes the focus should be on whether the registrant has explicitly or implicitly approved or endorsed the third-party statement. In the case of an implicit approval or endorsement, the key question in the context of hyperlinking is whether the hyperlink and the hyperlinked information together create a reasonable inference that the registrant has approved or adopted the hyperlinked information.

The SEC believes that an important factor in the analysis is what the registrant says about the hyperlink, including what is implied by the context in which it places the hyperlink. In order to avoid potential confusion or misunderstanding as to the registrant's view or opinion of the hyperlinked information, the SEC recommends in the Release that the registrant explain the context for the hyperlink. For example, at one end of the spectrum, the registrant may explicitly endorse the hyperlinked information or suggest that it supports a particular assertion on the registrant's website. Alternatively, it may merely note that the hyperlinked information contains information that may be of use to the reader. The SEC recommends that the explanation for the hyperlink take into account the nature and content of the information. A more fulsome explanation may be appropriate if the registrant is selectively linking to a favorable piece of third-party information, as opposed to if the link is on a media page on the registrant's website that links to both positive and negative news articles about the registrant.

Many registrants use other methods, such as exit notices or intermediate screens, to clearly indicate that information is from a third party. The Release indicates that the sufficiency of these methods to avoid an inference that the registrant has adopted the hyperlinked information will depend upon the particular circumstances surrounding the hyperlinked information. The Release also reiterates the SEC's position that disclaimers alone do not insulate a registrant from liability for information that it makes available to investors, through hyperlinks or otherwise, that it knows, or is reckless in not knowing, to be materially false or misleading.

Use of Summaries or Overviews. The Release encourages registrants to make use of summaries or overviews to present information, particularly financial information, on their websites. In light of registrant

concerns over liability for material misstatements or omissions when presenting summary or overview information, the Release provides guidance concerning their use.

The registrant should alert readers to the summary nature of the information and where more information can be found. In particular, the Release indicates that a registrant may wish to consider the following: (1) using appropriate titles or headings that convey the summary nature of the information; (2) providing explanatory language to identify the information as summary in nature and the location of the more detailed additional information; (3) placing the summary in close proximity to hyperlinks to the more detailed information from which the summary is derived; and (4) using a "layered" format, i.e., embedded links in the information that enable the reader to obtain increasingly detailed information.

Blogs and Electronic Shareholder Forums. Over the last few years, blogs and online forums have become increasingly popular and have begun to be added to public company websites. In recognition of the increasing role played by electronic shareholder forums, earlier in the year, the SEC issued a release specifically addressing selected issues that they raise.

The Release clarifies the application of the anti-fraud provisions to blogs and electronic shareholder forums. These clarifications do not break new ground and are consistent with the application of the anti-fraud provisions to other types of communications. In the Release, the SEC reminds registrants that all communications made by on or behalf of the registrant are subject to the anti-fraud provisions of the federal securities laws, including those made through blogs and electronic shareholder forums. Accordingly, the Release recommends that registrants consider putting in place controls and procedures to monitor company statements made through these channels. However, the SEC notes in the Release that a registrant is not responsible for third party statements made on a company-sponsored website, nor is it obligated to correct or respond third party misstatements.

In the Release, the SEC also indicates that a term or condition of a blog or shareholder forum that requires a user to agree not to make investment decisions based on its content or that disclaims liability for damages arising from the use or inability to use the blog or forum, in the SEC's view, violates the anti-waiver provisions of the federal securities laws.

Applicability of Disclosure Controls and Procedures

The Securities Exchange Act requires a registrant to carry out an evaluation regarding the effectiveness of the design and operation of its disclosure controls and procedures, and its principal executive officer and principal financial officer must certify as to the same. The Release clarifies that information furnished on a registrant's website is not subject to disclosure controls and procedures, unless the information is posted in order to satisfy an Exchange Act disclosure obligation. Examples of information that the SEC allows to electively be disclosed on a corporate website, rather than in an Exchange Act filing, include code of ethics waivers and the policy of the registrant's board on attendance at the annual meeting. Therefore, disclosure controls and procedures must be designed to address the elective disclosure of any information required by the Exchange Act on the registrant's website, but will not apply to any other information contained on the registrant's website.

Format of Information and Readability

Finally, in the Release, the SEC recognizes the increasingly interactive nature of online communications. The Release clarifies that it is not necessary for information on a public company website to adhere to a printer-friendly format, except where explicitly required by the SEC's rules (such as for proxy materials).

A copy of the Release is available at http://www.sec.gov/rules/interp/2008/34-58288.pdf.

Authored by Michael R. Littenberg, Farzad Damania and Avital Gopas.

If you have any questions concerning this Alert, please contact:

Robert Goldstein	**212.756.2519**	**robert.goldstein@srz.com**
Peter J. Halasz	**212.756.2238**	**peter.halasz@srz.com**
Eleazer N. Klein	**212.756.2376**	**eleazer.klein@srz.com**

Michael R. Littenberg	**212.756.2524**	**michael.littenberg@srz.com**
Robert B. Loper	**212.756.2138**	**robert.loper@srz.com**
Benjamin M. Polk	**212.756.2476**	**benjamin.polk@srz.com**
John M. Pollack	**212.756.2372**	**john.pollack@srz.com**
Richard A. Presutti	**212.756.2063**	**richard.presutti@srz.com**
David E. Rosewater	**212.756.2208**	**david.rosewater@srz.com**
Marc Weingarten	**212.756.2280**	**marc.weingarten@srz.com**
André Weiss	**212.756.2431**	**andre.weiss@srz.com**

New York
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Washington, DC
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

London
Heathcoat House
20 Savile Row, London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

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Insider Trading Law & Compliance Answer Book 2013 — Chapter 11: Regulation Fair Disclosure

11

Regulation Fair Disclosure

*Marcy Ressler Harris & Michael R. Littenberg**

The Securities and Exchange Commission (SEC) proposed Regulation Fair Disclosure (Regulation FD) to "level [the] playing field" by providing material financial information to all investors at the same time, and not just to industry insiders.[1] The SEC's proposal received nearly six thousand comments in the first three months. While most of the comments were favorable, a vocal minority argued that the proposed regulation, if adopted, actually would reduce the amount of information available to investors.

The critics expressed concern that Regulation FD would chill issuers from providing material information to anyone, for fear that they would find it so difficult to determine when a disclosure would be "material" and therefore subject to the new regulation. This chilling effect, critics argued, could result in issuers "speaking less often out of fear of liability based on *post hoc* assessment that disclosed information was material," which would ultimately lead to market inefficiency.[2] The critics suggested instead that the SEC pursue voluntary means of ensuring greater public disclosure.

After considering all the comments, the SEC modified its proposed regulation to safeguard against inappropriate

liability. But the SEC adopted Regulation FD, which became effective on October 23, 2000, after concluding it would promote full and fair disclosure of information by issuers and enhance market fairness and efficiency.

More than a decade later, Regulation FD remains controversial. Although more financial information is available to the investing public today than ever before, the increased flow of information more likely is due to increased access to the Internet and other forms of electronic communications, rather than to Regulation FD. Critics continue to argue that Regulation FD has added confusion rather than clarity to corporate disclosure practices. Whether the regulation has achieved its intended purpose remains an unanswered question.

This chapter discusses the policies that the SEC sought to advance with Regulation FD, how the regulation differs from general insider trading laws, how its disclosure requirements work in practice, which market participants are covered by the regulation and which fall outside its scope, and more. It concludes with a discussion of related disclosure rules adopted by the self-regulatory organizations.

Policies Underlying Regulation FD

Q 11.1 What is Regulation FD?

Regulation FD is an SEC regulation that generally requires a domestic public company to disclose material nonpublic information

to the public simultaneously with or prior to disclosing information selectively to analysts, institutional shareholders, or other securities industry professionals. The regulation targets only information disseminated by issuers and their senior officials and other persons acting on their behalf[3] to enumerated categories of securities market professionals and other recipients,[4] where "it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information."[5]

Regulation FD addresses the potential for trading that results when issuers selectively disclose material nonpublic information to certain investment professionals, such as analysts or large institutional shareholders, who then may trade or cause others to trade on such information before it has been disseminated to the broader public.

Q 11.2 Why did the SEC adopt Regulation FD?

The SEC adopted Regulation FD to promote full and fair disclosure of financial information to the investing public. The SEC hoped that Regulation FD would stop the practice, which it believed was common, whereby issuers would disclose material nonpublic information selectively to favored analysts and other securities industry professionals, who would use that information to profit, before the same information was disclosed to the general public. The SEC offered the following reasons for the adoption of Regulation FD, all of which support the goal of making material information about issuers more accessible to the public.

- First, the SEC hoped to end selective disclosure by issuers to favored institutional customers and other market insiders, and thereby to restore investors' confidence in the fairness of the market for all investors. Previously, analysts and firms were believed to be receiving material nonpublic information from issuers, upon which they could trade or recommend trades to their customers and thereby profit or avoid a loss, before the information ever reached the public.[6]
- Second, the SEC hoped to eliminate the pressure certain issuers were believed to be placing on market analysts to issue favorable reports in exchange for access to inside information about the issuer, which disadvantaged public investors who traded in reliance on possibly tainted

research. By requiring that issuer meetings and conference calls generally could not occur unless they were open to the general public, the SEC hoped to restrict issuers' use of material nonpublic information as a commodity available only to market analysts who provided positive coverage.[7]

- Third, because technological developments such as Internet webcasting and teleconferencing made it easier for companies to disseminate information to the public broadly, companies no longer needed to rely on securities analysts to convey information to investors. The SEC believed the public would be better served by relying on issuers to communicate information to shareholders and potential shareholders directly and in real time, without the intervention of any professional intermediaries.[8]

Q 11.3 What is the relationship between Regulation FD and traditional insider trading laws?

According to the Adopting Release for Regulation FD, "selective disclosure has an adverse impact on market integrity that is similar to the adverse impact from illegal insider trading: investors lose confidence in the fairness of the markets when they know that other participants may exploit 'unerodable informational advantages' derived not from hard work or insights, but from their access to corporate insiders."[9]

Regulation FD addresses the potential for insider trading that results when certain corporate issuers selectively disclose material nonpublic information to certain investment professionals, such as analysts or large institutional shareholders, who then may trade or cause others to trade on such information before it has been disseminated to the broader public. As such, Regulation FD targets the transmission of information rather than the actual trading. In this fundamental way, it differs from traditional insider trading laws.

Q 11.4 Is there a private right of action under Regulation FD?

Importantly, there is no private right of action to enforce Regulation FD and, therefore, it can be enforced only by the SEC, either in a proceeding before an administrative body or in a federal court action, or both.[10]

Q 11.5 How has the SEC enforced Regulation FD?

Most of the cases the SEC has brought under Regulation FD have resulted in administrative orders of settlement prior to adjudication. In the one reported decision involving Regulation FD, *SEC v. Siebel Systems, Inc.*,[11] the court dismissed all of the SEC's Regulation FD claims after finding that the disclosures at issue were neither "material" nor "nonpublic."

As a result, the court never reached the constitutional challenges to Regulation FD raised in *Siebel*, which included claims that "(1) the SEC lacked the statutory authority to promulgate the regulation; (2) the regulation abridges the freedom of speech protected by the First Amendment; (3) the regulation is void for vagueness in violation of . . . Due Process; and (4) the regulation is unconstitutional as applied."[12] It is unclear how a federal court may respond to a cognizable Regulation FD claim, let alone to the claim that Regulation FD is unconstitutional.

Required Disclosures

Q 11.6 How does Regulation FD work?

Absent an agreement to keep the information confidential (see Q 11.9.1), if an issuer, or someone acting on the issuer's behalf, intentionally discloses material nonpublic information to a securities market professional or to a security holder where it is reasonably foreseeable that the recipient will trade on the information, then the issuer must disclose the information to the public simultaneously.[13]

If the disclosure is unintentional, a "prompt" public disclosure is required.[14] If the issuer does not make a prompt public disclosure, it violates Regulation FD.

Q 11.6.1 What is a prompt disclosure?

A prompt disclosure is a disclosure that an issuer releases "as soon as reasonably practicable" after one of the company's senior officials learns that an unintentional disclosure has been made.[15] Regulation FD sets an outside time for reasonable practicability, which provides that an issuer's public disclosure must be made by the later of twenty-four hours or the "commencement of the next

day's trading on the New York Stock Exchange" after the senior official learns of the unintentional disclosure.[16] Public disclosure after the prescribed timeline may result in a Regulation FD violation, as it did in *In re Fifth Third Bancorp*.[16.1] In that case, the SEC determined that Fifth Third violated Regulation FD when it privately disclosed material nonpublic information and did not publicly disclose this information promptly thereafter.[16.2] Despite publicly disclosing the information less than forty-eight hours after the nonpublic disclosure, Fifth Third still violated Regulation FD.[16.3]

Q 11.6.2 What is the difference between an intentional disclosure and one that is unintentional?

An intentional disclosure is a disclosure made with willful knowledge or in reckless disregard whether material nonpublic information is being disclosed. In a securities fraud case not involving Regulation FD, the Ninth Circuit defined recklessness as an "extreme departure from the standard of ordinary care."[17] Thus, an intentional disclosure under Regulation FD is any type of communication with a covered recipient in which an issuer knowingly or recklessly divulges material nonpublic information that has not previously been released to the public.

By way of illustration, if a chief executive officer (CEO) of a public company plans not to disclose quarterly earnings guidance, but changes his mind during a meeting with analysts and discloses the information, aware that it is material and nonpublic, then that CEO has intentionally violated Regulation FD.

However, if that CEO discloses the same earnings guidance in the private meeting with the analysts, mistakenly believing that the information already has been released publicly, then the CEO has made an unintentional disclosure that must be disseminated to the public promptly.[18]

Thus, making a mistake is not automatically actionable under Regulation FD, as long as the issuer promptly discloses the information to the public. But failing to make broad public disclosure promptly may result in a Regulation FD violation. Such conduct also may result in a violation of section 13(a) of the Securities Exchange Act of 1934 Act (1934 Act), which obligates an issuer to maintain disclosure controls and procedures with respect to the proper and

timely handling of information required to be disclosed in reports filed with the SEC.[19] Often in enforcement proceedings related to Regulation FD, the SEC alleges violations of both Regulation FD and section 13(a).[20]

Q 11.6.3 What is material information?

Regulation FD does not define the term "material," relying instead on the definition of that term as developed under existing case law and the SEC's Staff Accounting Bulletin 99 (addressing materiality in connection with financial statements).[21] As discussed in more detail in chapter 6, information is "material" when "there is a substantial likelihood that a reasonable shareholder would consider [the information] important," or when it "would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available."[22]

Assessing "materiality" for purposes of Regulation FD requires the exercise of judgment and therefore often poses problems for issuers called upon to respond in real time to questions from analysts, shareholders, and other securities professionals related to corporate developments. The SEC itself acknowledged that the lack of a bright-line test for materiality could result in issuers "speaking out less often out of fear of liability based on a *post hoc* assessment that the disclosed information was material."[23] To provide greater clarity, the SEC, in adopting Regulation FD, supplied a nonexhaustive list of categories of information that may be material in certain cases. The categories include

> earnings information; mergers, acquisitions, tender offers, joint ventures or changes in assets; new products or discoveries, or developments regarding customers or suppliers (*e.g.*, the acquisition or loss of a contract); changes in control or in management; change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report; events regarding the issuer's securities—*e.g.*, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and bankruptcies or receiverships.[24]

More often than not, information in these categories will be regarded as material for Regulation FD purposes. In addition, information about an issuer's major new products, contract awards, expansion plans, and discoveries may be deemed material as well.[25]

Q 11.6.4 What is "nonpublic" information?

"Nonpublic" information is information that the issuer has not disseminated to all investors in the marketplace. For example, information that an issuer provides to a small group of securities professionals at a conference or during an on-site visit falls into this category. By contrast, information an issuer discloses in a press release that is broadly distributed to the media, or in a Form 8-K or Form 10-K filed with the SEC, constitutes public information.

If an issuer discloses material nonpublic information during a meeting of shareholders that is open to the public but is not covered by the press and is not broadcast through any electronic means, that disclosure is not considered to be public, because it is not "reasonably designed to provide broad nonexclusionary distribution of information to the public."[26] Similarly, a disclosure made by an issuer during a telephonic investor conference call is not necessarily a public disclosure, as it does not necessarily include members of the media and the general public.

Whether an issuer-led conference call is deemed public for Regulation FD purposes "depend[s], among other things, on when, what and how widely the press reports on the meeting."[27] For the conference call to be deemed "public," the issuer must give the public reasonable advance notice of the conference call, including the time, date, and subject matter of the call plus the call-in information.[28] The notice period depends on the particular facts and circumstances. A notice of several days would be reasonable for a regular quarterly earnings announcement,[29] while a shorter period of notice may be appropriate when unexpected events occur and the information is critical or time-sensitive.

Q 11.6.5 What is a "public" disclosure?

To make information "public," it must be disseminated in a manner calculated to reach the securities marketplace in general through recognized channels of distribution, and public investors

must be afforded a reasonable waiting period to react to the information.[30] An issuer may use a single method or a combination of methods of disclosure, and it may not always be possible or desirable for an issuer to rely on a single method of disclosure.

Generally, for purposes of Regulation FD, issuers use a Form 8-K to make a public disclosure following a prohibited selective disclosure.[31] However, an issuer may "instead disseminate[] the information through another disclosure method (or a combination of methods) reasonably designed to provide broad, nonexclusionary distribution of the information to the public," such as a press release.[32]

The filing of a Form 10-Q or a proxy statement also satisfies the public dissemination requirement of Regulation FD.[33] Again, the dissemination must be timely and clear and must be brought to the reader's attention. The issuer may not bury the information or make the reader piece together the information being disclosed. This requirement was reaffirmed by the SEC staff in a Compliance and Disclosure Interpretation in 2009.[34]

Once an issuer files the information on the SEC's EDGAR (Electronic Data-Gathering and Retrieval) system and receives confirmation of the filing, the issuer can disclose that information selectively to securities industry professionals without violating Regulation FD.[35] No further waiting time is needed.

Disclosure via Website

Q 11.7 Is a disclosure made on an issuer's website a "public" disclosure?

Prior to 2008, the SEC did not consider a website posting, without more, to constitute public disclosure for Regulation FD purposes. Companies were required to file or furnish a Form 8-K or make some other broad form of dissemination under Regulation FD at the same time they posted the information on their website.

However, in an interpretive release dated August 1, 2008, the SEC recognized that in certain circumstances, the use of websites to deliver information is equal to other methods of disseminating public information, and decided to permit a company's website to serve as a

stand-alone method of public disclosure in limited circumstances, as described below.[36]

In particular, disclosures that issuers make via their websites may be considered "public" as long as the company's website is a "recognized channel of distribution," the information is posted in a manner calculated to reach investors, and the information is posted for a reasonable time.

Thus, according to the SEC's guidance, for an issuer to use its website alone to publicly disclose material nonpublic information it already has selectively disclosed, the issuer must consider the following questions: (1) Is the company website a recognized channel of distribution? (2) Is the company disseminating the information in a manner that makes it available to the marketplace in general? (3) Is the company giving investors and the market a reasonable waiting period to react to the information?

Q 11.7.1 What makes a website a recognized channel of distribution?

Whether the website is a "recognized channel of distribution" depends on the steps the company has taken to alert the market to its website and disclosure practices.[37]

Q 11.7.2 How is information adequately disseminated to the marketplace on a website?

Adequate dissemination depends on two factors: the manner in which the information is posted on a company's website, and the timely and ready accessibility of such information to investors and markets.[38]

An issuer must consider how it lets investors and the markets know that its website routinely contains material information. An issuer must also consider where the information is located on the website; for example, is it prominently displayed in a location known and routinely used for such disclosures, and in a format that the general public can readily access? Additionally, the issuer must keep the website accurate and current.

Determining accessibility to the general public depends on the company's market. For instance, companies that are well followed by

the market know that the information on their websites will be read and further distributed by the media. But "companies with less of a market following . . . may need to take more affirmative steps so that investors . . . know that information is or has been posted on the company's website and that they should look at the company website for current information about the company."[39] Such companies should continue to issue press releases and/or file and furnish Form 8-Ks to ensure that material information is widely disseminated.[40]

Also, companies should exercise caution when using social media to communicate with the public. Specifically, they should advise their employees on the dangers of disseminating nonpublic information through services such as Facebook, Twitter, and LinkedIn. Recently, Francesca's Holdings Corporation, a corporation that manages the women's retail store Francesca's Collections, terminated its CFO for "improperly communicat[ing] Company information through social media [his Twitter page]."[40.1] On the page, the CFO commented "Board Meeting. Good numbers = Happy Board"[40.2] during the quiet period prior to the issuer's earnings release. Such communication was a violation of Regulation FD, as the CFO's Twitter page is not a recognized channel of distribution and therefore the disclosure was nonpublic. Currently there is no indication that the SEC has brought an enforcement action against the CFO or Francesca's Holdings.

Q 11.7.3 What is a reasonable time period for the public to react to information on a company's website?

An issuer that wishes to disseminate material nonpublic information to the public exclusively over its website must consider the public's reaction time to the information.[41] In particular, the issuer must provide a reasonable waiting period for the public to react to the posted information before it selectively discloses the information to analysts, brokers, dealers, or shareholders.

When determining a reasonable waiting period, an issuer should bear in mind the size and market following of the company, the nature of the information being disclosed and its complexity, the action it has taken to make investors and the market aware that its website is the "key source of important information," and the company's efforts to disseminate the information, including using other avenues of distribution.[42]

The SEC has not defined the reasonableness of any particular waiting period. Rather, what constitutes a reasonable waiting period is a facts-and-circumstances determination. For instance, a large company that frequently uses its website as a key resource for providing information, has taken steps to make investors and the market aware of this, and reasonably believes that its website is well followed by investors and other market participants may get comfortable with a waiting period that is shorter than that of a company with a less robust web presence.

Scope Issues

Q 11.8 Whose conduct does Regulation FD target?

Regulation FD applies only to disclosures made by or on behalf of a publicly traded company's senior management—its officers or senior-level staff—who regularly communicate with securities professionals, including brokers or dealers, investment company personnel, investment advisers, research analysts, or holders of the company's securities, "under circumstances in which it is reasonably foreseeable that the person (or entity) will purchase or sell the issuer's securities on the basis of the information."[43]

Regulation FD does not prohibit an issuer from communicating material nonpublic information to its own employees, officers, or directors or to third parties, other than to certain third-party investment professionals and other persons who are likely to trade the issuer's securities on the basis of the information.

Q 11.8.1 Does Regulation FD cover only disclosures by issuers or are disclosures by others covered as well?

Regulation FD covers issuers and the responsible senior officials and agents who act for or on behalf of issuers. SEC enforcement actions alleging violations of Regulation FD usually are brought against an issuer and one or more senior-level employees of the issuer.[44] The SEC can bring an administrative action seeking a cease-and-desist order, an action in district court seeking an injunction and, in egregious cases, a monetary penalty or both types of actions simultaneously.[45]

Less common are actions brought under Regulation FD solely against a member of an issuer's senior management, and not also against the issuer. In *In re Christopher A. Black*,[46] the SEC did not charge the issuer with a Regulation FD violation, but did bring that charge against the issuer's senior vice president and chief financial officer, for allegedly selectively disclosing, from his home computer, material nonpublic information regarding the issuer's second-quarter earnings forecast. According to the SEC's administrative settlement in the matter, five days after the issuer announced earnings guidance in a press release, Black, the company's chief financial officer, sent "additional color" about the guidance to eight sell-side analysts who covered the issuer, via email from his home computer. He did not provide a copy of the email to anyone at the issuer before sending it to the analysts.

In settling with the SEC, Black agreed to cease and desist from causing further violations of Regulation FD and section 13(a) of the 1934 Act. In a related district court action settled simultaneously with settlement of the administrative proceeding, Black agreed to pay $25,000 as a civil penalty.[47]

Q 11.8.2 Can someone who receives selective disclosure of material nonpublic information and subsequently trades based upon that information be liable under Regulation FD if that person is not a senior official of the issuer?

No. Regulation FD imposes obligations—and liability—only on the issuer and its senior officials. It is important to note, however, that although the trader cannot be liable under Regulation FD, the trader can be liable under the insider trading laws.

Q 11.9 What disclosures fall outside Regulation FD?

Regulation FD is a narrow regulation that applies only to a limited group of communications made by a limited group of people to a limited group of professionals under limited circumstances.

Regulation FD does not apply to a variety of communications:

- communications by private companies or foreign private issuers;

- disclosures made in connection with most registered offerings;[48]
- disclosures made by employees of an issuer who are not authorized to speak under Regulation FD;
- disclosures by an issuer to the media, customers, suppliers, attorneys, investment bankers, or accountants; [49] and
- disclosures by an issuer to the issuer's own officers, directors, and employees.[50]

However, the insider trading laws and general antifraud provisions of the securities laws apply to these communications and would bar trading by the recipients of material nonpublic information where, for instance, such trading was made in breach of a duty of trust or confidence.

Q 11.9.1 What if a disclosure is made pursuant to a confidentiality agreement?

Disclosures of material nonpublic information made by an issuer pursuant to a confidentiality agreement also fall outside the scope of Regulation FD, even if such disclosures are made to an analyst, securities professional, or other market insider.[51] The recipient can agree to keep the information confidential either in writing or orally, but the customary market practice is to have a written confidentiality agreement to help insulate the issuer from liability for a Regulation FD violation. The confidentiality agreement is not required to precede the receipt of the information, but must be entered into before the recipient shares the information with other parties.

For purposes of Regulation FD, an agreement not to trade on information, or an acknowledgment that trading on the information may violate insider trading laws, is not equivalent to an agreement to keep the information confidential.[52] If the recipient of the information later trades on the basis of the information or communicates the information to others who then trade on the basis of the information, the recipient could face liability under traditional insider trading laws.

Q 11.10 To avoid violating Regulation FD, does an issuer need to use the identical language in its public and private disclosures?

No. Although the SEC argued in favor of requiring issuers to use the identical language in public and private disclosures, the court in *SEC v. Siebel Systems, Inc.* found no support for the SEC's position in Regulation FD itself, or in the Proposing and Adopting Releases.[53] Moreover, in dismissing the SEC's complaint, the court found that the public and private statements at issue were equivalent in substance, even though the public statements, made during conference calls and via the Internet, were in the future tense, while the private statements, made during two private events attended by institutional investors, were in the present tense.[54]

The court described as "nit-picking" the SEC's scrutiny of particular words used, the tenses of verbs, and the general syntax of each sentence, finding that such an approach placed an unreasonable burden on a company's management and spokespersons to become linguistic experts, or otherwise live in fear of violating Regulation FD should the words they use later be interpreted by the SEC as connoting even the slightest variance from the company's public statements. "If Regulation FD is applied in such a manner," the court concluded, "the very purpose of the regulation, i.e., to provide the public with a broad flow of relevant investment information, would be thwarted."[55]

Q 11.11 When an issuer learns that its public disclosure did not adequately communicate the intended message, what steps can it take under Regulation FD to clarify or amplify its message?

Under Regulation FD, the proper course of action is to make additional public disclosure, *not* to selectively disclose the corrected message in private communications with industry professionals.

Motorola, Inc. faced this situation shortly after the adoption of Regulation FD.[56] In a February 2001 press release and subsequent public conference call, Motorola disclosed that its first-quarter sales and orders were experiencing "significant weakness" and that the company did not expect to achieve the first-quarter sales or earnings

guidance it previously had reported. In the days following the public release of that information, the company's head of investor relations, after reviewing analysts' models and research notes, concluded that analysts still were overstating Motorola's likely first-quarter results.

After reaching that conclusion, the investor relations director contacted approximately fifteen sell-side analysts by telephone to discuss their models, and during the calls he told ten of them that first-quarter sales and orders were down 25%. He made the calls and statements to the analysts after first discussing his plans with the company's in-house counsel, who advised that the clarifying information was neither material nor nonpublic, but simply provided quantitative definition for the previously publicly disclosed qualitative term "significant."

After investigating the facts, the SEC concluded that counsel's advice, while incorrect, had been sought and given in good faith. As a result, the SEC did not bring charges against Motorola and its investor relations director under Regulation FD, but instead issued a report of investigation to serve as guidance to issuers. In the report, the SEC made clear that

> [w]hen an issuer endeavors to make public disclosure of material information—but later learns that it did not, in fact, fully communicate the intended message, and determines that further disclosure is needed—the proper course of action under Regulation FD is not to selectively disclose the corrected message in private communications with industry professionals, but rather to make additional public disclosure.[57]

Q 11.12 If a corporate insider provides an analyst with material nonpublic information that the analyst knows is material and nonpublic, does Regulation FD bar the analyst from trading or recommending that others trade on the basis of that information?

No. Regulation FD is a limited provision that targets disclosures, not trading, and regulates the conduct only of issuers and their senior officials, not the conduct of investors and other market profes-

sionals even if they know that the information received from issuers is material and nonpublic.

However, the general insider trading laws under certain circumstances might bar trading by securities professionals who knowingly possess material nonpublic information about an issuer. For instance, trading would be prohibited if the information was obtained in breach of a duty owed to the issuer. Such a duty might be owed by the person in possession of the information (that is, the corporate insider who made the selective disclosure and therefore "tipped" the analyst or securities professional), or by the person who obtained the information and tipped it to the analyst or other securities professional. Since trading by a person who is aware of material nonpublic information may subject that person to heightened scrutiny by the SEC and others, a person aware of material nonpublic information would be wise, before trading on the basis of such information, to consult with an experienced attorney in order to determine whether his or her trading would violate the insider trading laws under any possible theory.

Even aside from general insider trading laws, internal policies and procedures of an analyst's or other securities professional's employer may restrict the use of material nonpublic information. The employer's policies, for example, may require the analyst to notify his employer's legal or compliance personnel upon knowingly receiving material nonpublic information from an issuer. In such case, the employer's policies may require the analyst to alert the issuer to the fact that the information selectively disclosed to the analyst had not been disclosed publicly previously or simultaneously, and to suggest that the issuer disseminate the information publicly on a prompt basis within the meaning of Regulation FD.[58] Alternatively, the legal or compliance personnel may conclude that the potential risks and costs of an SEC investigation outweigh the possible benefits of trading even in circumstances where the firm has reasonably concluded that any resulting trading would not violate the insider trading laws.

Evolution of Regulation FD

Q 11.13 How has Regulation FD changed since its adoption?

The SEC has amended Regulation FD several times since its adoption. In 2005, the SEC amended the regulation to exempt certain disclosures made during and in connection with registered offerings,

> whether or not underwritten, for capital formation purposes for the account of the issuer (unless the issuer's offering is being registered for the purpose of evading the requirements of this section), if the disclosure is by any of the following means: . . . [a] registration statement filed under the Securities Act, including a prospectus . . . ; [a] free writing prospectus used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act; [a]ny other Section 10(b) prospectus; [a] notice permitted by Rule 135 under the Securities Act . . . ; [a] communication permitted by Rule 134 under the Securities Act . . . ; or [a]n oral communication made in connection with the registered securities offering after filing of the registration statement.[59]

Under the amendment, Regulation FD continues to apply to secondary offerings by selling security holders, as well as to traditional private placements and offerings under Rule 144A and Regulation S by domestic public companies.

In December 2009, the SEC removed nationally recognized statistical rating organizations (NRSROs) as a category of covered recipients for purposes of Regulation FD.[60] Thus, if an issuer discloses material nonpublic information to an NRSRO, it is not a violation of Regulation FD.

In a related change, on September 29, 2010, the SEC removed as a category of excepted communications disclosures made to entities whose primary business is the issuance of credit ratings, where the information is disclosed to the rating agency solely for the purpose of enabling it to develop a credit rating and the entity's ratings are publicly available.[61]

The SEC has made other changes in its application of Regulation FD over the years that have not involved changes to the regulation itself. For instance, at the time it adopted Regulation FD, the SEC did not view disclosures made over a company's website to be public disclosures under Regulation FD, due to the then level of Internet penetration. As noted, in 2008 the SEC updated its guidance regarding the use of company websites as a means of disclosure for purposes of Regulation FD. In its updated guidance, the SEC acknowledged that electronic communications had become the "superior method" of providing issuer information to most investors, as compared to other methods,[62] as long as the company's website is a recognized channel of distribution, the information is posted in a manner calculated to reach investors, and the information is posted for a reasonable time.[63]

Q 11.14 Has Regulation FD achieved its intended purpose?

It is unclear whether Regulation FD has achieved its intended purpose. In the early 2000s, several surveys indicated that issuers were providing more material information than they did prior to the adoption of Regulation FD. One study concluded that companies had significantly increased the quality and quantity of information they distributed to the public.[64] Another article noted that the "net effect appears to be improved information for shareholders with minimal dilution of the quality or quantity of communication from public companies."[65]

Yet issuers, analysts, shareholders, and potential investors still can be confused about which disclosures are prohibited and which are permitted under Regulation FD. For this reason, the SEC updated its Regulation FD Compliance and Disclosure Interpretations in June 2010.[66] Whether the SEC's recent guidance will result in greater clarity and more information being disclosed to the marketplace remains to be seen. But it serves to confirm that, even after ten years, applying Regulation FD in particular situations still can be confusing.

Related Disclosure Rules of the Self-Regulatory Organizations

Q 11.15 How have the self-regulatory organizations addressed the disclosure of material information?

The New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotation (NASDAQ) systems, and the Financial Industry Regulatory Authority (FINRA) each have adopted rules and offered guidance to issuers regarding disclosure of material information.

Q 11.15.1 What rules has the NYSE adopted?

The NYSE Listed Company Manual provides that disclosures concerning "[a]nnual and quarterly earnings, dividend announcements, mergers, acquisitions, tender offers, stock splits, major management changes and any substantive items of unusual or nonrecurrent nature" should be released immediately by a Regulation FD–compliant method or combination of methods.[67]

Additionally, the NYSE prescribes that news that must be released immediately should be distributed by the "fastest available means."[68] Ordinarily, this requires a release to the public press by telephone, facsimile, or hand delivery, or a combination of those methods.[69] The NYSE suggests that issuers send press releases to Dow Jones & Company, Reuters Economic Services, and Bloomberg Business News, because a press release sent exclusively to the issuer's local media is not adequate disclosure to investors.[70] In addition, issuers should send information that would "significantly affect trading" to the company's NYSE representative by email.[71]

Q 11.15.2 What rules has NASDAQ adopted?

NASDAQ Stock Market Rules mandate that companies make prompt public disclosure of any material information that would reasonably be expected to affect the value of the companies' securities or influence investors' decisions.[72] In addition, issuers must provide notice to NASDAQ's MarketWatch Department prior to making a public disclosure:

> Companies are required to notify MarketWatch at least ten minutes prior to the public release of certain material news announcements when the public release of the information is made during NASDAQ market hours (7:00 a.m. to 8:00 p.m. ET). If the public release of the material information is made outside of NASDAQ market hours, companies must notify MarketWatch of the material information prior to 6:50 a.m. ET. Material news disclosures must be submitted directly to MarketWatch through the Electronic Disclosure submission system accessible at www.NASDAQ.net 24 hours a day.[73]

Q 11.15.3 What rules has FINRA adopted?

FINRA (successor to the National Association of Securities Dealers (NASD)) has adopted NASD rules concerning Regulation FD,[74] including NASD Rules 4310(c)(16) and 4320(e)(14), which require that, except in unusual circumstances, NASDAQ issuers are to disclose promptly to the public through any Regulation FD–compliant method or combination of methods any material information that would be reasonably expected to affect the value of their securities or influence investors' decisions. The rules further provide that NASDAQ issuers shall notify NASDAQ of the release of such material information prior to its release to the public.[75]

Notes

* Shauneida DePeiza Saldenha, an associate in Schulte Roth & Zabel's Litigation Group, assisted in the preparation of this chapter.

1. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599, 2000 WL 1201556, at *1–2 (Aug. 15, 2000) [hereinafter Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556].

2. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *32.

3. An "issuer" is a company that has a "class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)." 17 C.F.R. § 243.101(b). A "senior official" is any "director, executive officer, investor relations or public relations officer, or other person with similar functions" employed by an issuer. 17 C.F.R. § 243.101(f).

4. Securities market professionals are "(1) broker-dealers and their associated persons, (2) investment advisers, certain institutional investment managers and their associated persons, and (3) investment companies, hedge funds, and affiliated persons. These include sell-side analysts, many buy-side analysts, large institutional investment managers, and other market professionals who may be likely to trade on the basis of selectively disclosed information." Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *8.

5. 17 C.F.R. § 243.100(b)(1)(iv).

6. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *2.

7. *Id.*

8. *Id.* at *3.

9. *Id.* at *2.

10. 17 C.F.R. § 243.102.

11. SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 705 (S.D.N.Y. 2005).

12. *Id.* at 709 n.16.

13. 17 C.F.R. § 243.100(a)(1).

14. 17 C.F.R. § 243.100(a)(2).

15. 17 C.F.R. § 243.101(d).

16. *Id.*

16.1. *In re* Fifth Third Bancorp, Exchange Act Release No. 65808 (Nov. 22, 2011), *available at* www.sec.gov/litigation/admin/2011/34-65808.pdf.

16.2. *Id.*

16.3. *Id.*

17. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991) (reckless conduct is "a highly unreasonable omission,

involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading . . . that is either known to the defendant or is so obvious that the actor must have been aware of it.").

18. *See In re* Secure Computing Corp., Exchange Act Release No. 46,895, 2002 WL 31643024 (Nov. 25, 2002).

19. 15 U.S.C. § 78m(a).

20. *See, e.g., In re* Secure Computing Corp., Exchange Act Release No. 46,895, 2002 WL 31643024; *see also In re* Schering-Plough Corp., Exchange Act Release No. 48,461, 2003 WL 22082153 (Sept. 9, 2003*)*; *In re* Office Depot, Inc., Exchange Act Release No. 63,152, *available at* www.sec.gov/litigation/admin/2010/34-63152.pdf (Oct. 21, 2010).

21. U.S. Securities and Exchange Commission, SEC Staff Accounting Bulletin: No. 99, 1999 WL 625156 (Aug. 19, 1999).

22. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 439, 449 (1976).

23. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *32.

24. *Id.* at *10.

25. *Id.*; *see also In re* Secure Computing Corp., Exchange Act Release No. 46,895, 2002 WL 31643024.

26. U.S. Securities and Exchange Commission, Compliance and Disclosure Interpretations: Regulation FD, www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm (last updated Aug. 14, 2009).

27. U.S. Securities and Exchange Commission, Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, www.sec.gov/interps/telephone/phonesupplement4.htm (last visited Sept. 16, 2011).

28. U.S. Securities and Exchange Commission, Compliance and Disclosure Interpretations: Regulation FD, www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm (last updated Aug. 14, 2009).

29. *Id.*

30. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968).

31. Thomas Ishmael, *Securities and Exchange Commission Regulation Fair Disclosure—*A *Modern Law with Outmoded Methods: An Appeal for Dissemination of Material Information on Corporate Websites*, 33 OKLA. CITY U. L. REV. 629, 630 (2008).

32. 17 C.F.R. § 243.101(e)(2).

33. *Id.*

34. U.S. Securities and Exchange Commission, Compliance and Disclosure Interpretations: Regulation FD, www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm (last updated Aug. 14, 2009).

35. *Id.*

36. Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 2008 WL 4068202, at *2 (Aug. 1, 2008).

37. *Id.* at *6.

38. *Id.* at *2.

39. *Id.* at *7.

40. *Id.* at *9.

40.1. Francesca's Collections, *Francesca's Holdings Terminates Employment of CFO Gene Morphis Following Board Investigation of His Use of Social Media* (May 14, 2012), *available at* http://investors.francescascollections.com/releasedetail.cfm?ReleaseID=672925.

40.2. Gene Marbach, *Social Media and Reg. FD: Francesca's Holdings Former CFO Was Too "Social" in Disseminating Information* (May 18, 2012), *available at* www.makovsky.com/Social-Media-and-Reg-FD-Francesca-Holdings-Former-CFO-Was-Too-Social-in-Disseminating-Information.

41. *Id.* at *7.

42. *Id.* at *8.

43. 17 C.F.R. § 243.100(b).

44. *See, e.g., In re* Raytheon Company and Franklyn A. Caine, Exchange Act Release No. 46,897, 2002 WL 31643026 (Nov. 25, 2002) (action against issuer and CFO following one-on-one calls between CFO and sell-side analysts concerning issuer's estimate of its expected annual and quarterly distribution of earnings per share); *In re* Secure Computing Corp. and John McNulty, Exchange Act Release No. 46,895 (2002), *available at* www.sec.gov/litigation/admin/34-46895.htm (action against issuer and CEO following CEO's disclosures to two portfolio managers at two institutional advisers concerning a significant new contract between issuer and another company); *In re* Marino, Exchange Act Release No. 66,990 (May 15, 2012), *available at* www.sec.gov/litigation/admin/2012/34-66990.pdf (action against issuer and CEO following CEO's disclosure of issuer's financial information to partner of registered investment advisor, resulting in civil penalties of $50,000 imposed against CEO and of $400,000 imposed against issuer).

45. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *20 & n.91 (SEC "likely will seek more severe sanctions for violations that continue for a longer period of time.").

46. *In re* Christopher A. Black, Exchange Act Release No. 60,715, 2009 WL 3047553 (Sept. 24, 2009).

47. SEC v. Black, Case No. 09-CV-0128 (S.D. Ind.) (filed Sept. 24, 2009), *available at* www.sec.gov/litigation/litreleases/2009/lr21222.htm.

48. 17 C.F.R. § 243.101(b).

49. 17 C.F.R. § 243.100(b)(2).

50. *See* Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *9.

51. U.S. Securities and Exchange Commission, Compliance and Disclosure Interpretations: Regulation FD, www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm (last updated Aug. 14, 2009).

52. *Id.*; Selective Disclosure and Insider Trading, Securities Act Release No. 7881, 2000 WL 1201556, at *8 n.28.

53. *See* SEC v. Siebel Sys., Inc., 384 F. Supp. 2d 694, 704 (S.D.N.Y. 2005).

54. *Id.*

55. *Id.* at 705.

56. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 46,898, 2002 WL 31650174 (Nov. 25, 2001).

57. *Id.*

58. *See, e.g., In re* Office Depot, Exchange Act Release No. 63,152 (Oct. 21, 2010), *available at* www.sec.gov/litigation/admin/2010/34-63152.pdf (two analysts called the director of investor relations to express concerns about the disclosure and the lack of a press release).

59. 17 C.F.R. § 243.100(b)(2)(iv).

60. Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 61,050, 2009 WL 4071279 (Dec. 4, 2009). While the SEC released this final rule on December 4, 2009, the rule was not effective until February 1, 2010, and the rule had to be complied with by June 2, 2010.

61. Removal from Regulation FD of the Exemption for Credit Rating Agencies, 75 Fed. Reg. 61,050 (Oct. 4, 2010).

62. Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 2008 WL 406820273 (Aug. 1, 2008). Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 2008 WL 4068202 (Aug. 1, 2008).

63. *See* Q 11.3.6.

64. Philippe Jorion et al., *Informational Effects of Regulation FD: Evidence from Rating Agencies*, 76 J. FIN. ECON. 309, 310 (2005) (citing Frank Heflin et al., *Regulation FD and the Financial Information Environment: Early Evidence*, ACCT. REV., Jan. 2003, at 1).

65. Ernest W. Torain, Jr., *infra* note 75, at 643, 645.

66. U.S. Securities and Exchange Commission, Compliance and Disclosure Interpretations: Regulation FD, www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm (last updated June 4, 2010).

67. NYSE Listed Company Manual, Section 2 Disclosure and Reporting Material Information ¶ 202.06(A), *available at* http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F3%5F3%5F1&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F.

68. *Id.* ¶ 202.06(C).

69. *Id.*

70. *Id.*

71. *Id.*

72. NASDAQ OMX, Listing Center FAQs, *available at* https://listingcenter.nasdaqomx.com/Show_Doc.aspx?File=marketwatch_faq.html (last updated Oct. 13, 2010); *see also* NASDAQ Listing Rules 5250(b)(1), *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F.

73. NASDAQ OMX, Listing Center FAQs, *available at* https://listingcenter.nasdaqomx.com/Show_Doc.aspx?File=marketwatch_faq.html (last updated Oct. 13, 2010).

74. After the consolidation of NASD and NYSE Regulation into FINRA, FINRA established a process to create a consolidated rulebook. Initially, a transitional rulebook comprised NASD and NYSE rules, and that rulebook does not yet address certain rules. However, FINRA states that any "[c]onduct that was subject to any rule in the Transitional Rulebook at the time such rule was in effect remains subject to that rule for the purpose of regulatory examinations and disciplinary/enforcement proceedings." Thus, issuers remain subject to any rules remaining in the transitional rulebook until the rules are either expressly voided or made part of the consolidated rulebook. FINRA Information Notice, Rulebook Consolidation Process, *available at* www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117506.pdf.

75. Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Issuer Disclosure of Material Information, Release No. 34-46288, 67 Fed. Reg. 51,306 (2002); *see* Self Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Issuer Disclosure of Material Information, 67 Fed. Reg. 72,011 (2002)); *see also* Ernest W. Torain, Jr., *Regulation FD: The First Five Years, in* CORPORATE GOVERNANCE 2006: BEST PRACTICES FOR GATEKEEPERS, at 641, 643, 645 (PLI Corp. Law & Practice Course Handbook Ser. No. 1530, 2006).

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Public Company Hot Topics

7. Additional Materials: The OECD's Final Downstream Pilot Program Report — Implications for Conflict Minerals Rule Compliance

- SRZ Conflict Minerals Resource Center
- SRZ White Paper — Ramping Up Conflict Minerals Rule Compliance — A Near-Term Checklist for Public and Private Companies
- Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

SRZ Conflict Minerals Resource Center

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CONFLICT MINERALS RESOURCE CENTER
February 2013

On August 22, 2012, the SEC adopted the final rule implementing Section 1502 of the Dodd-Frank Act, the Conflict Minerals Rule, aimed at reducing a significant source of funding for armed groups that are committing human rights abuses and contributing to the conflict in the Democratic Republic of the Congo. Under the final rule, SEC reporting companies that manufacture or contract to manufacture products that contain conflict minerals must conduct diligence on the source and chain of custody of the applicable conflict minerals. In some cases, the company must publicly disclose in a new SEC form, Form SD, that its products containing the minerals have not been found to be "DRC conflict free."

SRZ has been following the development of the Conflict Minerals Rule since the passage of Dodd-Frank Act. Our Conflict Minerals Resource Center is continuously updated to reflect new developments and new resources available to help public and private companies comply with the conflict minerals rule.

SUBSCRIBE TO ALERTS **SRZ's Conflict Minerals Resource Center is periodically updated to reflect new developments. Click here to receive alerts when new materials are added.**

For more information on Conflict Minerals Rule compliance, please email Michael Littenberg at michael.littenberg@srz.com.

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Diamond District Monthly: Conflict Minerals Rule Adopted: Compliance Considerations for Privately Owned Companies in the Jewelry Industry

IR Magazine: What IR Departments Need to Know About the SEC's Conflict Minerals Rule

SRZ Client Alert: The New Conflict Minerals Rule: An Overview for Private Equity and Venture Capital Professionals

Practical Law Company: Preparing for Conflict Minerals Rule Compliance: Company Action Items Checklist

SRZ Client Alert: SEC Adopts Final Conflict Minerals Rule: An Overview of the Rule, Action Items and Resources for Compliance

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EICC and GeSI Tungsten Supply Chain Transparency: Smelter Audit

SELECTED FORM DOCUMENTS

National Association of Manufacturers Supplier Notification Letter

IPC Dear Supplier Letter

IPC Dear Customer Letter

NGO AND UN RESOURCES

Global Witness Guide for Companies — Do No Harm: Excluding Conflict Minerals From the Supply Chain

Enough Project Company Rankings on Conflict Minerals

Enough Project — From Child Miner to Jewelry Store: The Six Steps of Congo's Conflict Gold

Raise Hope for Congo Conflict Minerals Company Rankings

Solutions for Hope Tantalum Sourcing Project

UN Global Compact Business Guide for Conflict Impact Assessment and Risk Management

U.N. Security Council Letter Dated 12 November 2012 Concerning the Democratic Republic of the Congo

Report of the UN Group of Experts on the Democratic Republic of the Congo

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ICGLR Regional Certification Mechanism (RCM) — Certification Manual

Greening ICT supply chains - Survey on conflict minerals due diligence initiatives

NEW Responsible Sourcing Network — What's Needed: An Overview of Multi-Stakeholder and Industry Activities to Achieve Conflict-Free Minerals

STATE AND LOCAL MATERIALS

Pittsburgh City Council Proclamation on Conflict Minerals

St. Petersburg City Council Resolution on Conflict Minerals

Text of California Senate Bill No. 861 on Conflict Minerals

Text of Maryland House Bill 425 on Conflict Minerals

Text of Proposed Massachusetts Bill H.2898 on Conflict Minerals

OTHER RESOURCES

TheCorporateCounsel.net Survey Results: Conflict Minerals

Cheuvreux Credit Agricole Group Conflict Minerals Presentation, October 2012

NON-US INITIATIVES

Australian Government Due Diligence Guidelines for Responsible Supply Chains

European Parliament Resolution with Provision on Conflict Minerals

United Kingdom Foreign and Commonwealth Office – Conflict Minerals: Guiding British Companies Trading in Minerals from the Democratic Republic of Congo to be Socially, Economically and Environmentally Responsible

European Commission — Trade, Growth and Development: Tailoring Trade and Investment Policy for Those Countries Most in Need

Canada — Proposed Legislation

OTHER SUPPLY CHAIN DISCLOSURE INITIATIVES

Text of California Transparency in Supply Chains Act

Press Release from Bill Sponsor on H.R. 2759, Business Transparency on Trafficking and Slavery Act (Pending)

Text of H.R. 2759 – Business Transparency on Trafficking and Slavery Act (Pending)

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"Apple, Boeing Among Thousands Explaining Metal Origins to SEC," *Bloomberg*, Aug. 22, 2012

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SRZ'S CAPITAL MARKETS PRACTICE

SRZ offers a full-service capital markets practice that provides transactional and ongoing advice through all stages for companies of all sizes. We counsel public companies, their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank and Sarbanes-Oxley, and with exchange requirements, as well as on governance and executive compensation matters. We closely monitor and advise our public company clients on rule-making initiatives and evolving best practices.

We have experience in every major industry, including apparel, automotive, aviation, biotechnology, broadcasting, business services, computer hardware, consumer services, defense, energy, entertainment, financial services, food and beverage, government services, healthcare, information technology, insurance, manufacturing, media, natural resources, real estate, restaurant and hospitality, retailing, shipping and logistics, software, technology and telecommunications.

SRZ White Paper — Ramping Up Conflict Minerals Rule Compliance — A Near-Term Checklist for Public and Private Companies

Schulte Roth & Zabel

Ramping Up Conflict Minerals Rule Compliance — A Near-Term Checklist for Public and Private Companies

A White Paper by Michael R. Littenberg and Farzad F. Damania

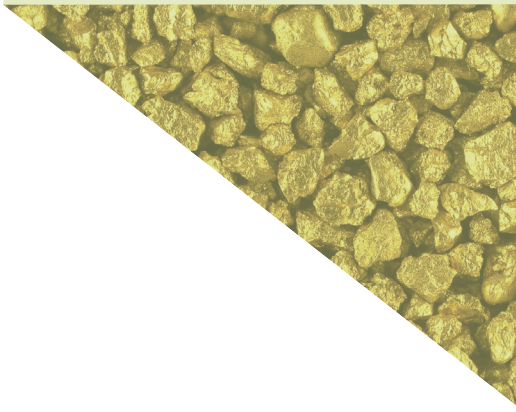
The SEC's Conflict Minerals Rule took effect on Jan. 1, 2013. In a nutshell, the rule requires public companies to conduct supply chain diligence and make disclosures concerning specified minerals and their derivatives contained in their products. The rule is intended to reduce a significant source of funding for armed groups that are committing human rights abuses in the eastern Democratic Republic of the Congo (DRC).

The Conflict Minerals Rule imposes substantial compliance obligations on a significant portion of the public company universe across a wide range of industries. The SEC estimates that approximately 6,000 registrants are impacted by the rule and that 75 percent of these registrants will be required to file a Conflict Minerals Report thereunder. Although private companies are not directly subject to the Conflict Minerals Rule, they are indirectly affected by the rule to the extent that they are part of a public company's supply chain. Some estimates place the number of affected private companies in the hundreds of thousands, ranging from small businesses to large companies and both domestic and foreign.

Most companies are familiar, at least in broad strokes, with the diligence and reporting requirements under the rule. However, in many cases, companies are having difficulty at a more basic level with the initial steps that need to be taken to efficiently establish and administer an effective Conflict Minerals Rule compliance program. At many companies, developing the compliance program has been daunting due to the complexity of the rule and the limited guidance thereunder, as well as the scope of the project.

Companies in the earlier stages of Conflict Minerals Rule compliance — which includes most companies — should consider the following near-term action items to the extent not already taken or in process. The items in this checklist come from our extensive practical experience advising on the Conflict Minerals Rule.

For more information on the SEC's Conflict Minerals Rule, please see the SRZ *Alert* "SEC Adopts Final Conflict Minerals Rule: An Overview of the Rule, Action Items and Resources for Compliance" at **http://www.srz.com/SEC_Adopts_Final_Conflict_Minerals_Rule/**.



Conflict Minerals Rule compliance is one of the most complex compliance projects ever undertaken by many public companies and requires significant cooperation across locations, divisions and departments.

Assembling the Team

- ☑ Create an internal Conflict Minerals Rule compliance team. For most companies, the internal team should consist, at a minimum, of representatives from manufacturing, engineering, procurement, IT, finance, internal audit and legal. Corporate social responsibility and investor relations should be represented as well to the extent those functions reside in-house.

- ☑ Empower the team leader. Conflict Minerals Rule compliance is one of the most complex compliance projects ever undertaken by many public companies and requires significant cooperation across locations, divisions and departments. At many companies, it has been a slow, difficult process to achieve the requisite level of internal cooperation to move Conflict Minerals Rule compliance forward effectively. Senior management should empower the project leader with the authority to develop and implement the compliance program and create the appropriate incentives to ensure cooperation.

- ☑ Establish a point person to address questions on the Conflict Minerals Rule. This may be the team leader or, in a larger organization, perhaps one of his or her reports. Designating a point person for inquiries will make it more likely that important questions concerning the Conflict Minerals Rule get asked and will help ensure that the rule is applied consistently throughout the organization, especially with respect to Step One diligence. Furthermore, as certification requests, questionnaires and contract amendment requests are received, these also will need to be dealt with consistently throughout the organization.

- ☑ Consider whether one or more additional internal hires are needed to manage the Conflict Minerals Rule compliance program.

- ☑ Consider whether the internal team needs to be supplemented by specialist outside counsel. Outside counsel can assist in (1) developing the compliance program, (2) educating personnel on the requirements of the Conflict Minerals Rule, (3) advising on interpretive questions and gray areas under the rule (there are many), (4) preparing compliance policies, supplier communications, questionnaires, certifications and contract modifications, (5) reviewing and advising on incoming materials from suppliers and customers and (6) preparing Conflict Minerals Rule disclosure.

- ☑ Consider the need for other outside consultants. Other consultants can, among other things, assist in analyzing the supply chain and supply chain risk, developing and assessing the effectiveness of diligence procedures and advising on and implementing enhancements to IT systems.

Schulte Roth & Zabel is the only law firm to have an online Conflict Minerals Resource Center. This frequently updated resource contains an extensive collection of SRZ-authored materials, U.S. government resources, NGO materials, industry group resources and form documents to assist in compliance with the rule. Subscribe to receive conflict minerals information through the SRZ online Conflict Minerals Resource Center at **http://www.srz.com/Conflict_Minerals_Resource_Center/**.

Getting Up to Speed

- ☑ Conduct internal training sessions on the Conflict Minerals Rule for relevant personnel. Given the complexity of the rule, at most companies, it is unrealistic to expect personnel to have a good understanding of the rule based solely on a written summary.
- ☑ Become familiar with the OECD conflict minerals due diligence framework, since it is currently the only recognized framework for Step Three due diligence.
- ☑ Become familiar with other relevant NGO recommendations and industry initiatives. In many cases, companies will want to piggyback on industry-wide diligence initiatives to reduce compliance costs.

Scoping Out the Compliance Project

- ☑ Determine the products that may be implicated by the Conflict Minerals Rule. At companies without a centralized product database, this often is a cumbersome task. Some companies circulate questionnaires internally to elicit this information.
- ☑ Catalogue current procurement policies and practices, supplier diligence practices and internal reporting and data gathering practices and capabilities relevant to Conflict Minerals Rule compliance in order to determine areas that may require enhancement.
- ☑ Construct a work plan, timeline and budget for Conflict Minerals Rule compliance.
- ☑ Consider conducting a pilot compliance program. This is especially important for companies with a complex supply chain to identify weaknesses and areas for improvement before the Conflict Minerals Rule compliance program is rolled out more broadly.
- ☑ Prior to conducting a pilot compliance program, consider whether to send a preliminary questionnaire to suppliers or a sample group to gather information concerning their existing procurement practices, compliance policies and procedures and data-gathering capabilities. The insight gained from the responses to the preliminary questionnaire can be used to construct a more effective pilot compliance program or hard launch.
- ☑ Demo third-party Conflict Minerals Rule compliance software solutions. Many companies will need to look to third-party software solutions to assist with data collection, and there are several solutions competing for IT spend.
- ☑ Meet with supply chain consultants if some of the heavy lifting will need to be outsourced. Because this is a developing expertise with consultants at a wide range of price points, many companies will want to meet with several supply chain consultants before deciding which firm to hire.

Communicating the Rule and the Compliance Program

- ☑ Update compliance manuals and policies to reflect the Conflict Minerals Rule and the company's compliance policy. Some companies have separate supply chain policies, while others include the principles in their social responsibility or equivalent policy.
- ☑ Send a written communication to relevant employees sensitizing them to the Conflict Minerals Rule, the company's compliance obligations under the rule and the company's compliance policy.
- ☑ Implement procedures to ensure that all certification and contract amendment requests relating to Conflict Minerals Rule compliance are sent to a knowledgeable employee for vetting. Many of the certifications and amendments that companies have been requested to sign thus far are overly broad and, as a practical matter, impossible to comply with. Because of technical language used in the certifications and amendments, this often will not be evident to employees that are not familiar with the Conflict Minerals Rule.

Managing Suppliers

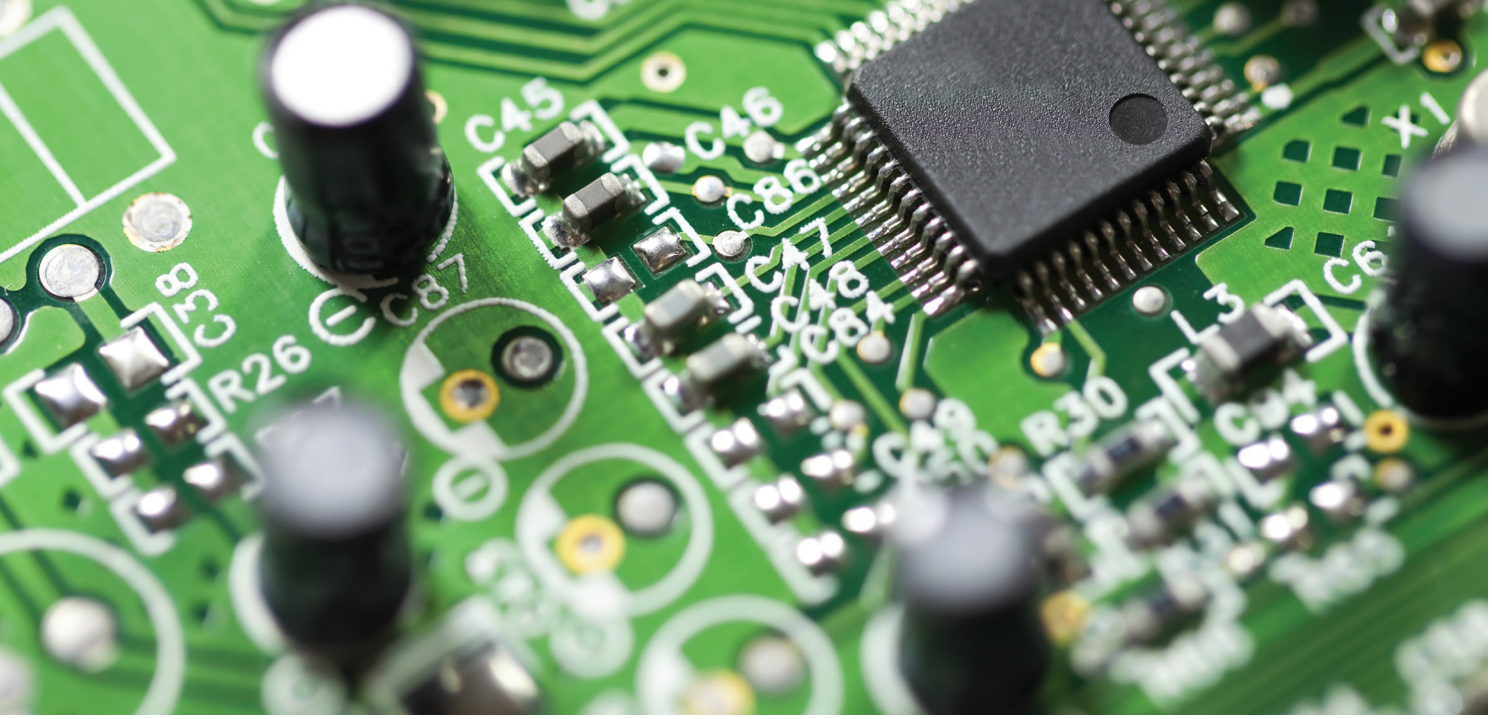
- ☑ Assemble a database of supplier personnel that should receive Conflict Minerals Rule compliance materials. Supplier compliance personnel will in many cases be different from regular supplier contacts, who typically are on the sales side of the organization.
- ☑ Send an initial written communication to suppliers sensitizing them to the final Conflict Minerals Rule and your company's compliance obligations thereunder.
- ☑ Consider whether to conduct sessions on the Conflict Minerals Rule for suppliers.
- ☑ Communicate your supply chain policy to suppliers.
- ☑ Develop supplier questionnaires and certifications and determine additional supplier documentation, diligence and compliance requirements. The supplier certification process should take into account industry recommendations and diligence initiatives to map common supply chains. Questionnaires and certifications also should capture information relevant to Step Three of the due diligence inquiry to the extent applicable. In addition, consider whether to build into these materials forced labor and child labor elements, given evolving disclosure and legislative developments in those areas.
- ☑ As discussed above, consider sending a preliminary questionnaire to suppliers, or a sample group, to gather information concerning their existing procurement practices, compliance policies and procedures and data-gathering capabilities.
- ☑ Incorporate relevant elements of Conflict Minerals Rule compliance into contracts and purchase orders with suppliers, such as adherence to your company's supply chain policy, diligence and inspection rights, supplier disclosure, reporting and cooperation requirements and flow-down clauses.
- ☑ Develop a risk management plan that includes procedures for suspending or terminating suppliers that do not comply with your sourcing policies, as well as alternative sources for products and/or conflict minerals.
- ☑ Confirm that contract manufacturers have the systems in place to track the date of manufacture of products, since this will determine the calendar year in respect of which products are required to be reported.
- ☑ Consider participating in the continuing development of industry supply chain initiatives.

Near-Term Disclosure Considerations

- ☑ Many public companies already have included a conflict minerals risk factor in their public disclosure. However, if your company has not already done so, consider whether the risks relating to the Conflict Minerals Rule are significant enough to your particular business to merit a risk factor. The risk factor should reflect the uncertainty surrounding the final rule.
- ☑ If not already publicly available, consider whether to post your sourcing policy proactively on your website. Sites such as Rankabrand.org and Goodguide.com are already explicitly tracking conflict minerals policies.

A Few Other Items to Consider

- ☑ Conflict minerals that are "outside the supply chain" prior to Jan. 31, 2013 are not required to be reported on under the Conflict Minerals Rule. Conflict minerals are outside the supply chain if they were smelted or refined or outside of the covered countries before that date. Conflict minerals and products already in-house should be inventoried prior to Jan. 31, 2013 so that they can be excluded from diligence and reporting. In addition, supplier certifications should be requested in respect of grandfathered conflict minerals and products that are delivered or manufactured on or after Jan. 31, 2013.
- ☑ Benchmark your supply chain policy and practices against your competitors to the extent their policies and practices are publicly disclosed.
- ☑ Participate in industry working groups. These groups are a good source of information as to how peer companies are addressing interpretive questions under the Conflict Minerals Rule.
- ☑ Consider the investor relations and shareholder implications of Conflict Minerals Rule compliance and conflict free sourcing generally. At a minimum, expect to receive questions from some institutional investors on conflict minerals usage and sourcing and the anticipated effect of the Conflict Minerals Rule on your company. Some investors may more actively seek to drive conflict free sourcing through shareholder proposals and voting policies. In any case, expect conflict free sourcing to become an increased focus of some institutional investors. Underscoring the increased emphasis on human rights generally by some institutions, the Louisiana Municipal Police Employees' Retirement System recently sued The Hershey Co. for access to its internal records, alleging that Hershey was complicit in child labor violations by African cocoa suppliers.
- ☑ When pursuing acquisitions, the Conflict Minerals Rule needs to be taken into account in due diligence and assessing risk.



Implications of the Court Challenge — Or Why Should We Do Anything at This Time?

In October 2012, a lawsuit challenging the Conflict Minerals Rule was filed with the Court of Appeals for the D.C. Circuit by the National Association of Manufacturers, the U.S. Chamber of Commerce and the Business Roundtable.

Substantive documents relating to the court challenge are available at SRZ's online Conflict Minerals Resource Center at **http://www.srz.com/Conflict_Minerals_Resource_Center/**.

The challenge to the Conflict Minerals Rule was not unexpected. The petitioners had previously indicated that they might challenge the rule. In addition, the successful challenges of mandatory proxy access and the CFTC's position limits rule, the dissents of Commissioners Gallagher and Paredes in connection with the adoption of the Conflict Minerals Rule and the challenge of the SEC's resource extraction disclosure rule all contributed to the likelihood that the Conflict Minerals Rule would be challenged.

Although the challenge is being handled by the court on an expedited basis, the case is still in its early stages. Final briefs currently are due on March 28, 2013 and a decision by the court is not expected until fairly late in the year.

In the meantime, public companies and their suppliers are in the difficult position of having to determine how much effort and expense to incur in connection with their Conflict Minerals Rule compliance in light of the uncertainty surrounding the rule. The right answer for the vast majority

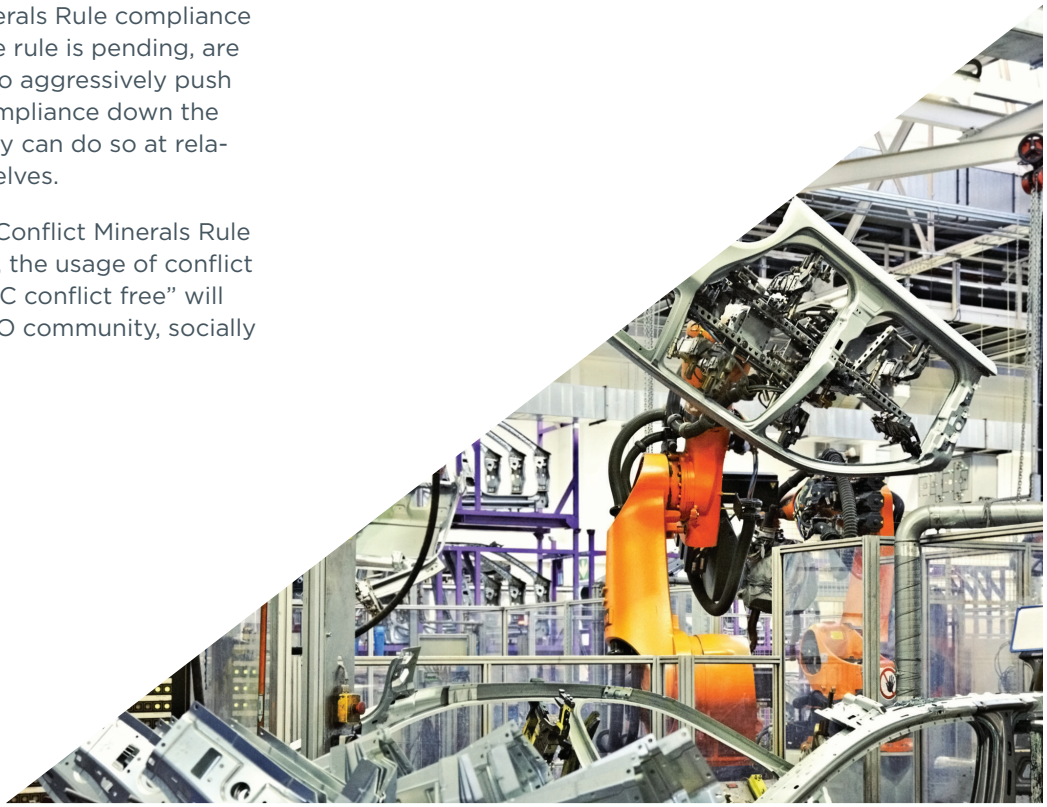
of public companies and private suppliers is to stay the course for the time being and continue to implement their compliance programs.

If companies wait until the court case is resolved to begin their compliance, they are unlikely to complete all of the work that must be done in 2013. However, the good news (or, depending upon one's perspective, bad news) for most companies is that they still are in the early stages of developing their Conflict Minerals Rule compliance programs and have significant ground to cover before they get to the heavy lifting under the rule, in particular the expensive and time-consuming exercise of supply chain-wide diligence and enhancements to IT systems. Therefore, in most cases, company compliance personnel are not yet in the position of having to advocate internally for immediate approval of significant budget items needed to comply with a rule that ultimately may be struck down.

In addition, in most cases, suppliers do not have the luxury of deferring the implementation of their compliance programs. Many companies that are taking a more gradual approach to their own Conflict Minerals Rule compliance while the challenge to the rule is pending, are nevertheless continuing to aggressively push Conflict Minerals Rule compliance down the supply chain because they can do so at relatively little cost to themselves.

Furthermore, even if the Conflict Minerals Rule ultimately is struck down, the usage of conflict minerals that are not "DRC conflict free" will remain a focus of the NGO community, socially responsible investors and consumer groups. Larger companies that already have expended significant effort to establish conflict free supply chains also are expected to continue these initiatives irrespective of the outcome of the challenge to the Conflict Minerals Rule. Other companies are expected to remain focused on creating a conflict free supply chain as part of their broader corporate social responsibility program, either to obtain a competitive advantage in the marketplace or to avoid adverse publicity.

Whatever the reason, in each case the result is the same — companies up and down the supply chain will need to stay focused on Conflict Minerals Rule compliance and the creation of a conflict free supply chain generally.



SRZ Contacts

Michael R. Littenberg
Partner
+1 212.756.2524 | michael.littenberg@srz.com

Michael R. Littenberg is a partner in Schulte Roth & Zabel's Business Transactions Group and heads the firm's public companies practice. His principal areas of focus are corporate finance — across a broad range of equity and debt products — and mergers and acquisitions. As a significant part of his practice, Michael also counsels both domestic public companies and foreign private issuers and their boards, board committees, special committees, executive officers and investors in connection with ongoing compliance under the U.S. securities laws, including under Dodd-Frank, Sarbanes-Oxley and the JOBS Act, and with exchange requirements, as well as on governance and executive compensation matters. His public company clients range from well-known large-cap companies to growing micro-cap companies and his experience spans every major industry.

Michael has been especially active in advising companies on the SEC's Conflict Minerals Rule. In addition, he is the most widely quoted and published attorney in the United States on the rule.

Michael is a frequent speaker at conferences and seminars, has authored numerous articles and is frequently quoted as an expert in the business and specialty press on topics pertaining to his areas of expertise. Michael is listed in *Who's Who in Securities Law* and in *New York Super Lawyers* for securities and corporate finance and was voted by his peers to *New York Super Lawyers Top 100 Lawyers* in the New York Metro area.

Michael received his J.D., *magna cum laude*, from Tulane University Law School, where he was an editor of the Tulane Law Review and a member of the Order of the Coif, and his B.S. from Indiana University.

Farzad F. Damania
Special Counsel
+1 212.756.2573 | farzad.damania@srz.com

Farzad F. Damania is a special counsel in the New York office, where his practice focuses on capital markets and securities law, mergers and acquisitions and general corporate law. Farzad counsels public companies in a broad array of industries in connection with SEC, NYSE and Nasdaq filings and ongoing compliance.

Farzad also advises public and private companies on the SEC's Conflict Minerals Rule. Farzad is listed in New York Super Lawyers Rising Stars for securities and corporate finance and governance and compliance.

A member of the American Bar Association and the Bar Council of Maharashtra and Goa, Farzad received his LL.M. from Chicago-Kent College of Law, Illinois Institute of Technology, LL.B. from Government Law College in Bombay, India, and B.A. from St. Xavier's College in Bombay, India.

Complexity. Clarified.

Conflict Minerals Rule compliance is one of the most complex compliance projects ever undertaken by most companies. That's why many public and private companies across a wide range of industries are turning to Schulte Roth & Zabel to help them with their Conflict Minerals Rule compliance program.

A leader in Conflict Minerals Rule compliance, SRZ has been actively advising on the rule since the adoption of Dodd-Frank. Our experience and capabilities include educating client and supplier personnel and boards on the rule, assisting in determining the applicability of the rule and assessing risk, advising on the construction and implementation of compliance programs, preparing conflict minerals policies and procedures and vendor and customer communications, advising on the many interpretive issues that arise under the rule and helping clients to incorporate Conflict Minerals Rule compliance into their acquisition diligence.

Find out how we can help you to efficiently establish and administer your Conflict Minerals Rule compliance program.

Michael R. Littenberg, Partner
+1 212.756.2524
michael.littenberg@srz.com

Farzad F. Damania, Special Counsel
+1 212.756.2573
farzad.damania@srz.com

Schulte Roth & Zabel is also the only law firm to provide an online Conflict Minerals Resource Center with frequently updated proprietary and other materials to assist in compliance with the rule.
Visit http://www.srz.com/conflict_minerals_resource_center.

Schulte Roth&Zabel
New York | Washington DC | London | www.srz.com

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
New York
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Schulte Roth & Zabel LLP
Washington, DC
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

Schulte Roth & Zabel International LLP
London
Heathcoat House, 20 Savile Row
London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

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Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Final downstream report on one-year pilot implementation of the Supplement on Tin, Tantalum, and Tungsten

January 2013

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SECTION I: OECD DOWNSTREAM DUE DILIGENCE PILOT IMPLEMENTATION – CYCLE 3

Overview of the OECD Guidance

The "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" provides due diligence recommendations for responsible global supply chains of minerals to help companies respect human rights and avoid contributing to conflict through their activities. The Guidance provides companies potentially sourcing minerals or metals from conflict-affected and high-risk areas with a five-step, risk-based due diligence framework. It is intended to serve as a tool to cultivate transparent mineral supply chains and sustainable corporate engagement in the minerals sector, while enabling countries to benefit from their natural mineral resources. The OECD 3Ts Supplement outlines the recommended steps companies should take to identify and respond to risks in the supply chain.

The Guidance was developed through a multi-stakeholder process with in-depth engagement with the OECD and representatives from African countries, industry, civil society, the United Nations Group of Experts on the DRC, and the World Bank. The Guidance builds on and is consistent with the relevant supply chain provisions contained in the OECD Guidelines for Multinational Enterprises and the U.N. Guiding Principles for Business and Human Rights. With specific regard to supply chain due diligence for responsible mineral sourcing, risk-based due diligence refers to the steps companies should take to identify, prevent, and address actual or potential adverse impacts and do not contribute to conflict or serious abuses associated with the extraction, transport or trade of minerals through their supply chain activities.

The Guidance is also intended to help companies put in place a due diligence process that can help them meet disclosure requirements under national laws, such as Section 1502 of the U.S. Dodd–Frank Wall Street Reform and Consumer Protection Act Act ("Dodd-Frank"), which requires U.S.-listed companies to disclose whether they use "conflict minerals" (tin, tungsten, tantalum, and gold), and whether these minerals originate in the Democratic Republic of the Congo (DRC) or in an adjoining country. Currently, the Guidance is the only internationally recognised due diligence framework which issuers, and other companies in the supply chain operating beyond U.S. borders, can use to develop due diligence processes for satisfying the reporting requirements under Dodd-Frank.

Overview of the OECD Downstream One-Year Pilot Implementation Phase

The one-year pilot implementation of the OECD Guidance focuses on how companies implement due diligence in the supply chains of tin, tantalum, and tungsten, especially as the due diligence relates to minerals potentially sourced from Africa's Great Lakes Region. The purpose of the pilot was to assist with the implementation of the OECD 3Ts Supplement by allowing companies to learn from each other's experiences; share best practices as well as tools, and methodologies for implementing the Guidance; and to identify any challenges in the implementation of the Guidance.

The downstream portion of the pilot began in August 2011 and culminated in November 2012. BSR, a global network, consulting and research organisation, assisted the OECD in collecting data over three reporting cycles for 30 downstream companies and four industry associations that volunteered to participate. In each of the three cycles, the participating companies and industry associations reported to the OECD through standardised questionnaires, group conference calls, industry-only meetings, and follow-up discussions on the progress achieved and challenges faced while carrying out the due diligence steps recommended in the OECD 3Ts Supplement.

Key features of the 3Ts downstream pilot implementation phase include:

- **Industry**: While the majority of participants are large multi-billion multinationals from the information and communications technology sector, a range of other industries including aerospace and defence, automotive, medical devices, consumer products, extractives, chemicals, and lighting also participated in the pilot. In addition, many pilot participants fall into multiple categories due to their diversified business structures or because their products are used across multiple industries. Industries that are not represented among pilot participants include jewellery, construction, pharmaceuticals, and packaging. There is limited to no participation from small and medium enterprises[1]. The majority of participants earned revenues of more than US$1 billion in 2010 (Figure 2). As such, the pilot during Cycle 1 and Cycle 2 did not include any SMEs (small to medium-sized enterprises). During Cycle 3, four industry associations distributed standardised surveys to their membership to capture a broader set of experiences from smaller companies, including SMEs, and those results can be found in Section III of this report.
- **Geography** (Figure 1): Effort was made to recruit companies from a wide range of countries. The majority of participating companies (85 percent) are based in OECD countries, with more than half headquartered in the United States. The remaining 15 percent are companies from non-OECD countries and headquartered in Singapore, Malaysia, India, or China. The pilot reports mainly cover U.S. and EU companies' due diligence practices. The majority of participants are subject to U.S. disclosure requirements and are under pressure to adopt systems and processes that will comply with the U.S. law

[1] Small and medium-sized enterprises (SMEs) are non-subsidiary, independent firms which employ fewer than 250 employees. Small firms are generally those with fewer than 50 employees, while micro-enterprises have at most 10, or in some cases 5, workers. Financial assets are also used to define SMEs. In the European Union, a new definition came into force on 1 January 2005: medium, small and micro enterprises should not exceed EUR 43 million, EUR 10 million and EUR 2 million, respectively.

Figure 1: Location of pilot companies' headquarters (by country)

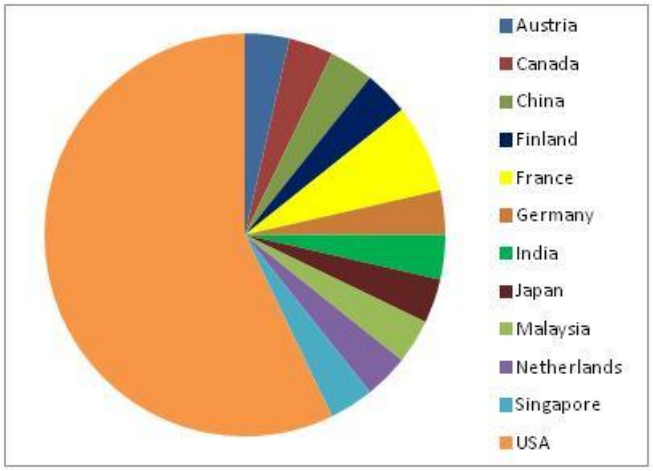
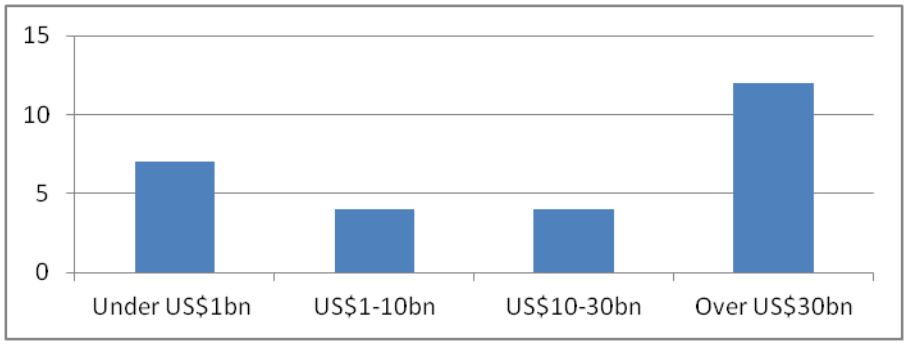
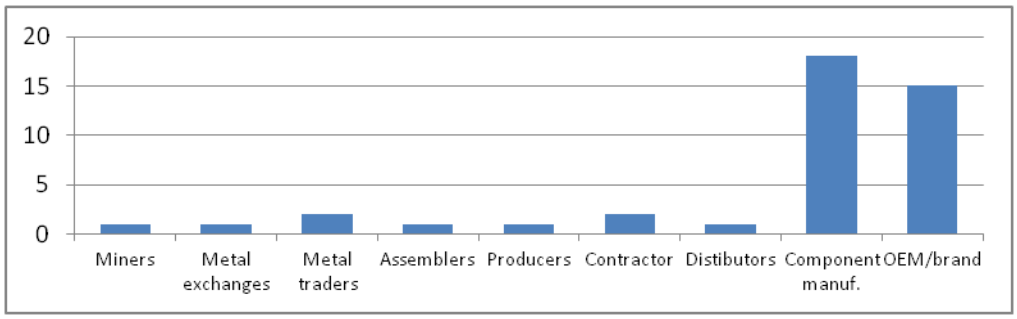


Figure 2: Breakdown of pilot companies by revenue earned (2010)



- **Supply chain position** (Figure 3): "Downstream" refers to the mineral supply chain from smelters/refiners to retailers, and includes metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers (OEMs), and retailers. The majority of companies (60 percent) are either original equipment manufacturers (OEMs) or component manufacturers, with zero representation from companies that act exclusively as metal traders and exchanges or retailers. Approximately 30 percent of the respondents categorise their companies as OEMs, and another 30 percent categorise their companies as component manufacturers. Nine companies fall into multiple categories along the downstream supply chain, from metal exchanges through OEMs. These companies employ highly integrated or vertical supply chains, meaning that they have business operations along various points of their supply chains and may even be involved in upstream operations.

Figure 3: Participants in the downstream pilot fall within various categories along the supply chain



Summary of Cycles 1 and 2

Cycle 1 (August to December 2011) culminated in a baseline report that demonstrated the actual levels of due diligence implementation by participating pilot companies, established the breadth of current practices, and described major challenges encountered at the beginning of the 12-month pilot. During the Cycle 1 meeting held in Paris in November 2011, participants expressed the need for more detail on emerging due diligence practices, more examples and explanations for practical methods to implement the Guidance, a better understanding of expectations throughout the supply chain, and opportunities to share experiences with their peers.

In response to this feedback, the Cycle 2 of the pilot (January to May 2012) provided an opportunity for the participating companies to provide deeper insights into their current practices and specific experiences in developing systems and processes for the implementation of the five-step framework. Three conference calls with downstream pilot participants enabled direct learning and sharing among the pilot group. The Cycle 2 report demonstrated that participants made progress implementing systems to conduct due diligence, particularly on Steps 1 and 2 of the Guidance. Steps 1 and 2 encourage companies to introduce a supply chain transparency system by structuring internal systems to support due diligence, identify to the best of their efforts smelters in their supply chains, and communicate with suppliers.

Throughout the first two cycles, participants encouraged greater involvement and input by industry associations to raise awareness, develop due diligence implementation tools, and collect information on their members' practices. Therefore, the Cycle 2 report featured more information on industry association activities to support the due diligence activities of their members.

Introduction to Cycle 3

Cycle 3 of the OECD downstream implementation pilot was aimed at understanding how companies' efforts to implement due diligence have evolved over the one-year pilot (August 2011 to November 2012). Specifically, this report focuses on current practices and opportunities for cross-fertilisation among different sectors and along the downstream supply chain. In order to understand the evolution of practices and implementation of the five-step framework of the OECD Guidance, Cycle 3 data was compared to the baseline data captured in Cycle 1.

It should be noted that there were a total of 30 respondents to the Cycle 1 questionnaire even though the information in the Cycle 1 report is based on the answers of 28. This is a result of two companies not submitting their responses in time. These two companies' data is included in the Cycle 1 data for this report. In Cycle 3, only 24 companies responded to the questionnaire, therefore there is a discrepancy of six participants between the Cycle 1 and Cycle 3 data. Comparisons between Cycle 1 and 3 are based on a consistent sample of companies.

Cycle 3 Methodology

In July 2012, Cycle 3 questionnaires were distributed to downstream participants. One questionnaire was distributed to the companies and another questionnaire was distributed to the industry associations (both are available in the Annexes of this report). The responses to the industry association questionnaires have been integrated into the main findings of the report in Section II. Both questionnaires were modified versions of the Cycle 1 survey with many of the same questions. However, the Cycle 3 questionnaire was simplified to include the most relevant questions pertaining to the OECD Guidance and the OECD 3Ts Supplement. The objective was to enable the comparability of the quantitative data to show how implementation of the Guidance evolved over the one-year period.

Industry associations were also invited to distribute a separate simplified questionnaire to their membership to capture company practices beyond the 30 participating companies, particularly among SMEs and end-product manufacturers. These findings are presented in Section III of this report (p. 57).

During the May meeting held at the OECD, pilot participants shared ways to communicate common and realistic expectations to suppliers, establish consistent supply chain data, and reach out to SMEs, particularly those based in Asia. The participants also suggested that the OECD convene a small group of willing pilot participants to explore the development of common content for reaching out to suppliers and other companies in the downstream supply chain to make them aware of the due diligence efforts and reasonable expectations, and how they could avoid the harmful unintended consequences of regulatory pressure. As part of the pilot process, sixteen downstream companies and four industry associations participated in the group and two conference calls were held to develop the common supplier template. The common supplier template reproduced in Annex 1 (see p. 67) reflects the common approach developed by the sixteen downstream 3T pilot participants to promote consistency of supplier communications on sourcing minerals (3TG) from conflict-affected and high-risk areas. It is intended as a template that companies may customise and tailor. The main letter includes

optional texts which companies can choose to include or not. The main letter is followed by an Appendix with detail on specific items and a list of useful resources which companies may choose to incorporate as an Addendum to the main letter.

Two meetings were held via conference call with pilot participating companies and industry associations. The first call (August 2012) focused on reviewing the process for Cycle 3 and the final phase of the implementation project. During the second call (October 2012), the initial data findings of Cycle 3 were presented and companies were invited to provide more insights on the data collected to inform the final report and provide feedback on the one-year implementation phase.

Downstream Participants and Cycle 3 Response Rate

The following list includes the companies and industry associations that agreed to disclose their participation in the OECD pilot. Three companies chose not to disclose their participation. In total, thirty companies and four industry associations participated in the pilot.

Companies	Industry Associations
» Alcatel-Lucent » Alpha (Cookson) » AMD » ArcelorMittal » The Boeing Company » Circuit Connect » EPIC Technologies » Flextronics » Ford Motor Company » Foxconn » Freescale » General Electric Company » Hewlett Packard » KEMET » Lockheed Martin Corporation » Nokia » Northrop Grumman Corporation » Oracle » Panasonic Corporation » Royal Philips Electronics » Plansee Group » Research In Motion (RIM) » Siemens AG » Texas Instruments » TriQuint » Unisem Group » United Technologies	» AIAG (Automotive Industry Action Group) » EICC (Electronics Industry Citizenship Coalition) » GeSI (Global e-Sustainability Initiative) » IPC (Association Connecting Electronics Industries)

All four industry associations and 24 companies submitted responses to the Cycle 3 questionnaire. Five companies declined to participate in the third and final round, citing a lack of resources, poor timing, or changes and mergers in the company. One company did not submit its questionnaire due to delayed legal reviews. The rate of participation in the additional industry association questionnaire distributed to industry association members is described separately in Section III of this report (p. 50).

Illustrative List of Products Containing Tin, Tantalum, and Tungsten (3Ts)

The following list is an illustrative list of products containing the 3Ts. This is **not an exhaustive list** of products. The Cycle 2 downstream report includes a commodity analysis conducted by one of the downstream pilot participants to determine products that contain the 3Ts. This list is comprised of examples of product categories and products that contain 3Ts.

Tin	Tantalum	Tungsten
» All electrical products (toys, phones, computers, audio, GPS, appliances, etc.) » Lighting, including seasonal light » Jewellery, watches » Canned food (e.g. coating for steel cans) » Decorative crafts » Eyeglasses, lenses » Sports/fitness equipment » Power tools » Plastics » Automotive parts (e.g. brake pads) » PVC » Buckles, fasteners, zippers, buttons » Metallicized yarns	» Electronics (including electronic toys, phones, computers, watches, cameras, appliances, GPS, etc.), appliances » Lighting » Eyeglasses and camera lenses » Power tools » Automotive parts (e.g. self-dimming mirrors and fuel pumps, automotive drilling and machining, airbags, skid control, engine controls, etc.) » Alloys for aerospace and gas turbines, jet engines » Corrosion resistant equipment for chemical processing » Coatings and parts for medical devices and implants	» Appliances » Lighting, including seasonal lighting » Phones » Computer » Jewellery » Decorative crafts » Sports/fitness equipment » Power tools, including lawn mowers and grass cutters

SECTION II: DEVELOPMENT OF DUE DILIGENCE PRACTICES OVER A ONE-YEAR PERIOD

Summary Findings

Since the beginning of the pilot phase in August 2011, participants have demonstrated a marked improvement in their understanding of the issue of minerals from conflict-affected areas, the OECD Guidance, and their supply chains. While it is difficult to generalise experiences across a group of companies with diverse processes and necessities, a number of common practices and trends emerged over the course of the one-year pilot period.

During the one-year pilot period, another critical development occurred. The U.S. Securities and Exchange Commission (SEC) issued its Final Rule on the U.S. Dodd-Frank Act, Section 1502 on "Conflict Minerals" applicable to U.S. stock exchange listed companies concerning the 3TG (so called "conflict minerals"). U.S. publicly traded companies are required to conduct a reasonable country of origin inquiry into the origin of 3TG used in their products and determine whether the 3TG originated in the Democratic Republic of the Congo (DRC) or one of its nine neighbouring countries. If so, those companies must exercise due diligence to determine if trade in those minerals supported conflict. The SEC Final Rule requires companies subject to Dodd-Frank requirements to exercise due diligence in conformance to a nationally or internationally recognised due diligence framework. The SEC Final Rule on Section 1502 of the Dodd Frank Act on Conflict Minerals recognises the OECD Guidance as an international framework available to companies to perform due diligence for responsible mineral sourcing and thereby help them meet their reporting obligations under the Act. The SEC says that the OECD Guidance "satisfies our criteria and may be used as a framework for purposes of satisfying the final rule's requirement that an issuer exercise due diligence in determining the source and chain of custody of its conflict minerals." Uncertainty remains around how auditing firms will audit due diligence practices and develop auditing protocols against the Guidance and whether there will be any consistency in their development and use.

The OECD Guidance aims to support responsible sourcing from the region through due diligence practices. However, the SEC Final Rule was regarded by pilot participants, as providing a disincentive to companies sourcing from the region because those companies that do source from the region will have to conduct due diligence, write a conflict minerals report, get an independent audit and prepare a public disclosure document to the SEC, while others who decide not to source from the Great Lakes Region altogether will not have to undertake such endeavours. During the pilot, companies aimed to demonstrate a common and practical approach to carry out due diligence in a manner consistent with the OECD Guidance to minimise the burden to the extent practical and encourage companies to continue sourcing from the region.

Progress is evident across a number of areas of the Guidance, most notably under Step 1. More companies have implemented policies, undertaken efforts to gain a better understanding of their supply chain, and engaged with their suppliers; prioritising those that have the highest risk of supplying

products with the 3Ts. Progress has also been demonstrated for Step 2 and Step 3. The data comparisons between Cycles 1 and 3 show increased levels of reliance on industry initiatives, namely the Conflict-Free Smelter (CFS) Program to undertake joint activities on obtaining smelter information (Step 2) and responding to identified risks (Step 3).

Participants indicated that there were challenges, however, with interpretations of the Guidance regarding the level of information they obtain about upstream and smelter due diligence and the level of information downstream companies should review under Step 2. This might explain why companies indicated a decrease in implementation of Step 2, II., B, despite increasing knowledge of the supply chain and smelters, and use of industry tools such as the CFS Program to identify risks and implement due diligence.

The downstream section of Step 2 includes the following general recommendation applicable throughout the section on risk assessment, including Step 2, II. , B: "[d]ownstream, companies […] may engage and directly cooperate with other industry members […] to carry out the recommendation contained in this section in order to identify the smelters/refiners in their supply chain and assess their due diligence practices […]. Although the CFS Program does not provide information on transit and transportation routes used between the mine and the smelter, it does review this type of information covered by the in-region sourcing scheme, including country of origin information, as part of the Step 4 third-party audit of smelters due diligence practices for in-region sourcing.

A. Key Trends

Trends	Approaches and Findings
More companies have agreed to source responsibly from the Great Lakes Region	Seventy-five percent of participants in Cycle 3 (18 respondents) indicated that they intend to source minerals responsibly in accordance with available international standards contained in the OECD Guidance. The pilot participants that are intending to source minerals responsibility will do this through various means, including participating in industry programmes (e.g. CFS) and constructively engaging with suppliers. This is a dramatic change by downstream companies from the beginning of the pilot. Most participants in Cycle 1 were reluctant to indicate an approach to sourcing responsibly from the region due to a lack of understanding of the implications of such a policy. The CFS Program developed by GeSI and the EICC will accept the International Conference on the Great Lakes Region (ICGLR) certificates as a credible in-region sourcing mechanism, once validated by the CFS Program and so long as minerals originate from "green" (conflict-free) validated sites.
	Pilot participants' approach to responsible sourcing in accordance with available international standards contained in the OECD Guidance differs significantly from the broader group of non-participating pilot companies surveyed through the industry associations. While 75 percent of pilot participants are *encouraging* responsible sourcing from conflict and high-risk areas, only 25 percent of the broader group of companies takes this approach. Participants note that there may be challenges to encouraging responsible sourcing of material from the Great Lakes Region in the supply chain due to the burden of Dodd-Frank requirement to file a Conflict Minerals Report and have it audited.
	Participants have demonstrated more interest in engaging smelters on the topic and creating opportunities to strengthen market opportunities in Africa.
Increased development and implementation of formal and defined policies	More participants have defined and established clear policies on sourcing minerals from conflict-affected and high-risk areas. These policies describe the company's commitment, due diligence activities, and supplier expectations, with overall greater alignment with Annex II of the OECD Guidance.
	More companies have a better understanding of how to use and reference appropriate elements of Annex II into their minerals policies. Participants have tailored the Model Policy of Annex II to their needs and position in the supply chain in order to fully implement an actionable policy that only includes elements that they can implement with their direct suppliers.

Increased engagement with direct suppliers on due diligence expectations, contractual obligations, and capacity building	Participants made significant progress in engaging with their key suppliers on due diligence requirements by first identifying and prioritising a sub-set of suppliers for communications; using standardised tools such as the Conflict Minerals Reporting Template (developed by the EICC and GeSI) to collect information; reminding suppliers of their contractual obligations; and building suppliers' capacity through regular communications, training, information sessions, and meetings as recommended in Steps 2A[2] and 3B(ii) of the Guidance[3].
	Companies are enforcing policy compliance by requiring supplier declarations, incorporating expectations of data reporting on conflict minerals and encouraging use of smelters that have been certified "conflict-free". The incorporation of clauses into supplier contracts has led to improved response rates from their suppliers. Once the CFS has a majority of smelters represented, some companies have indicated the intention to include contract clauses and terms and conditions for CFS compliance smelters only in their supply chain.
	Companies used consistent and regular communications, educational opportunities, and reminders of contractual obligations to address suppliers' lack of cooperation.
Progress made in identifying smelters in the supply chain to the best of their efforts	Both companies with and without smelter relationships indicated that they are relying on the Conflict Minerals Reporting Template (developed by the EICC and GeSI) to obtain information from their suppliers. Companies noted that the provision of a standard reporting template across multiple industries and companies has enabled progress in obtaining supplier information (including smelters) over the one-year pilot phase. These tools also help companies deal with the issue of confidentiality, both individually and as an industry, by using data-collection and roll-up tools that do not require the list of all suppliers used within a company's supply chain.

[2] See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Step 2, II. Downstream companies should identify the risks in their supply chain by assessing the due diligence practices of their smelters/refiners against this Guidance. Downstream companies who may find it difficult to identify actors upstream from their direct suppliers (due to their size or other factors), may engage and actively cooperate with other industry members with whom they share suppliers or downstream companies with whom they have a business relationship to carry out the recommendation in this section in order to identify the smelters/refiners in their supply chain and assess their due diligence practices or identify through industry validation schemes the refiners/ smelters that meet the requirements of this Guidance in order to source therefrom. Downstream companies retain individual responsibility for their due diligence, and should ensure that all joint work duly takes into consideration circumstances specific to the individual company.
A. Identify, to the best of their efforts, the smelters/refiners in their supply chain. Downstream companies should aim to identify the mineral smelters/refiners that produce the refined metals used in their supply chain. This may be carried out through confidential discussions with the companies' immediate suppliers, through the incorporation of confidential supplier disclosure requirements into supplier contracts, by specifying to direct suppliers the smelters/refiners that meet the requirements of this Guidance, by using confidential information-sharing systems on suppliers and/or through industry wide schemes to disclose upstream actors in the supply chain.

[3] See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Step 3 B ii) DOWNSTREAM COMPANIES – Depending on their position in the supply chain, downstream companies are encouraged to build and/or exercise their leverage over upstream suppliers who can most effectively and most directly mitigate the risks of adverse impacts. Should downstream companies decide to pursue risk mitigation while continuing trade or temporarily suspending trade, their mitigation efforts should focus on suppliers' value orientation and capability-training to enable them to conduct and improve due diligence performance. Companies should encourage their industry membership organisations to develop and implement due diligence capability-training modules in cooperation with relevant international organisations, NGOs, stakeholders, and other experts.

	Companies have employed a combination of tactics to identify more smelters over the one-year pilot phase, including direct communications with their suppliers and the integration of disclosure requirements into supplier contracts as recommended in Step 2A of the Guidance.
Progress made in obtaining smelter due diligence information recommended in the Guidance	Companies without direct smelter relationships indicated that they have limitations to obtaining information independently. The primary industry scheme currently in place, the CFS Program, utilises a third party auditor to assess the due diligence information consistent with the OECD Guidance including transportation and transit routes and mine origin to make a determination of whether the smelter minerals are conflict-free. Although the CFS Program does not provide information on transit and transportation routes used between the mine and the smelter, it does review this type of information covered by the in-region sourcing scheme as part of the Step 4 third-party audit of smelters due diligence practices for in-region sourcing. Downstream companies rely on the CFS and third party audits to assess smelters' due diligence practices in accordance with the Guidance. This is aligned with the recommendation contained in the Guidance, which allows for the review of the information on country of mineral origin, transit and transportation routes and smelters/refiners through collective efforts.
Companies without direct smelter relationships cannot identify red flags and mitigate risks arising upstream in the supply chain with their direct suppliers	Participants noted that their participation in industry initiatives as outlined in the Guidance only provides them with one-way information on upstream activities. It does not provide opportunities for companies without smelter relationships to understand and mitigate risks in the upstream supply chain. They also indicated that the recommendations on red flags pertain to the upstream process and do not apply to downstream suppliers. This is in line with the Guidance, which depending on the position of downstream companies in the supply chain, only encourages them to build and/or exercise their leverage over upstream suppliers that can most effectively and most directly mitigate the risks of adverse impacts.
	Downstream companies without direct smelter relationships have tailored their due diligence practices to reflect their specific positions in the supply chain, and they have implemented relevant recommendations from the Guidance accordingly. Therefore, downstream participants are focusing their efforts, per the Guidance, on the *"internal controls over their immediate suppliers,"* which are their tier-1 suppliers. Companies have undertaken efforts to build these suppliers' due diligence capacity.
Both the delay and final implementation of the SEC Dodd-Frank Final Rule (which was issued on 22 August 2012[4]) has hindered the pace of due	Some participants waited to finalise specific aspects of their due diligence activities to ensure alignment with the final U.S. law which was issued on 22 August 2012.
	Participants have had difficulty convincing suppliers not to boycott the DRC or Great Lakes Region. A few companies have seen an increasing number of their customers requesting the exclusion of minerals coming

[4] SEC Press release "SEC Adopts Rule for Disclosing Use of Conflict Minerals." Released August 22, 2012. http://www.sec.gov/news/press/2012/2012-163.htm.

diligence progress	from the Great Lakes Region due to the SEC Final Rule, which in their view creates increased cost and public disclosure when sourcing from the region.
	Companies noted that according to the SEC rule, they would not be required to file a conflict minerals report if they did not source from the Great Lakes Region. This is the primary incentive for companies to stop sourcing from the region.
Industry associations are supporting their members and non-members through standardised tools and education about minerals sourced from conflict and high-risk areas.	Participating associations are supporting members by providing trainings and access to tools, webinars, and in-person meetings. They are providing general information and educational opportunities for their members to learn about responsible sourcing practices and data collection.
	Associations have developed standardised tools and processes to enable common approaches to due diligence. More specifically, the associations have developed common questionnaires and data collection tools that enable consistency throughout the supply chain and support collaborative processes, particularly the CFS, which provide assurance of the conflict-free status of smelters.
	Participating associations are supporting their members to understand better the OECD Guidance through publications, web communications, event presentations, press releases, direct mail, and conferences.
	Increased cross-sector collaboration has taken place over the course of the pilot period. The EICC and GeSI have proactively engaged with other industry associations on the use of the CFS Program, due diligence tools, and participation in the Extractives Working Group. The EICC and GeSI have held nine workshops (three in 2011) with members of the tantalum and tin supply chains, and they have collaborated with other industry groups, including the Automotive Industry Action Group, the Japan Electronics and Information Technology Industries Association, and the Retail Industry Leaders Association.

B. Common Practices Identified by Pilot Participants

During Cycle 3 pilot participants shared views on the implications of the reference contained in the SEC Final Rule to the OECD Guidance as an internationally recognised framework and the requirement that companies subject to Dodd-Frank, exercise due diligence in conformance to a nationally or internationally recognised due diligence framework, such as the OECD Guidance. Because the SEC Final Rule further requires an independent audit of the Conflict Minerals Report on the conformance of the due diligence to a nationally or internationally recognised due diligence framework, such as the OECD Guidance, pilot participants felt that a critical point of learning was how the Guidance applies to companies that do not have direct relationships with smelters . As a result of the peer-learning exercise and building on the flexibility incorporated into the Guidance, a majority of pilot participants collectively identified the following common approaches/practices to implementing the OECD Due Diligence Guidance for downstream companies that do not have direct relationships with smelters:

Step 1 Management Systems	Step 2 Identify & Assess Risks	Step 3 Responding to Risks	Step 4 Audit Smelters	Step 5 Publicly Report
• Adopt a conflict minerals company Policy. • Assemble an internal team to develop a program that implements the Policy and oversee due diligence, with senior management support. • Establish systems of controls and transparency over mineral supply chain by creating a process to engage relevant first-tier suppliers and request information, including information gathered by first-tier suppliers about their own supply chains. • Strengthen engagement with relevant suppliers, such as incorporating expectations regarding disclosure into supplier contracts, specifications or other documents. • Maintain related records for at least five years. • Establish and publish a company or industry-wide grievance mechanism.	• Identify relevant or highest priority first-tier suppliers that supply products which contain conflict minerals. Determine the engagement approach that is appropriate for the breadth of your company's supply chain. • Request information from relevant suppliers to understand, to your best efforts, the smelters/refiners in the supply chain using (if appropriate) industry data collection tools (e.g. EICC/GeSI Conflict Minerals Reporting Template). Some companies with large supply chains may choose to use a combination of either gathering information from their suppliers and/or using a contract flow-down approach. • Review smelter/refiner information or other relevant information provided from your supply chain against the expectations established by your company's Policy • Compare smelters/refiners used by relevant suppliers against independently verified list or other reasonable means to assess whether companies are using only conflict-free minerals (e.g. the EICC/GeSI Conflict Free Smelter Program).	• Report findings of supply chain risk assessment, such as relevant suppliers' failure to meet key expectations set by your company's Policy or supplier contract/specification to designated senior management. • Design and implement capability building (individually or as an industry) for relevant first-tier suppliers (e.g. how to fill in the Template) to enable your supply chain to conduct and improve performance to your company's expectations. • Devise and adopt a risk management plan designed to mitigate the risk that your relevant first-tier suppliers fail to fully understand and cooperate with your expectations. For instance, communication strategies to encourage suppliers to cooperate, communication to understand suppliers' progress and plans, or provide incentives and/or penalties. • Implement the risk management plan, monitor, track, and report progress of relevant suppliers to senior management.	• Support the development and implementation of independent 3rd party audits of smelter/refiner's sourcing (e.g. the EICC/GeSI Conflict Free Smelter Program).	• Document and communicate company's practices and due diligence. • Report on risk assessment and mitigation. • Although not part of the public report, respond to customers as requested, while honoring the confidentiality of business relationships throughout the supply-chain.

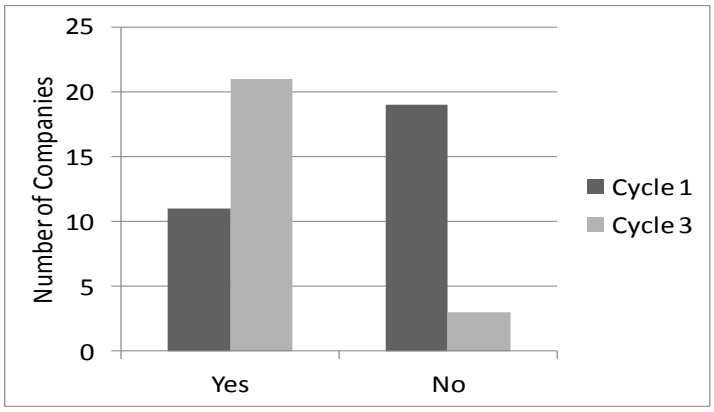
Detailed Findings, Challenges, and Identified Solutions per Step

Step 1: Establish Strong Company Management Systems

I.A: Adopt and commit to a supply chain policy for minerals originating from conflict-affected and high-risk areas.

The number of participants who adopted a supply chain policy for minerals from conflict-affected areas almost doubled— from 11 to 21 companies—over the one-year pilot phase (see Figure 4). During Cycle 1, participants indicated that their policies were still under development or that they only had general statements in place that condemned conflict and associated human rights abuses, and the link to mineral supply chains.

Figure 4: Number of participants with an adopted policy



Since Cycle 1, companies' policies have evolved from informational statements to more formal documents that describe the company's commitment, due diligence activities, and supplier requirements. In most cases, the policies urge suppliers to have the same expectations of their own suppliers to ensure alignment throughout the supply chain. There is no common format for how companies integrate their minerals policies into other relevant corporate communication tools. Some companies issue standalone policies, while others incorporate policies into their broader supplier codes of conduct, which are available on the human rights and responsible purchasing sections of their websites. The number of companies that indicated that their policies are consistent with Annex II of the OECD Guidance doubled— from 6 to 12 companies— between Cycles 1 and 3 (see Figure 5). Incorporation of the individual elements of Annex II significantly improved as well, as shown by Figure 6. In most cases, the policies are partly consistent with the elements included in Annex II. Five companies indicated that they reference *all* of the elements included in Annex II (compared to one company in Cycle 1). The elements of Annex II may also be covered in other corporate policies.

Figure 5: Number of participants with policies consistent with Annex II

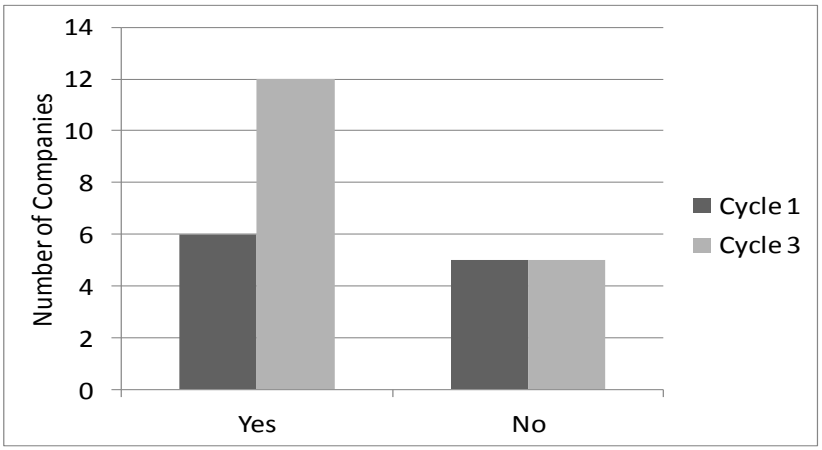
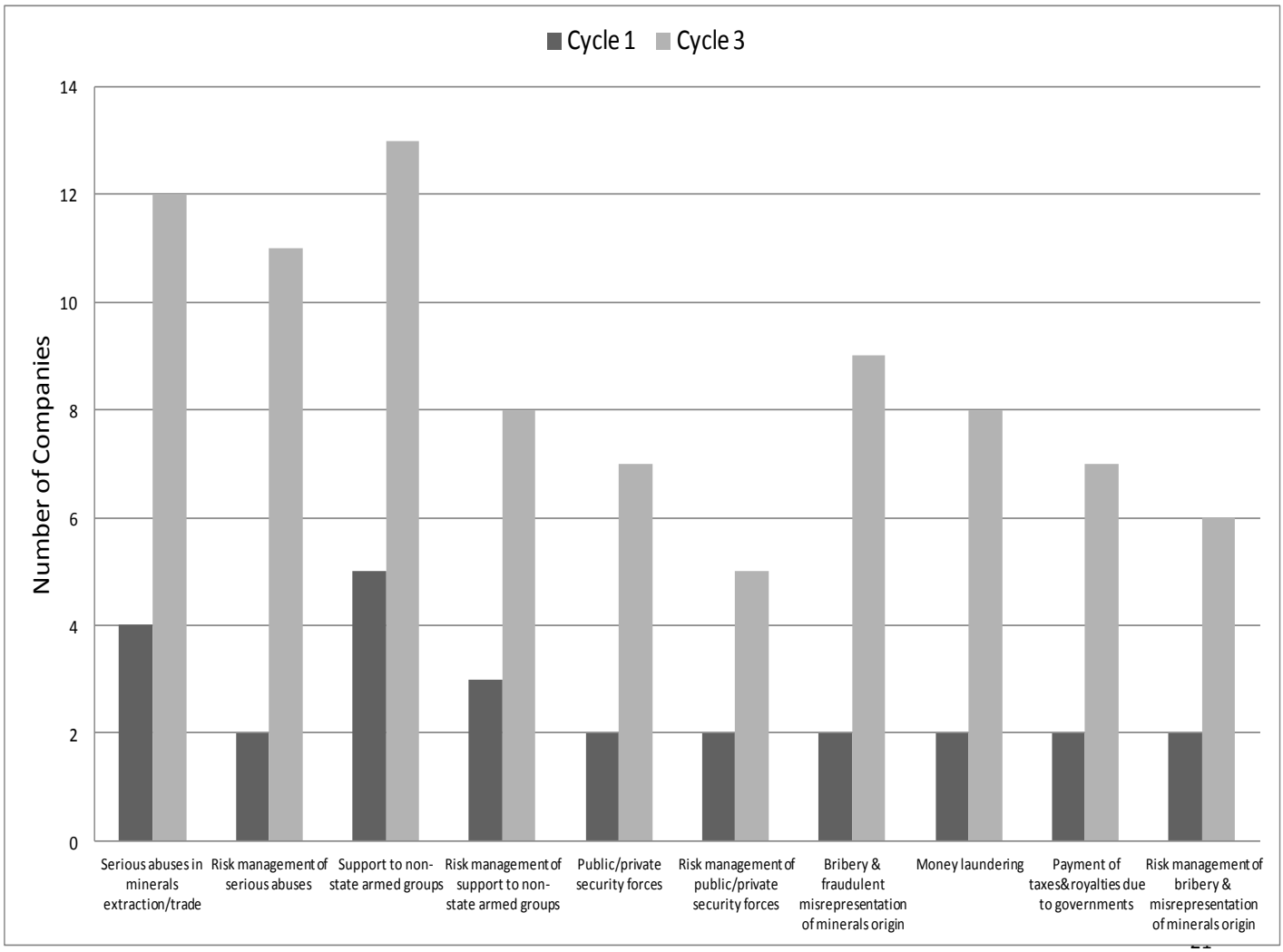


Figure 6: Elements of Annex II that are referenced in participants' policies



The increase in alignment with Annex II may be attributed to the greater adoption of policies focused on minerals potentially sourced from conflict-affected and high-risk areas; the incorporation of various Annex II elements in other company policies such as human rights, ethics, sourcing, and supply chain codes of conduct; and also the inclusion of elements of Annex II by either explicitly paraphrasing the elements contained therein (see Box 1) or by simply requiring suppliers to establish policies, due diligence frameworks, and management systems that are consistent with the OECD Guidance (see Box 2).

Box 1 highlights the common practice whereby participants explicitly reference specific elements of Annex II in their policies. The example referenced is from a company that does not have direct smelter relationships. As recommended in the Guidance, these elements may be included in standalone mineral sourcing policies or included in broader company policies focused on human rights, supply chain, ethics, etc.

Box 1: Sample Policy: Explicit Reference to Elements in Annex II

Our commitment
[Company name] is committed to respect human rights and the environment in accordance with accepted international conventions and practices, such as those of the United Nations' Universal Declaration of Human Rights, ILO Core Conventions on Labor Standards, UN Global Compact, and OECD Guidelines for Multinational Enterprises. We want to ensure that all materials used in our products come from socially and environmentally responsible sources. We do not tolerate nor by any means profit from, contribute to, assist with, or facilitate any activity that fuels conflict, leads to serious environmental degradation, or violates human rights, as set forth by above mentioned international conventions and [company name] policies.

Implementation of the Policy with Regards to Conflict Minerals
We prohibit human rights abuses associated with the extraction, transport, or trade of minerals. We also prohibit any direct or indirect support to non-state armed groups or security forces that illegally control or tax mine sites, transport routes, trade points, or any upstream actors in the supply chain. Similarly, [company name] has a no tolerance policy with respect to corruption, money-laundering, and bribery. We require the parties in our supply chain to agree to follow the same principles.

In reference to the second common practice, Box 2 highlights how companies have covered the elements in Annex II by referring to the entire Guidance rather than listing each of the elements, and asking its suppliers to develop a policy, due diligence, and management systems consistent with the Guidance. The elements are not listed explicitly so that each supplier may consider what is appropriate and relevant for its particular situation.

Box 2: Sample Policy: Broad Reference to the OECD Guidance

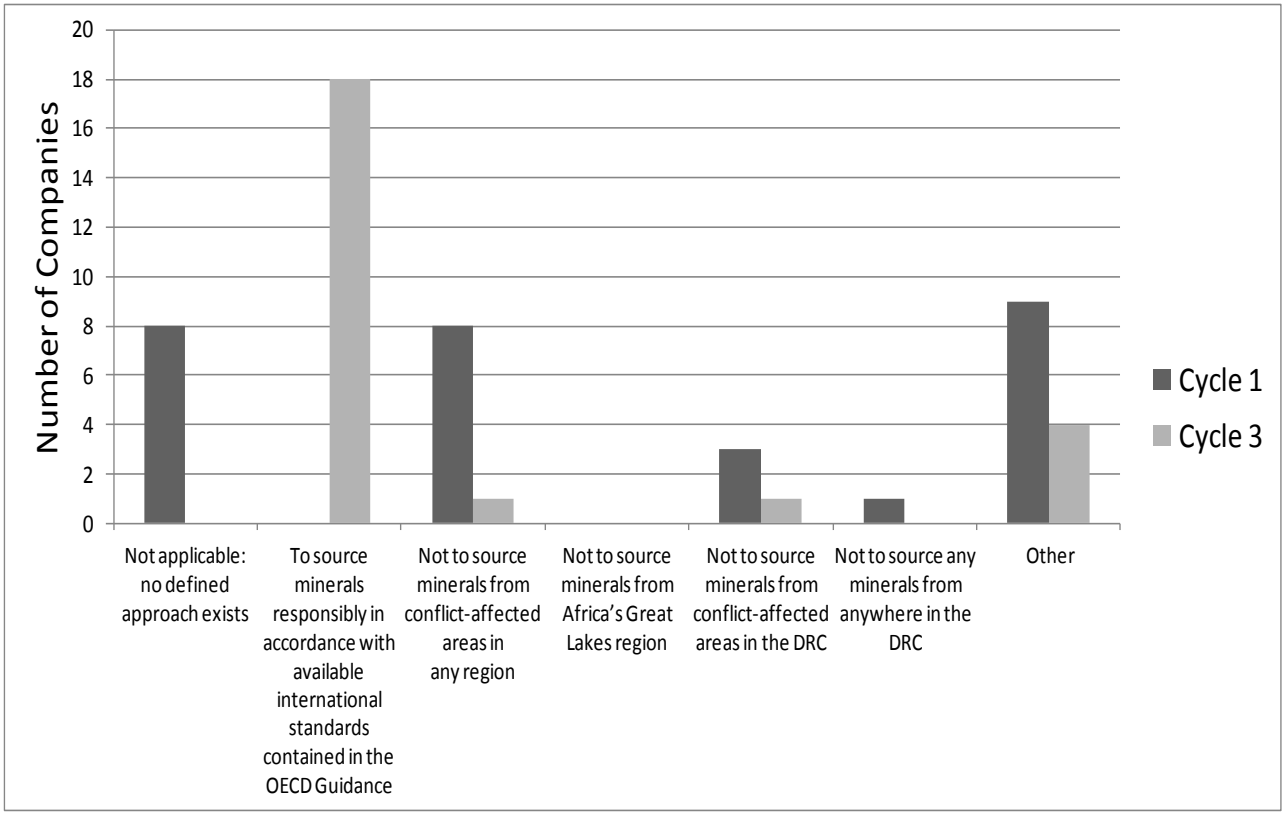
Conflict Minerals: Suppliers are expected to ensure that parts and products supplied to [Company] are DRC conflict-free (do not contain metals derived from "conflict minerals"; columbite-tantalite (tantalum), cassiterite (tin), gold, wolframite (tungsten), or their derivatives such that they do not directly or indirectly finance or benefit armed groups through mining or mineral trading in the Democratic Republic of the Congo or an adjoining country). Suppliers are to establish policies, due diligence frameworks, and management systems, consistent with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, that are designed to accomplish this goal.

Participants have tailored the Model Policy of Annex II to their needs and position in the supply chain in order to establish a fully actionable policy that only includes elements that they can implement with their direct suppliers of whom they have a measure of direct control.

The first three elements pertaining to serious abuses associated with the extraction, transport or trade of minerals; risk management of serious abuses; and direct or indirect support to non-state armed groups remain the most widely referenced elements in participants' policies. On the other hand, risk management of public or private security forces is the least referenced element as it is regarded by some participating companies as more relevant for upstream actors.

In Cycle 3, companies were asked to describe their general approach to minerals in their supply chain that may originate from conflict-affected areas (see Figure 7). Most participants, 75 percent in Cycle 3 (18 respondents), indicated that they intend to source minerals responsibly in accordance with available international standards contained in the OECD Guidance, working through various means such as industry programmes (e.g. CFS) and constructive engagement with suppliers. The number of respondents that stated they have not yet defined an approach dropped from eight in Cycle 1 to zero in Cycle 3. These trends indicate increased knowledge and awareness of the issue and subsequent adoption of more clearly defined company policies and due diligence practices. During Cycle 1, policies were not sufficiently advanced to make these distinctions.

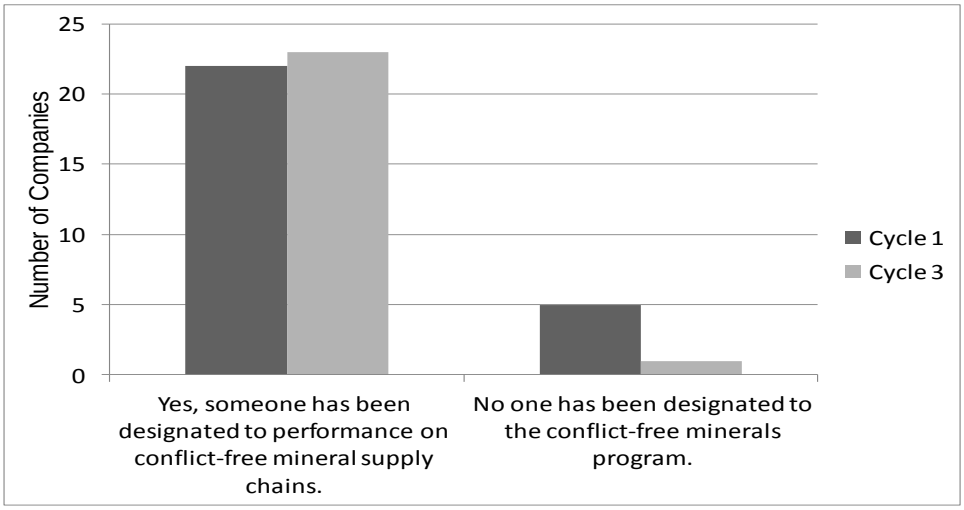
Figure 7: Participants' approach to minerals in their supply chain



I.B: Structure internal management systems to support supply chain due diligence.

The number of companies that indicated that they have designated responsibility for supply chain due diligence remained relatively unchanged over the one-year pilot phase. This is due to the fact that 22 companies had already designated senior staff in Cycle 1 (see Figure 8).

Figure 8: Number of participants with designated senior-level oversight



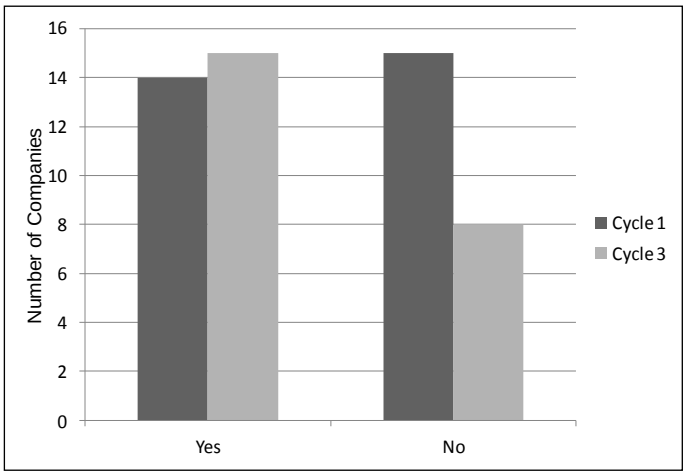
The most commonly referenced role that is given accountability for supply chain due diligence is a senior manager in the procurement department. However, most respondents, with the exception of a few, have cross-functional teams responsible for due diligence efforts. The teams are made up of representatives from relevant business functions including engineering, legal, public relations, quality, supply chain management, and corporate responsibility.

The methods most commonly cited over the one-year period to hold leaders and their teams accountable for performance are to conduct monthly reporting of key performance indicators at the executive level and to perform internal auditing of reported due diligence results and procedures.

I.C: Establish a system of controls and transparency over the mineral supply chain

More participants have established systems for control and transparency of the mineral supply chain by creating a process to engage relevant first-tier suppliers and request information about those suppliers' own supply chains. The actual number of companies that established a system of controls and transparency over their 3T mineral supply chains has increased slightly from Cycle 1 to Cycle 3. As indicated in Figure 9, the number of participants to establish a method for identifying smelters/refiners in their supply chains increased from 14 to 15 companies. With regards to Figure 9, the number of companies that had identified smelters who are sourcing from red flag suppliers increased from eight to 12 companies. These data indicate that while approximately half of the participants had already established a system to identify their smelters in the beginning of the pilot one year ago, more of these companies have made progress in obtaining information on country of origin.

Figure 9: Number of participants that have established a method for identifying smelters (company level or through CFS Program)



The most common approach among participants to identify smelters and obtain their sourcing information is to rely on a collaborative industry process as advocated by the Guidance. The Conflict Minerals Reporting Template is the most common data collection tool used across industries by participants as well as the broader group of companies surveyed for this report. Both EICC and GeSI members and non-members, and companies with and without smelter relationships, rely on the Template to obtain smelter and refiner information. The process is open to all industries regardless of sector of affiliation because the tool is provided free of charge by EICC and GeSI. Companies noted that the provision of a standard reporting template across multiple industries and companies has enabled progress in obtaining information over the one-year pilot phase.

All of the participating industry associations developed or are developing data collection tools for their members to increase effectiveness and efficiency while advancing common approaches across their industries. They have built tools for common questionnaires and data collection in order to facilitate consistency throughout the industry supply chain. These tools also allow companies to overcome the issue of confidentiality, both individually and as an industry, by using data collection and roll-up tools that do not require the list of all suppliers used within a company's supply chain.

The Conflict Minerals Reporting Template allows companies to collect sourcing information on 3TG (tin, tantalum, tungsten and gold) used in company products, including whether products contain 3TG, and if so, the metal's country of origin and whether they are recycled. The template allows suppliers to indicate whether they have relevant policies or supplier due diligence requirements or have made any progress identifying smelter names and locations. EICC and GeSI have also developed the MRPRO™ Reporting Template Dashboard, which can be used to aggregate multiple completed Conflict Minerals Reporting Templates from suppliers. The Dashboard integrates with the Template, enables data analysis, and supports the preparation of consolidated information from multiple partners. The Dashboard is also a freely available tool provided by the EICC and GeSI.

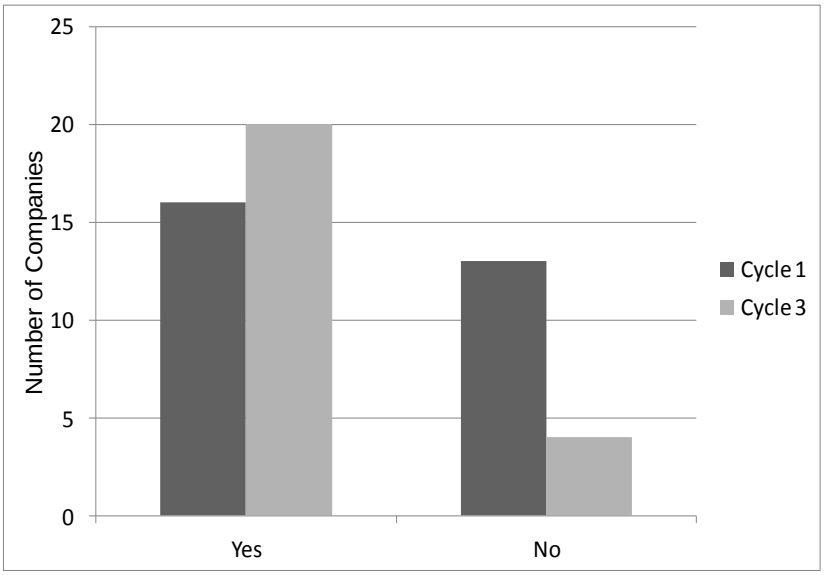
With cooperation from a number of associations including EICC and GeSI, IPC is coordinating, through an open standards development process, the creation of a data exchange standard that will facilitate the transfer of information between different tools is underway. It is expected that these tools, including the EICC and GeSI Conflict Minerals Reporting Template will conform to this standard by supporting the common data elements with an XML-type data structure to collect and exchange supplier information, regardless of their data collection and storage tools. The intent is to be recognised as a cross-industry standard rather than solely an industry-specific standard for electronics (which IPC is most commonly recognised for). AIAG's web-based smelter tracking tool enables companies to track smelters used. It will enable competitive confidentiality by enabling data roll-up throughout the automotive industry.

Several companies have also indicated that they are using a hybrid approach whereby the Conflict Minerals Reporting Template (or the same general questions) is combined with an internal system that also relies on Tier 1 to gather smelter information from Tier 2, and for Tier 2 to gather information from Tier 3 and so on down the line until the request reaches the smelter. Participants that do have direct relationships with smelters or with suppliers that source directly from smelters indicated that they work with their direct suppliers to obtain the information.

Twenty participants, up from 16 in Cycle 1, confirm that they have established a system to collect and store data (see Figure 10). While the majority of respondents again cite the Conflict Minerals Reporting Template as the primary data collection tool, approaches to store data vary depending on internal data storage systems and capabilities. The types of data that are generally being collected and stored by participants include the information requested in the Conflict Minerals Reporting Template which collectively includes:

- Smelter name and location
- Metal produced
- Mine name and country of origin, if known
- Supplier policy
- Level of supplier engagement
- Type of supplier engagement

Figure 10: Number of participants to establish a data collection system

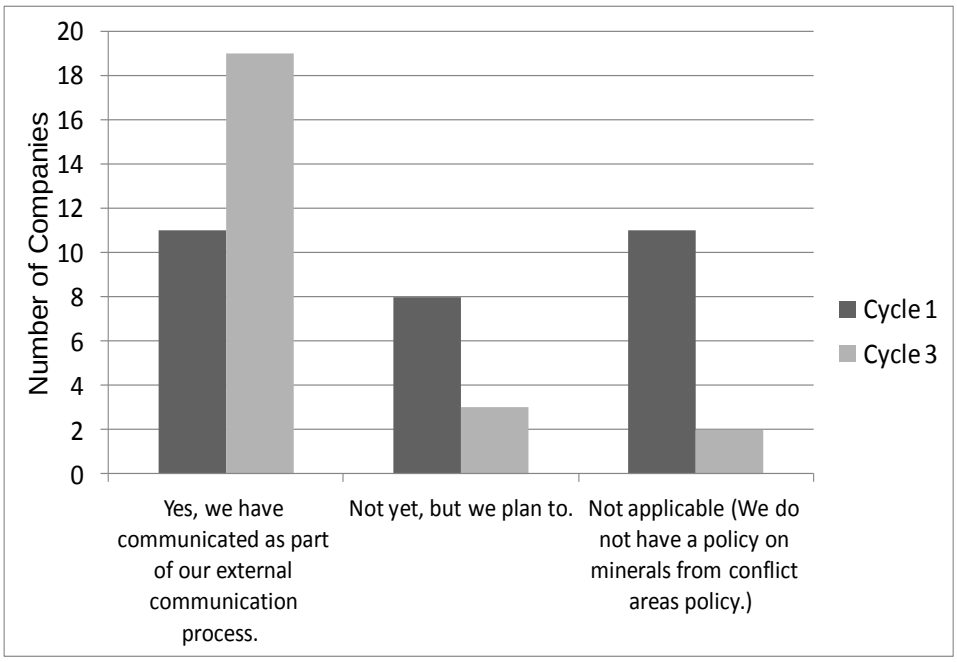


I.D: Strengthen company engagement with suppliers

More participants have strengthened engagement with their relevant Tier 1 suppliers that supply products with 3T content using an approach that is appropriate for the breadth of their supply chain. Overall, the level of supplier engagement on the issue of minerals from conflict areas has increased, with 19 respondents in Cycle 3 communicating their policies in some form to at least all relevant Tier 1 suppliers. Nineteen participants responded that they are communicating their policy to suppliers in Cycle 3, up from 11 participants in Cycle 1 (see Figure 11).

There are several reasons for movement on this indicator. First, more companies have adopted company policies on minerals from conflict areas. Second, some companies were waiting for the final SEC rule before defining and communicating a policy to suppliers. It should be noted, however, that many companies in the Cycle 1 report indicated that they had started communicating with their suppliers about new expectations and requirements even before they finalised a formal policy. Over the course of the pilot, more companies began to adopt formal policies and issue specific communications to their suppliers.

Figure 11: Number of participants to communicate their policy to suppliers



In Cycle 3, 19 of the 24 companies have communicated with suppliers via standard letters drafted internally or borrowed from joint industry letters. These letters generally include: information on conflict in the DRC and the United States legislation, company position on minerals sourcing, company action on due diligence, and expectations and instructions to submit required due diligence information.

In addition, companies have published their policy and expectations on external supplier information websites, and explained the company's position, expectations, and instructions for data collection at supplier meetings and webinars.

Two industry associations are disseminating joint industry communications to shared suppliers with expectations for responsible supply chain due diligence. During the pilot phase, the two associations provided tools and templates for their members to communicate their policies and expectations to suppliers. They have also distributed joint letters to suppliers, including companies based outside of the United States, to brief them on the legislation and expectations on supply chain due diligence. Industry associations have also developed smelter/refiner encouragement letters that are used at the industry and company levels to encourage smelters to become validated as conflict free.

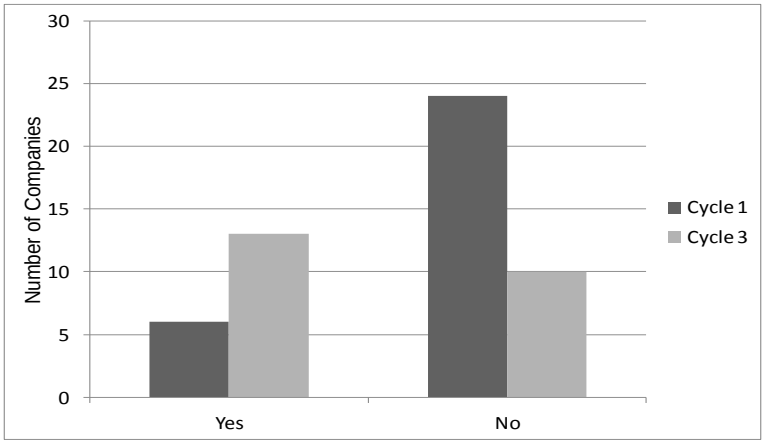
Most respondents have started to identify or have identified Tier-1 suppliers and or products containing 3TG. Over the course of the pilot, companies made significant progress to identify and prioritise Tier-1 suppliers for due diligence and data requests. First, participants identified products and commodities at risk of containing 3TG to help target suppliers of those products. Second, they used tools to identify metals including material content data forms, company declaration systems, bills of

material, and/or product part codes. Third, they prioritise 3T suppliers based on this analysis for subsequent communication and due diligence.

With the exception of a few participants who reached out to all of their Tier-1 suppliers, the majority of companies developed supplier priority levels based on 3T content in products. The most common trend was for companies to begin by communicating with a sub-set of Tier 1 suppliers that provide parts with highest content of 3TG in the first phase of due diligence. Many of these companies plan to reach all suppliers of 3TG materials in subsequent phases.

The number of participants who have incorporated contractual clauses on minerals from conflict areas has more than doubled from six in Cycle 1 to 13 in Cycle 3 (see Figure 12). More companies have imposed contractual obligations due to the reluctance of a number of suppliers to provide the requested information. Generally, these clauses require suppliers to adopt a policy, implement due diligence activities, and/or provide required information on smelters. Feedback from participants over the one-year pilot indicates that a clause in supplier contracts improves response rates from suppliers.

Figure 12: Number of participants to incorporate contractual clauses



Box 3 highlights a contractual clause requires suppliers to abide by the rules in its Supplier Code of Conduct. A clause is inserted into the contracts of relevant suppliers during contract negotiation or renewal.

Box 3: Sample Contract Clause: Individual Supplier Contract

19.3 Code of Ethical Conduct. Supplier shall conduct its operations in accordance with the [Company] Supplier Code of Conduct, [Company] Responsible Minerals Policy and the laws, principles and standards that are referenced therein (www.company.com).

Box 4 highlights a contract clause that outlines requirements on each of the four minerals in the company's standard supplier specification document.

Box 4: Sample Contract Clause: General Supplier Specifications

Suppliers must have a Conflict Minerals policy.

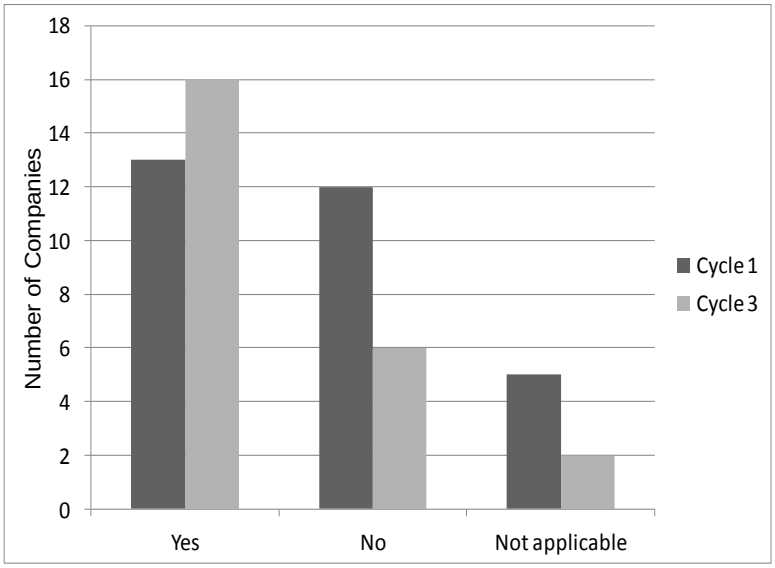
… Smelter information from Supplier and Supplier's supply chain must be disclosed and updated [using the Conflict Minerals Reporting Template] for any tantalum used in, or used in the production of, parts, materials, components and products. When [Company] notifies Supplier that there are sufficient Conflict-Free Smelters (CFS) available, any tantalum used in, or used in the production of, parts, materials, components and products must be sourced from a CFS.

… When "Conflict-free tantalum" or "DRC conflict-free tantalum" is specified in [Company] product or component specifications, Supplier is responsible for gathering reports from its supply chain demonstrating that any tantalum used in, or used in the production of, parts, materials, components and products must be sourced from a Compliant Tantalum Conflict-Free Smelter, listed on the Conflict-Free Smelter (CFS) Program webpage.

I.E: Establish a company-level, or industry-wide, grievance mechanism as an early-warning risk-awareness system

More companies established grievance mechanisms in Cycle 3, a rise to 16 respondents from 13 in Cycle 1 (see Figure 13). In most cases, companies are using existing grievance mechanisms that are available for all issues pertaining to a company's Code of Conduct requirements.

Figure 13: Number of participants to establish a grievance mechanism



Step 1: Challenges and Identified Solutions

While a number of approaches to overcome these challenges have been cited above, participants highlighted the following challenges in their Cycle 3 responses. The Table below includes possible corresponding solutions emerged as a result of the experience-sharing exercise:

Type of Issue	Challenge	Solution
Adopting a minerals supply chain policy	**Alignment with Annex II**: Some companies cited their limited sphere of control as a barrier. They believe they can only commit to a policy through direct activities and industry tools and schemes. They indicated that some potential risks were more relevant to the upstream supply chain, especially elements on public or private security forces.	Annex II is directly relevant for upstream companies because they are responsible for identifying and managing risks with on-the-ground information and risk mitigation (See Step 3(B) (2) (a) (i) of the Supplement on Tin, Tantalum and Tungsten). Some participants have incorporated Annex II appropriate elements in company policies on human rights, ethics, sourcing, and supply chain code of conduct or by requiring suppliers to establish policies, due diligence, and management systems consistent with OECD Guidance (see Box 1 and 2). Downstream companies could refer to Annex II to set out common expectations throughout the supply chain on how risks of contributing to conflict and serious human rights abuses should be identified, assessed and managed upstream in the supply chain. Downstream companies should identify to the best of their efforts the smelters/refiners in their supply chain and assess whether the smelter's due diligence practices conform to the Guidance. This can be done through action taken at a company level for those who have direct relationships with smelters or by relying on collaborative industry scheme, such as the CFS to validate conformance of smelter's due diligence practices with the Guidance.
Sourcing from the Great Lakes region	**Avoiding a de facto embargo:** Choosing to source from the Great Lakes Region is a business decision. To minimise reputational risks and avoid the costs associated with responsible sourcing, some companies may choose not to	Communication efforts on the part of all stakeholders on what responsible sourcing of minerals from conflict-affected and high-risk areas is and what the OECD Due Diligence Guidance encourages.

	source from suppliers that source responsibly from the region**.**	
Data storage:	There is a lack of established capable and compatible digital systems for managing supply chain information.	Some companies are using the MRPRO™ Dashboard, which can be used to aggregate multiple completed Conflict Minerals Reporting Templates from suppliers. The Dashboard integrates with the Template, enables data analysis, and supports the preparation of consolidated information from multiple partners. Companies also combine the Dashboard with internal data collection systems or add to their existing data systems. The conflict minerals data exchange - IPC 1755 – under development will facilitate capable and compatible data management system building.
Confidentiality:	Disclosure of company confidential information may violate contractual obligations of suppliers/customers, making it problematic to disclose/obtain supply chain information.	Industry associations have developed or are developing common questionnaires and data collection tools that also allow companies to overcome the issue of confidentiality, both individually and as an industry. However, contractual confidentiality agreements may exist and have to be negotiated between those parties that have those agreements. Further, by using data collection and roll-up tools that do not require the list of all suppliers used within a company's supply chain, companies can protect competitive information.
Strengthen company engagement with suppliers	**Language:** There are difficulties in communicating due diligence requirements with suppliers in different countries, primarily due to language barriers and lack of knowledge of the OECD.	Providing translations to items such as templates, trainings, and guidance should be done. In some situations companies have translated expectations and trainings into different languages. The OECD has translated the Easy-to-Use Guide to the OECD Due Diligence Guidance and the Implementation Questionnaire into Mandarin. The EICC and GeSI Conflict Minerals Template is available in eight languages.

Step 2: Identify and Assess Risk in the Supply Chain

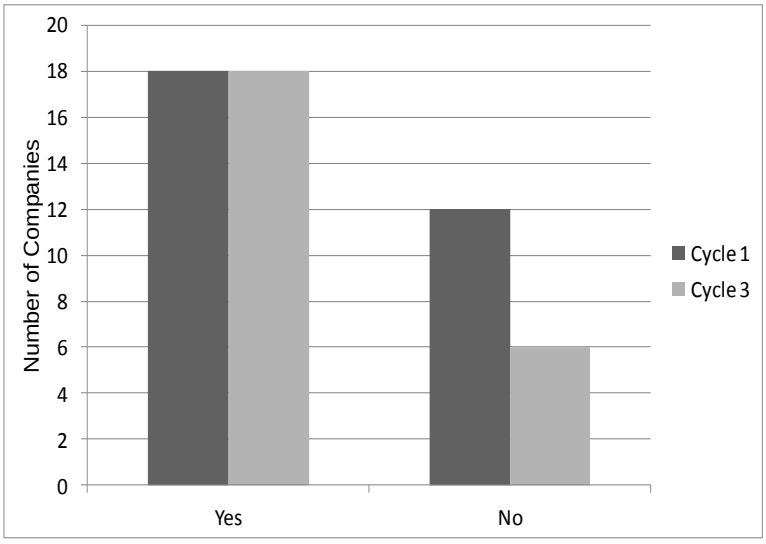
II.A: Identify, to the best of their efforts, the smelters/refiners in their supply chain.

Overall, participants throughout the representing levels of the supply chain have made progress in identifying smelters used in their supply chains. However, because six companies did not complete the questionnaires during Cycle 3, the figures appear to be static (see Figure 14).

Two more companies indicated they had identified smelters by using the Conflict Minerals Reporting Template in Cycle 3 than in Cycle 1. Six companies that had not identified any smelters during Cycle 1 had still not identified any by Cycle 3. These companies had either indicated that they had not begun or have just started their due diligence process.

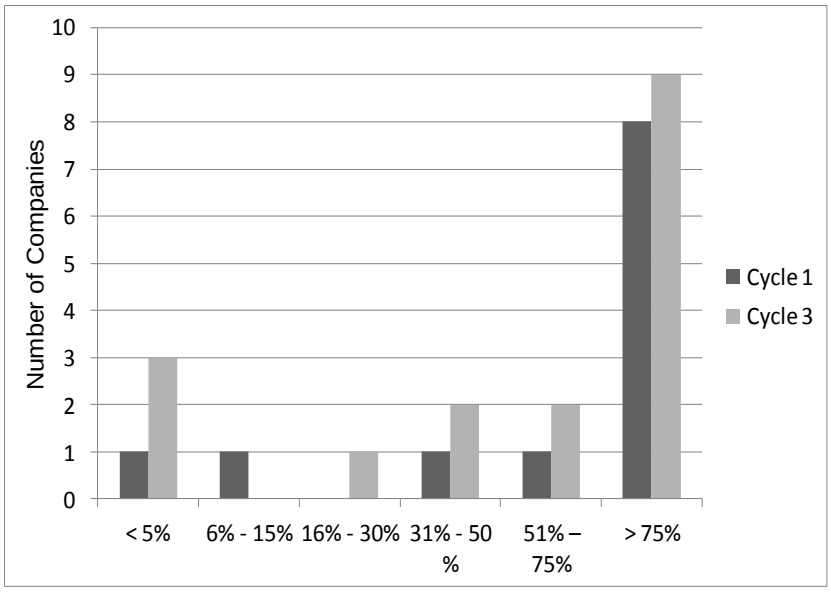
Companies report enhanced efforts to identify smelters through implementation of their due diligence processes. The work of the EICC and GeSI Extractives Work Group has been regarded by participants as a key tool to increase identification of smelters.

Figure 14: Number of participants to identify any smelters/refiners in the supply chain



In terms of the percentage of smelters that have been identified, there has been a slight increase from Cycle 1 to Cycle 3 as shown in Figure 15. More companies estimate that they have identified more than 75 percent of tin, tantalum, and/or tungsten smelters in their supply chains, with slight increases across all ranges.

Figure 15: Estimated percentage of smelters identified in company supply chains



As recommended in the Guidance, companies have employed a combination of tactics to identify more smelters over the one-year pilot phase by including direct communications with their suppliers, integrating disclosure requirements into supplier contracts, and using industry tools to obtain information from their Tier-1 suppliers. Over the course of the one-year pilot phase, an increased number of companies (from zero to 18 companies), have identified the Conflict Minerals Reporting Template as their primary methodology for identifying smelters, though six participating companies do not intend to use it.

Validating supplier responses to ensure reliable data about smelters is being passed through the supply chain remains a big challenge. The majority of participants conducting supplier surveys validate responses manually and have difficulty verifying information beyond template completeness. They have reported limitations to checking information accuracy. Participants are specifically using the Conflict Minerals Reporting Template and Dashboard to collect data from their suppliers and to verify the smelter names against the Conflict Free Smelter Program and/or the "known smelter list" that is now provided through the Template. They are also applying industry and technical knowledge and using common sense to validate responses.

Companies have also dealt with a lack of cooperation from some suppliers to identify smelters during the pilot. Participants cited supplier inability to gather information from their supply chains and refusal to cooperate on the grounds that information was proprietary. Companies noted that consistent and regular communications, combined with education of suppliers, helped to address these challenges. Companies encourage compliance to their policies by requiring supplier declarations. In addition, some companies have changed their contracts through clauses and/or terms and conditions regarding minerals from conflict affected areas.

Pilot participants are now taking various approaches to ease the burden of identifying smelters and lower the margin of error for supplier responses. For example, participants have indicated their intention to provide suppliers with a list of CFS- validated smelters once more comprehensive lists become available. Companies are also providing a list of smelters that have already been identified, even if they have not yet been certified as conflict-free, in order to help identify smelters and encourage them to enter the certification process.

Direct communications between some participating end-user companies and smelters, as part of industry collaboration, is aimed at encouraging smelter participation in the CFS Program. Participants working through their industry associations are sending out "encouragement" letters and request that they join the CFS Program. Two industry associations have developed a letter template for companies to use to engage with the smelters directly. Smelters are reluctant to talk to and give any due diligence information to companies that are not customers, so it takes several visits and several emails to convince smelters to consider the CFS Program.

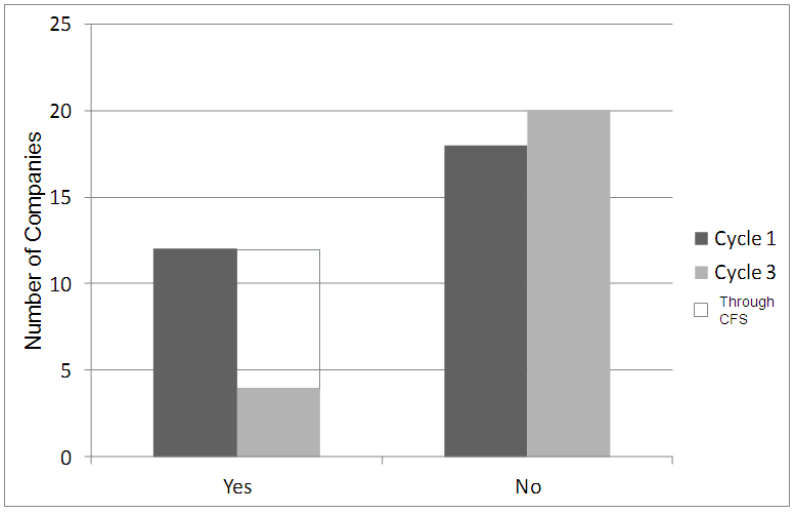
II.B: Identify the scope of risk assessment in the mineral supply chain

The actual number of companies obtaining country of origin information has increased slightly through individual and collaborative methods for data collection. (Note one company that had already obtained this information in Cycle 1 did not respond in Cycle 3). Some companies have been able to obtain country of origin information, though none have confirmed their ability to obtain information on transit and transportation routes. Over the course of the pilot period, companies' thoughts on approaches have converged to rely primarily on the CFS Program, particularly those without direct smelter relationships. The participants obtain the country of origin information on the CFS website, which hosts the list of compliant smelters that have been validated through the CFS audit. The website includes an aggregate list of the countries of origin for all of the smelters that have been verified.

According to the survey responses, downstream companies that have direct relationships with smelters can obtain country of origin directly from their smelters. The majority of companies that do not have these direct relationships have indicated their intention to use the CFS Program to obtain this information. More specifically, the data show that the number of participants that have obtained country of origin information from smelters decreased from 12 respondents in Cycle 1 to four in Cycle 3 (see Figure 16). However, eight respondents which indicated a no responded they relied on the CFS Program to obtain smelter due diligence information, rather than working independently (the impact is reflected in Figure 16). Obtaining country of origin information via collaborative means is aligned to the Guidance, which recognises that companies may actively cooperate with other industry members to identify smelters/refiners in their supply chain that meet the requirements of the OECD Guidance through industry validation schemes.[5]

[5] OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, STEP 2, II, Downstream Companies.

Figure 16: Number of participants to obtain country of origin information from smelters



Survey responses confirm that companies rely on the CFS Program for Country of Origin information. The pilot indicates that companies closer to the smelter in the supply chain have been communicating directly with smelters to perform due diligence and obtain Country of Origin information. The CFS Program does not provide information on transit and transportation routes used between the mine and the smelter in situations where the materials does not originate in conflict or high-risk areas, but do review this for in-region sourcing as part of the Step 4 third-party independent audit. Another respondent has indicated that Country of Origin information may be received directly from suppliers through the Conflict Minerals Reporting Template, but the CFS system is the only means of validating the information. Companies that are relying on the CFS Program are most commonly comparing smelter names received through supplier requests for information against the CFS compliant list. Countries of origin are presented in an aggregate list for all of the smelters that have been validated. These companies do not have a direct business relationship to interact with the smelters, with some end user companies as many as 9-10 tiers away from the smelter level. Participants are also reliant on the CFS Program to detect "red flag countries, suppliers or smelters" and to validate the information on mineral flows provided by the smelters.

Participants have been working collectively through industry processes to encourage smelters in their supply chain to be validated as conflict free via the CFS Program.

II.C: Access whether the smelters/refiners have carried out all elements of due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.

Most companies that do not have direct relationships with smelters are relying on industry processes, namely the CFS, for this assessing smelter due diligence. As stated above, companies reported a decrease in implementing this step independently. This is based on the information provided through the collaborative approach, the CFS Program. Five of the seven companies that responded they have assessed smelter due diligence do not have direct business relationships with smelters and indicated

they are relying on the CFS Program. These companies indicated that they compare smelter names from their suppliers against the CFS list as the smelters' due diligence is reviewed during the CFS audit.

Companies that responded "No" have a different approach. Of those, seven companies commented that they are using the CFS Program (via participation in the Extractives Working Group), but not for due diligence information on smelters. Their responses suggest they are limited to Country of Origin information and audit results. Furthermore, downstream participants without direct smelter relationships do not have access to information about the smelters' practices or operations, and therefore cannot identify risks or take direct action to enable mitigation.

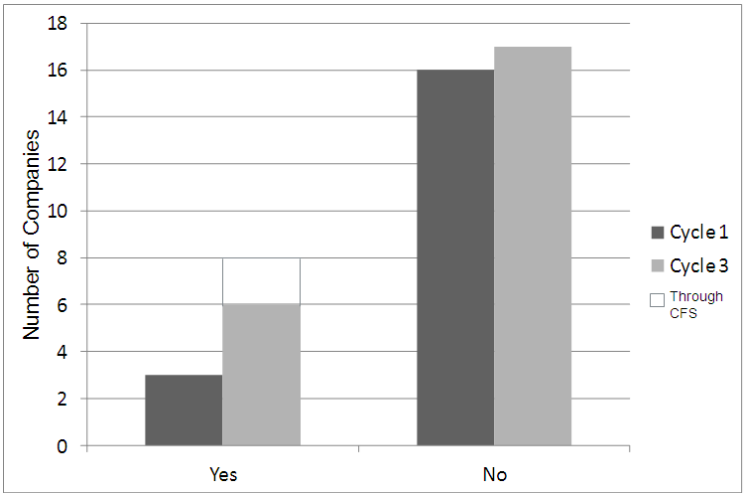
The reason for the decrease over the pilot period can be explained by increased understanding of supply chain complexities and due diligence processes and companies reliance on the industry CFS Program. Companies that have direct or indirect smelter relationships indicated that they sometimes participate in smelter pre-audit visits, which is primarily to encourage the smelter to participate in the CFS Program and outline the steps involved. Participants have engaged in direct conversation with smelters to discuss due diligence efforts, which sometimes includes documentation, facility and inventory reviews.

As smelters build systems and demonstrate compliance with the provisions of the CFS Program, they may encounter transition or transaction costs associated with participation in the programme. The CFS Early Adopters Fund was established by three companies (Intel, HP and GE) members of the EICC and GeSI Extractives Working group to provide incentive for early participation by partially offsetting the cost of each smelter's first successful audit. There are also plans underway by several entities including the EICC and GeSI Extractives Working Group to conduct activities for smelters to increase understanding of the implications of Dodd-Frank, expectations of the OECD Guidance, implications of in-region sourcing decisions, and the CFS Program.

II.D: Where necessary, carry out, including through participation in industry-driven programmes, joint spot checks at the mineral smelter/refiner's own facilities.

All of the six companies indicated that they are carrying out joint spot checks by solely relying on the work of independent auditors working on behalf of the CFS Program, regardless of whether or not they have direct relationships with smelters. However, the CFS Program conducts validation audits of conformance to OECD Guidance and provides reasonable country of origin information. CFS does not conduct spot checks. Therefore, we can conclude that no downstream companies or industry scheme (CFS Program) is carrying out spot checks. It is anticipated that more companies are addressing this element of the Guidance through their use of the CFS Program.

Figure 17: Number of participants to carry out joint spot checks



Step 2: Challenges and Identified Solutions

Type of Issue	Challenge	Solution
Identify smelters in the supply chain	**Confidentiality concerns:** Suppliers cannot disclose information at times because their sub-tier suppliers refuse to disclose smelter names due to contractual confidentiality.	Contractual confidentiality is a real issue that has to be negotiated between the two business parties with direct business relationships. Further in the supply chain, solutions need to be further explored.
	Non-disclosure from traders: Obtaining information from traders has been noted as particularly challenging as there are instances where suppliers cannot map their supply chains beyond the metal exchange. Traders claim they will not provide information on the source of metals due to confidentiality concerns. **Language Barriers**: Smelters with limited ability to communicate in English, particularly in Asia, find it difficult to continue engage with the CFS Program.	The CFS Program have provided some materials, and will be providing all of their materials, in relevant languages and continue to reach out to Asian smelters to encourage them to participate in the CFS Program.
	Fluid supply chains: Sub-suppliers and smelters in the supply chain are constantly changing, so the information must be updated regularly.	Supply chains will always be dynamic and there will some level of uncertainty. Periodic updates to disclosures could be requested as new information becomes available. This request could be included in contract clauses.
	Supplier non-response: Some suppliers refuse to cooperate due to the lack of Final Rule on Section 1502 of Dodd-	Finalisation of the SEC rule may address part of these concerns. Pilot participants noted that consistent and regular communications

	Frank. Others may be located in regions around the world that do not regard this level of disclosure as needed or due to business concerns.	and education with suppliers and reminders of contractual obligations with Tier-1 suppliers to encourage cooperation helped to address these challenges. Companies are enforcing compliance with their policies by requiring supplier declarations with those suppliers they have a business relationship with. Pilot participants also plan to ease the burden on suppliers by providing a list of CFS-certified smelters once more comprehensive lists become available. Confidentiality will continue to be a challenge with so many tiers of suppliers involved.
	Global supply chain: There is a lack of awareness among many suppliers, particularly with many Asian suppliers.	Participants working through industry associations send consistent messages to suppliers through letters encouraging smelters to join the CFS Program. Two industry associations have developed a letter template for companies to use to engage with the smelters directly. The CFS Program ensures compliance without requiring smelters to share information with companies that are not customers. However, a critical mass of customers requesting the same thing in the same way is the best solution to this challenge.
	Accuracy of smelter data provided: Thousands of smelter names received through the Conflict Minerals Reporting Template must be reviewed. Some smelters are known under multiple names or have subsidiaries with a different name. If a declared smelter is not on the CFS list, or on the known smelter list, companies are at a loss for an easy way to verify information they are receiving from suppliers. **Anti-competition laws:** Industry-wide pressure on suppliers to comply is a barrier given limitations to sharing supplier names from anti-competition laws.	Many pilot participants are using the Conflict Minerals Reporting Template to collect data from their suppliers and to review the smelter names against the CFS Program and/or the "known smelter list" that is now provided through the Template. However, many names received by companies cannot be verified and this still remains a significant challenge. Consolidation and regular third-party maintenance of a refiner/smelter list could help address this challenge.
Identify the scope of the risk assessment in	**Obtaining information on transit routes** Companies currently rely on the CFS Program to identify upstream risks and	This information is available through iTSCi. CFS collects information on country of origin and reviews information on transit and

the supply chain (Obtain country of mineral origin, transit and transportation routes used between mine and smelters)	are unclear as to whether they are conforming to the Guidance by not directly/independently obtaining all of the information stipulated in the OECD Guidance.	transportation routes contained in Step 4 third party independent audit. Downstream companies using industry schemes to assess the due diligence information of upstream actors is consistent with the OECD Guidance.
	Smelter engagement in the CFS Program: Only a limited number of smelters have signed up to participate in the CFS audit programme. It will take time before all of the smelters are signed up and validated. End-user companies do not have direct influence over smelters to encourage them to participate.	As a next step, participants are working collectively through industry processes to encourage smelters to participate in the CFS Program in order to smelters in their supply chain to be verified as conflict free.
	Lack of differentiation between downstream actors in the Guidance: There is still a perception among companies that the Guidance treats all downstream companies as if they have a relationship with the smelters and have visibility into the upstream processes.	The Guidance does not contain tailored recommendations to all different actors in the downstream supply chain like it does on the upstream actors, but where appropriate it contains qualifiers ("depending on the position of the company in the supply chain") which allows for a differentiation of treatment for all of the downstream guidance. The Guidance recognises that by virtue of practical difficulties "***downstream companies should establish controls over their immediate suppliers*** *and may coordinate efforts through industry-wide initiatives* to build leverage over sub-suppliers, overcome practical challenges and effectively discharge the due diligence recommendations contained in this Guidance." It follows that the modalities for supplier engagement may vary according to the position of the company in the supply chain as reflected in the menu of options provided in the Guidance. Downstream companies are free to choose which approach would suit best their specific situation. Pilot peer-learning table (see p. 19) on the application of the 5 Step Framework to companies who do not have a business relationship with smelters has been developed to provide an example and to assist in conforming to the Guidance.

Step 3: Design and Implement a Strategy to Respond to Identified Risks

STEP 3.A: Report findings to designated senior management.

Overall, more participants report findings of their supply chain risk assessment to senior management. Respondents who have developed a communication process to ensure that the findings of the actual and potential risks from supply chain assessments are reported to senior management is down from 14 in Cycle 3 from 13 in Cycle 1.

Companies with a direct relationship to smelters indicated that they report actual and potential risks that emerge from their due diligence practices through monthly or quarterly meetings with senior level executives that have responsibility for minerals from conflict areas. Findings such as failure of relevant suppliers to meet key expectations set by their policies and supplier contract specifications are reported to management. One company reported that every element of Annex II is an actual and potential risk that arises from the upstream supply chain.

STEP 3.B-D: Devising a risk management plan

3. B.2. a) ii): Devise and adopt a risk management plan.

1. Review the model supply chain policy on minerals from conflict-affected and high-risk areas in Annex II or their own internal policy if consistent with Annex II to determine whether the identified risks can be mitigated by continuing, suspending or terminating the relationship with suppliers.

2. Manage risks that do not require termination of the relationship with a supplier through measurable risk mitigation. Measurable risk mitigation should aim to promote progressive performance improvement within reasonable timescales. In devising a strategy for risk mitigation, companies should:

a) Consider, and where necessary take steps to build leverage over upstream suppliers who can most effectively prevent or mitigate the identified risk.

3. B 2. a) ii) DOWNSTREAM COMPANIES: Depending on their position in the supply chain, downstream companies are encouraged to build and/or exercise their leverage over upstream suppliers who can most effectively and most directly mitigate the risks of adverse impacts. Should downstream companies decide to pursue risk mitigation while continuing trade or temporarily suspending trade, their mitigation efforts should focus on suppliers' value orientation and capability-training to enable them to conduct and improve due diligence performance. Companies should encourage their industry membership organisations to develop and implement due diligence capability-training modules in cooperation with relevant international organisations, NGOs, stakeholders and other experts.

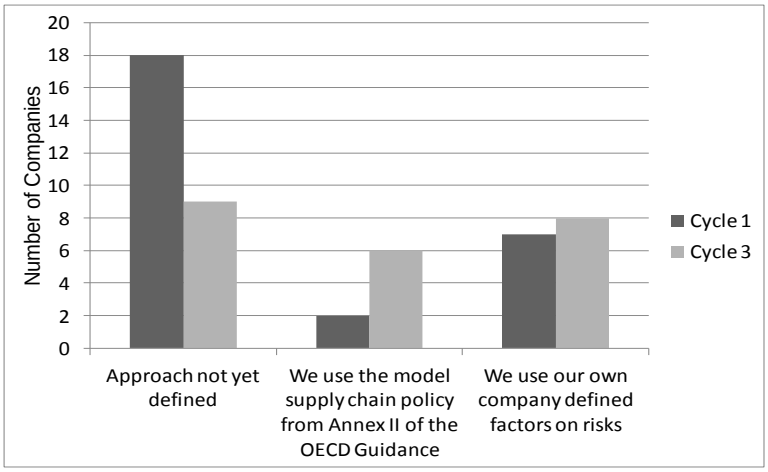
3.C: Implement the risk management plan, monitor and track performance of risk mitigation, report back to designated senior management and consider suspending or discontinuing engagement with a supplier after failed attempts at mitigation.

3. D: Undertake additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.

More companies have established and implemented risk management plans regarding minerals sourcing related to their immediate suppliers. Figure 18 shows an increase in the number of companies that use Annex II of the Guidance, including mitigating risks by continuing, suspending, or terminating the relationship with suppliers. The number of companies that have not yet defined an approach has declined by half, while the number of companies that use their own company-defined factors on risks has remained relatively flat. These companies cited that they use their own internal procurement risk framework.

Over the one-year pilot period, approaches by participants to risk management have converged on industry schemes to influence the upstream supply chain and ensure responsible sourcing as recommended in the Guidance. The Guidance provides that downstream companies should establish controls over their immediate suppliers and may coordinate efforts through industry-wide initiatives to build leverage over sub-suppliers, overcome practical challenges, and effectively discharge due diligence recommendations contained in the Guidance.

Figure 18: Participants' approach to managing risk of sourcing minerals from conflict areas



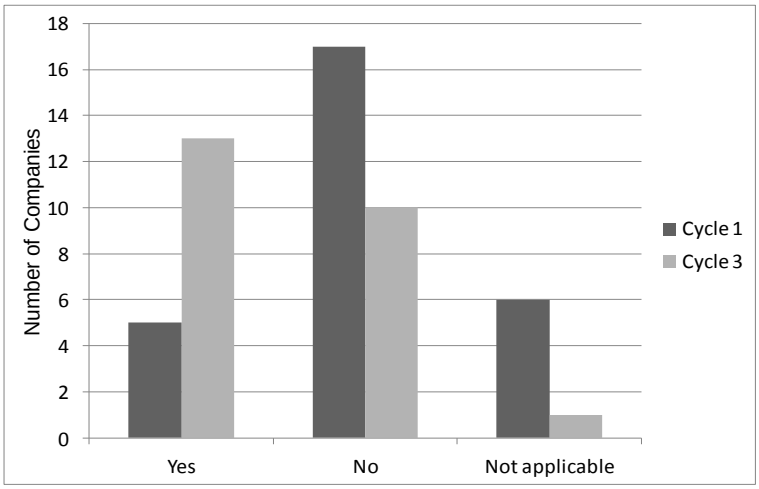
The Guidance recognises that upstream suppliers are those who can most effectively and most directly mitigate the risks of adverse impacts. Downstream companies are not expected to directly mitigate risks upstream in the supply chain. In this respect, participants noted that their participation in industry initiatives provides one-way information on upstream activities and add that there is limited opportunity for companies without smelter relationships to understand and mitigate risks in the upstream supply chain. The downstream companies which do not have business relationships with smelters are focusing their risk management on their direct and strategic suppliers and the application of "red flags" only applies to upstream suppliers of the smelters.

Risk management plans are designed to mitigate the risk that relevant Tier 1 suppliers fail to understand or cooperate with the company's expectations. These plans may include communications strategies to encourage suppliers to cooperate, to understand supplier progress and plans, or provide incentives and/or penalties. For example, when companies do not receive a response or receive inadequate responses, they will send a follow-up letter to the supplier to request additional information. Based on subsequent follow-ups, participants have indicated that repeated and continuous resistance, inadequate, or incomplete response by suppliers may result in reduced or discontinued relationship with that supplier.

Companies have implemented measures when information provided is inadequate to adjust to the rising use of reporting templates and evaluation of responses. The number of participants who have developed corrective action or improvement plans with suppliers has more than doubled from five

companies during Cycle 1 to 13 companies during Cycle 3 (see Figure 19). With advances made in the development of due diligence systems and data collection processes over the course of the one-year pilot phase, more companies have formalized corrective action plans as part of supplier enforcement on the issue of minerals from conflict areas. During Cycle 1, a number of participants indicated that they planned to begin corrective action processes during 2012 once more due diligence and smelter information was captured from suppliers.

Figure 19: Number of participants with corrective action plans in place



Participating companies that have risk mitigation processes in place have indicated that suppliers that continuously fail to follow their information requests may be suspended until the supplier sufficiently responds. Refusal to commit to and implement a corrective action plan within a reasonable time may result in the termination of the relationship. Companies have indicated that once comprehensive lists of validated smelters become available, they will require their suppliers to source from CFS-validated smelters only, making the process of risk mitigation easier.

The majority of participants are building leverage over suppliers and/or smelters through capability training and continuous improvement programmes through due diligence in the supply chain. While most of these companies are collaborating with industry initiatives to provide supplier trainings, four companies indicated in Cycle 3 that they are independently providing capability trainings to their direct suppliers to enable them to meet due diligence expectations. They are organising meetings and webinars to disseminate general information and expectations around the issue of minerals from conflict areas.

During training sessions, companies typically introduce the topic, explain the Dodd-Frank Act, provide background on the data request, reinforce company expectations, and demonstrate how to complete the Conflict Minerals Reporting Template. Companies are also providing information in languages other than English more frequently to communicate with suppliers, provide information, and collect data.

Some participants have also increased their engagement with NGOs and the U.S. government to encourage the development of pilot mineral supply chains in the Great Lakes Region. An example is participation in the Public-Private Alliance for Responsible Minerals Trade spearheaded by the United States State Department that aims to assist with the development of pilot supply chain systems that will allow businesses to source minerals from mines that have been audited and certified to be conflict-free.

Step 3: Challenges and Identified Solutions

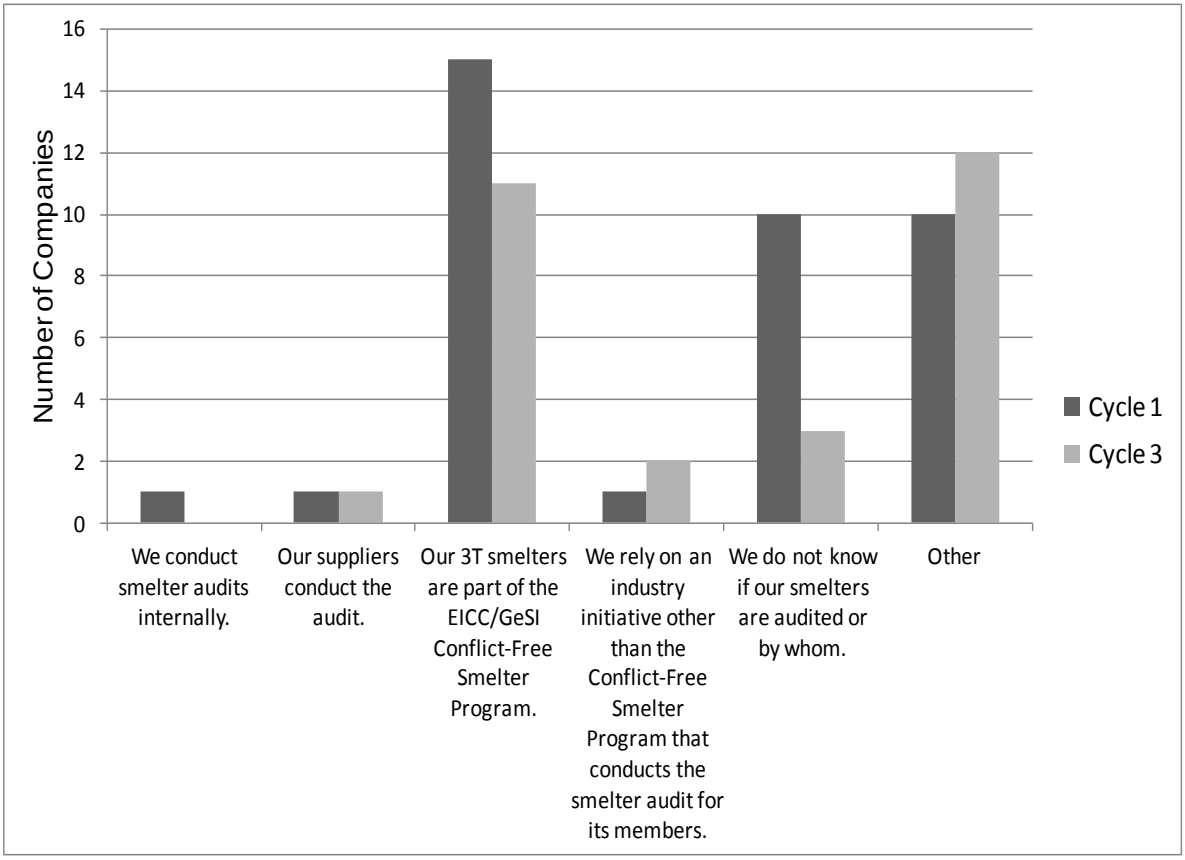
Type	Challenge	Solution
Devise and adopt a risk management plan	**Limited resources to conduct proper risk management:** There will be an evolvement of this activity as due diligence and the CFS Program becomes more mature	Risk mitigation activities/ responses outlined in Annex II are more actionable for upstream suppliers. As systems develop, downstream companies may adopt a policy to reinforce suppliers' adherence through the business relationship such as sourcing from smelters that are validated by CFS.
Implement the risk management	**Limited number of smelters participating in the CFS:** At this time, the CFS Program and available verified conflict-free smelters are of an insufficient number to justify the suspension or termination of relationships with suppliers with the exception of tantalum	Enhance outreach efforts in collaboration with key partners, including the OECD, member and non-member countries to encourage participation in CFS.
	Limited information from industry collaboration: Participants noted that their participation in industry initiatives only provides them with one-way information on upstream activities and provides limited opportunity for companies without smelter relationships to understand and mitigate risks in the upstream supply chain.	Companies that do not have direct business relationships with smelters can use tools such as the Conflict Minerals Reporting Template and CFS list of validated smelters to assess and respond to risks based on their *direct suppliers'* conformance with requests for information and/or to source from CFS-validated smelters.

Step 4: Carry Out Independent Third-Party Audit of Smelters' / Refiners' Due Diligence Practices

IV.A: Plan an independent third party audit of the smelter/refiner's due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.

The majority of participants rely on the CFS Program to audit smelters where no direct relationship with smelters/refiners exists. As shown in Figure 20, the number of participants that use the CFS Program decreased from 15 in Cycle 1 to 11 in Cycle 3. However, two additional companies commented that they participate in the CFS Program and rely on CFS audits of smelters' due diligence, therefore bringing the number of companies that are conducting audits through the CFS in Cycle 3 to 13. The decrease from Cycle 3 to Cycle 1 might also be explained by the fact that six fewer participants responded in Cycle 3. It should be noted that the number of participants who do not know if their smelters are audited decreased from 10 companies in Cycle 1 to three companies in Cycle3.

Figure 20: Responsibility for conducting audits of smelters



Over the one-year pilot period, participants' efforts to carry out audits and assess due diligence efforts by smelters has converged on the use of the CFS Program. CFS is the only industry initiative in place to validate third-party audits of smelters on conflict-free sourcing expectations by assessing smelter procurement activities. Industry smelter validation efforts are seen as the only option for companies

that do not have a direct relationship with smelters to request, conduct, or perform audits. Even companies with direct smelter/refiner relationships use the CFS Program to avoid duplication of efforts. Respondents utilize industry initiatives to encourage more smelters to participate in the CFS Program.

While the majority of companies use the CFS Program for independent auditing of their smelters, the companies expressed concern that it only covers a portion of their smelters for two reasons: 1) not all 3T smelters are participating in the CFS (particularly tungsten smelters that are reluctant to participate yet); and 2) the universe of smelters in their supply chains is unknown and they cannot guarantee that all of their smelters participate.

B. Implement the audit in accordance with the audit scope, criteria, principles and activities set out above.

The CFS auditing criteria are aligned with the OECD Guidance, and address data needs for both the OECD Guidance and the Dodd-Frank requirements. Overall, it meets the OECD's recommendations in terms of the scope, criteria, and principles outlined in the Guidance.

However, the CFS Program audits only validate conformance to Step 4 and parts of Step 1 and 2 of the OECD Guidance as the CFS audits focus primarily on the smelter's policy, programs, systems and chain of custody information. The CFS Program thus presupposes the existence of a third party audit on the conformity of the smelter's due diligence with respect to the remaining aspects of the Guidance. CFS auditors do evaluate this complimentary audit information to ensure the Guidance is conformed to. CFS-compliant smelters verify their procurement of conflict-free material that has already been audited (at the supply and transportation level up to the smelter) for conformance to Step 4 of the Guidance by a credible process.[6] Audits evaluate smelters using criteria that validate materials conflict-free or based upon the due diligence and traceability information associated with mineral purchases. The CFS Program expects smelters to manage risk mitigation beyond the smelter level of the supply chain and provide proof of such practices, as necessary to demonstrate compliance to the audit protocol.

The CFS Program consists of two reviews that occur at a smelter/refiner site during the assessment process:

1) Business Process Review

- Evaluate company policies and/or codes of conduct relating to conflict minerals
- Evaluate company standard operating procedures to ensure the policies are in effect

2) Material Analysis Review

[6] According to the EICC & GeSI Audit Standard and Instructions document dated June 2012, "With specific regard to the determination of the origin of minerals, smelters will have to collect the information required under the OECD Guidance. In order to generate the requested information, smelters may rely on a credible conflict free mineral traceability scheme that has been independently verified to conform to the OECD Guidance."

- Conduct a complete material analysis to demonstrate that all sources of materials procured by the smelting company are conflict-free (including any complementary OECD audit results)
- Evaluate whether source locations are consistent with plausible mining locations
- Establish whether material identified as "recycled" meets the definition of recycled material, and come from recycling or reasonable entities (e.g. customer take-back)

The CFS audits entail on-site verification based on documentation reviewed by external independent auditors. Audit firms conduct the actual assessment of the smelters and refiners. The current list of audits firms includes Liz Muller, Inc., STR Responsible Sourcing, and SGS. The firms and auditors have been trained in the CFS Program protocols and the OECD Guidance to be familiar with the issues related to conflict minerals, the in-region transportation/trade paths, and the goals of in-region schemes that account for the minerals' transportation.[7]

Step 4: Challenges and Identified Solutions

Type	Challenge	Solution
Plan an independent third-party audit of smelters due diligence	**Audits only cover a portion of smelters represented in participant supply chains:** Availability of verified smelters is limited. Currently 14 tantalum, 2 tin, and zero tungsten smelter companies have been validated by CFS. It will take time before more comprehensive lists of validated smelters are available.	At present, there are no other collective and/or industry-level alternatives to the CFS Program. Smelters are encouraged to voluntarily opt into the CFS Program. The success of tantalum smelter validation is largely due to the high use of tantalum in electronics and consequent ability to exercise leverage.
	Low influence: The lack of influence and cohesion by industries more dependent on tin and tungsten has impinged the pace of CFS validation relative to tantalum in electronics.	Other industries that are predominant users of tin and tungsten need to apply pressure to the supplying smelters. There are plans underway by the EICC and GeSI to conduct awareness raising activities for the smelting industry to increase their understanding of the implications of Dodd-Frank, the OECD Guidance, the expectations of downstream companies, and their participation in the CFS Program. More effort needs to be made by all stakeholders to engage tin and tungsten consuming companies and economies, including NGOs highlighting the linkage to other industries besides electronics, and governments reiterating that the U.N. Security Council supported taking forward due diligence guidelines consistent with

[7] For more information on the CFS audit protocols, go to http://www.conflictfreesmelter.org/cfshome.htm.

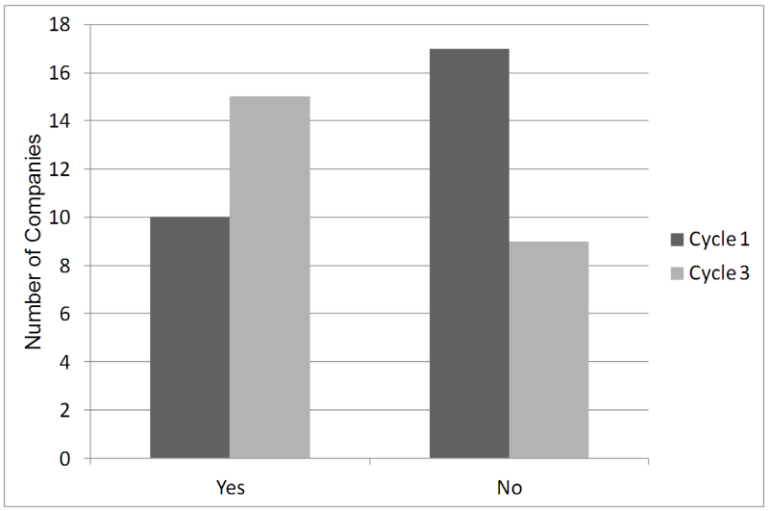
		the OECD Guidance. In its resolution 1952/2010, the U.N. Security Council called upon all states to take appropriate steps to raise awareness of the due diligence guidelines, and to urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying the aforementioned guidelines or equivalent guidelines (OECD Guidance).
	Lack of training: Suppliers need to train their supply chain on the requirements for conflict minerals reporting.	CFS pre-audit visits to smelters to educate them on the need and ways to move toward conflict-free materials. Outreach programmes by entities of all types to educate smelters, traders and other entities transacting minerals in the supply chain. OECD Guidance documents in multiple languages such that companies can convey this understanding to their suppliers (including smelters).
	Limited resources by smelters to participate in the CFS: Securing participation by smelters in the EICC and GeSI CFS Program by spending time and capital is difficult.	Three companies in the EICC and GeSI Extractives Working Group co-founded the CFS Early Adopters Fund to provide incentive for early participation by partially offsetting the cost of each smelter's first successful audit. Engagement by other tin and tungsten consumers will drive increased awareness and expectations in those industry sectors.

Step 5: Report Annually on Supply Chain Due Diligence

5. A: Annually report or integrate, where practicable, into annual sustainability or corporate responsibility reports, additional information on due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.

The majority of participants proactively communicate with the public on the issue of minerals from conflict areas. The number of participants that are reporting publicly on their due diligence policies and practices increased over the implementation period, from 10 companies in Cycle 1 to 15 companies in Cycle 3 (see Figure 21), as companies made progress in their due diligence implementation activities.

Figure 21: Number of participants that report publicly



Companies largely communicate information via their Corporate Social Responsibility reports and company websites. The majority of companies report or update their websites and reports on an annual basis. These companies communicate their policies and approaches, supplier requirements, due diligence activities, and risk management and mitigation. While a majority of the participants waited for clarity on Section 1502 of Dodd-Frank, the purpose of communication was to keep stakeholders informed of company activities. Now that the SEC has issued the Final Rule on Section 1502, there will be some companies who fall within the scope of the legislation and be obligated to publish their conflict minerals disclosure or a Conflict Minerals Report of their due diligence processes. However the first reports are not due to the SEC until May of 2014.

Companies that describe their public communications plans anticipate reporting on the following:

- Percentage of suppliers with due diligence efforts in place
- Efforts to implement the OECD Guidance, including participation in the Pilot phase
- Quantitative results of due diligence efforts, including the number of suppliers supplying products with 3Ts, the number of smelters identified in the supply chain, the number of validated smelters

- Names of smelters in their supply chain

Step 5: Challenges and Solutions

Type	Challenge	Solution
Report annually on supply chain due diligence	Step 4 independent third-party audits of smelters expect auditors to assess the conformity of the smelter/refiner due diligence practices with the Guidance, thus covering both Step 4 and Step 5 activities. Clarification of the sequencing and expectations of Steps 4 and 5 relative to each other needs to be provided to avoid misalignment of expectations.	Step 4 exclusive focus is on independent third party audits of smelters. The scope of the audit is described as follows: "The audit scope will include all activities, processes and systems used by the smelter/refiner to conduct supply chain due diligence of minerals from conflict-affected and high-risk areas. This includes, but is not limited to, smelter/refiner controls over the mineral supply chain, the information disclosed to downstream companies on suppliers, chain of custody and other mineral information, smelter/refiner risk assessments including the on-the-ground research, and smelter/refiner strategies for risk management". The Guidance recommends that while assessing individual smelters' due diligence practices (that currently are mainly carried out through complementary industry programmes like CFS and iTSCi), third-party audits cover all five steps, including whether smelters have publicly reported on their due diligence practices as recommended under Step 5. As part of their due diligence, smelters are expected to individually publicly report on their due diligence practices. This includes the publication of audit reports of smelters/ refiners, where they exist, with due regard taken of business confidentiality and other competitive concerns.
	Step 5 A.1.1 (addressed to upstream companies) has been read to imply the publication of confidential information, such as those on mine sites. It does not take into account that a program like the CFS can do the review of that confidential information via a 3rd party independent audits and validate that due diligence has been done without releasing publicly information on mine sites.	Step 5 does not expect upstream companies to publish information on mine sites. Upstream companies are expected to publicly report on company management systems and describe associated processes. The Guidance DOES NOT expect companies in the supply chain (upstream and downstream) to publicly disclose information on mine sites.

	Step 5, A.3.3 expects downstream companies to publish the audit reports of their due diligence practices. This is contributing to confusion about what types of audits are required, and at what points in the supply chain	Consider amending this provision to avoid confusion, since the Guidance only recommends third party-independent audit at the refiner/smelter level

SECTION III: BROADER SET OF EXPERIENCES BEYOND PARTICIPANTS

In response to feedback that the pilot phase only portrays the experiences of a small sub-set of the supply chain, and that the majority of participants representing large, multi-national OEMs in the ICT sector are usually demonstrating leadership on this issue, a simplified questionnaire was created to obtain a broader set of data about the experiences of non-pilot-participating companies, including SMEs, in Cycle 3. The questionnaire was distributed to members of four industry associations (see the questionnaire in the Appendix on page 73).

The objective of the questionnaire was to determine the level of due diligence awareness and implementation that was taking place among non-pilot-companies. The survey received 178 anonymous responses from a diverse group of companies in terms of industry (see Figure 22), size (see Figures 23), and revenues (see Figures 24).

In addition to representing a more diverse set of industries, the data also aimed to represent the practices of SMEs, which are defined as companies that have fewer than 250 employees and accounted for approximately 23 percent of the industry wide responses.

The below charts demonstrate the diversity of companies that responded to the simplified questionnaire.

Figure 22: Industry representation

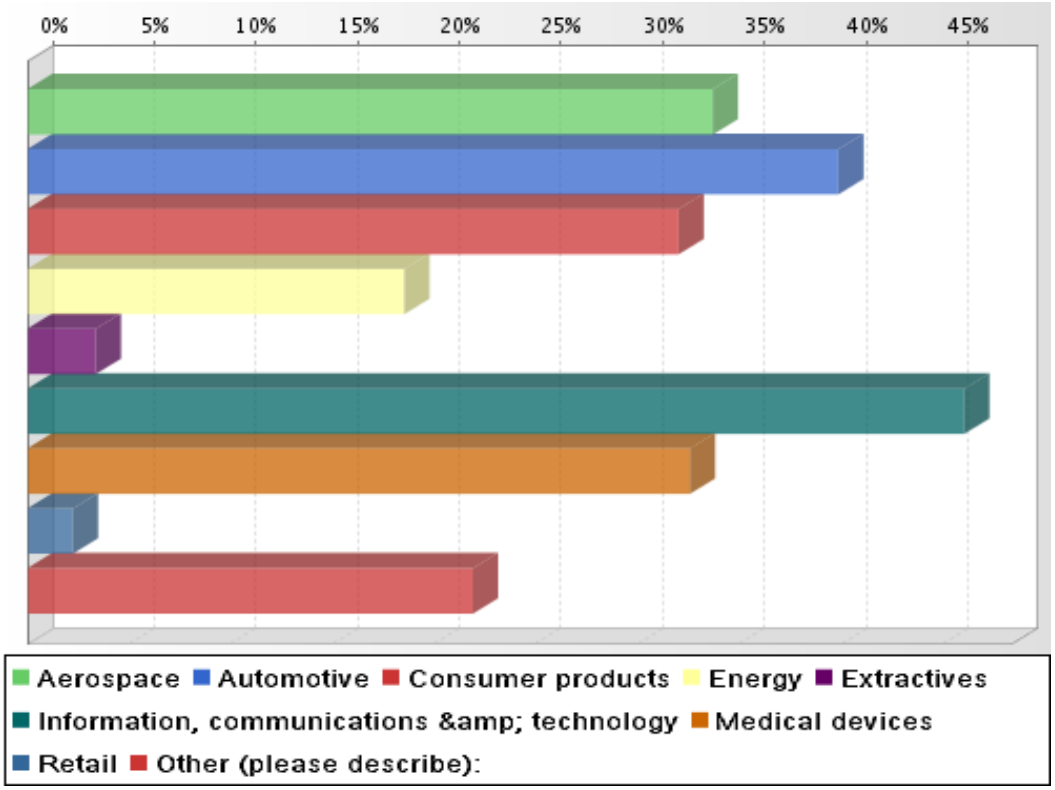


Figure 23: Company size

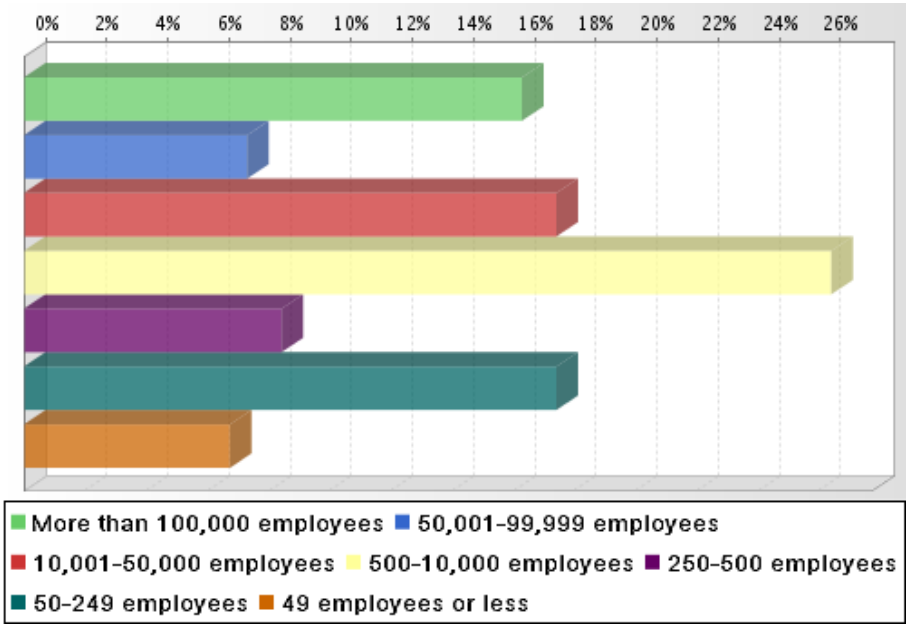


Figure 24: Company revenues

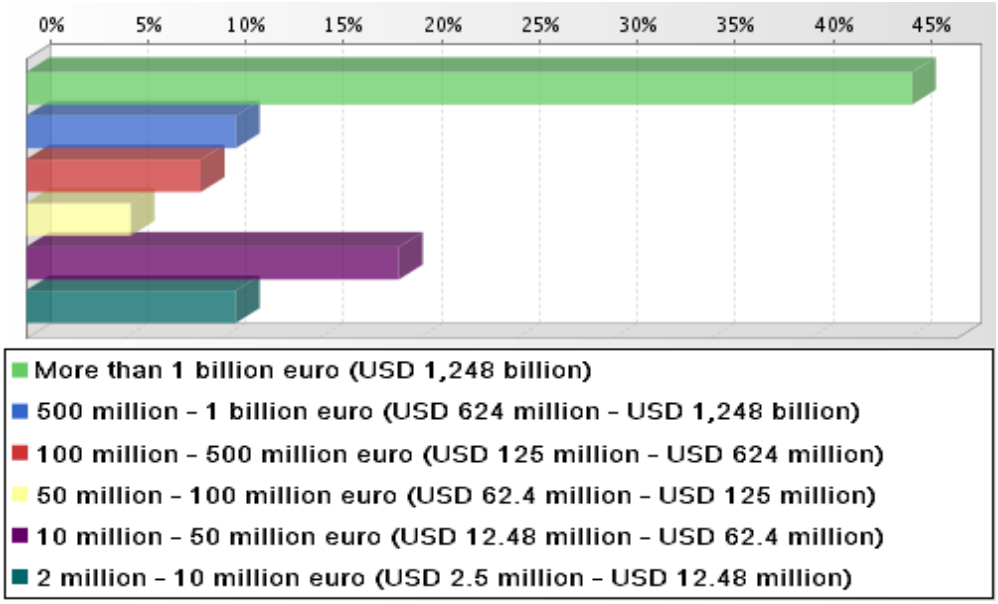
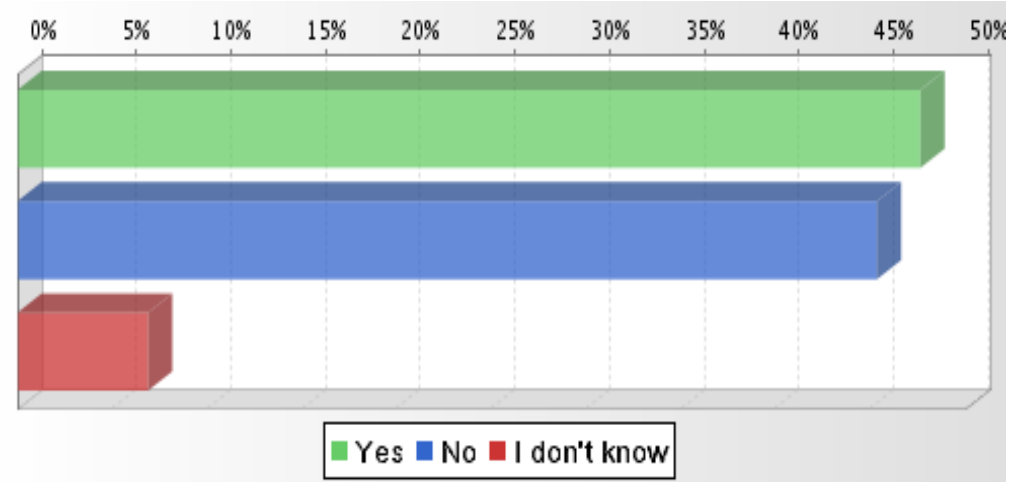


Figure 25 shows the number of respondents that are subject to the Dodd-Frank Act. More than 47 percent indicated that they are subject to disclosures to the SEC on Section 1502. Of those that indicated that they are not subject to Section 1502, 65 percent indicated that their customers are subject.

Figure 25: Companies subject to Dodd-Frank



Awareness

The industry associations that distributed the survey to its members have been communicating regularly with its membership on the issue of minerals coming from conflict affected areas. The survey respondents demonstrated a high level of awareness of the issue of minerals from conflict areas. More than 95 percent of respondents are aware of growing concern by regulators in the U.S., EU, and international bodies about the link between the 3TG trade and potential risk of conflict financing, with particular regard to the situation in the DRC. Also relatively high, 82 percent are aware of the potential risk of supporting conflict through the activities of their suppliers.

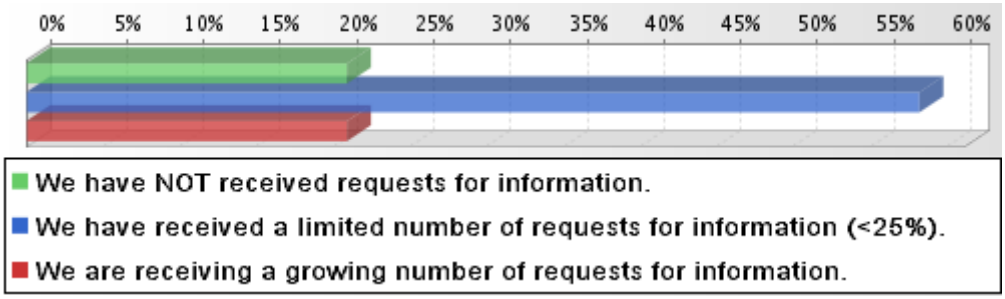
Yet, while 70 percent are aware of the OECD Guidance, only 59 percent are aware that they can use the OECD Guidance to identify and manage supply chain risks in accordance with international standards.

SME experiences: General awareness

Meanwhile, when considering SME data only, 84 percent of respondents to the simplified survey are aware of growing concern by regulators on the link between the minerals trade and conflict, and 60 percent are aware of the potential risk of supporting conflict. Fewer SMEs are aware of the OECD Guidance, at 40 percent, and only 30 percent are aware that the OECD Guidance can be used to identify and address risks in their supply chains. This data indicates that SMEs on average have a lower level of awareness than the broader set of companies surveyed.

Awareness of the Guidance may result from customer requests for information, yet companies may not understand how they can use the Guidance for their own supply chain due diligence.

Figure 26: Number of customer requests for information



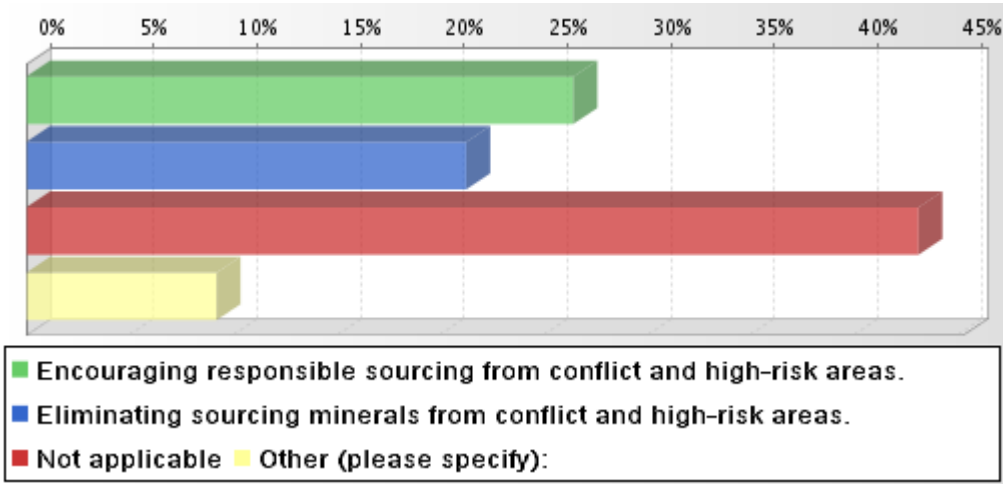
SME experiences: Customer requests for information

33 percent of SMEs indicated that they have NOT received request for information from their customers.

Policy

When asked whether they had any specific policies in place on minerals from conflict-affected areas or any other policies that explicitly address the issue, 54 percent answered affirmatively. Figure 27 shows what approach companies are taking in their policies. More than 26 percent of companies are *encouraging* responsible sourcing from conflict and high-risk areas, while 21 percent are *eliminating* sourcing minerals from conflict and high-risk areas. This is a significant statistic, demonstrating that a de facto embargo will be driven by these policies. These data differ significantly from the approach taken by the majority of downstream participants in the pilot phase, which is to source responsibly in accordance with available international standards contained in the OECD Guidance.

Figure 27: Approach to minerals sourcing policy



SME experiences: Policy

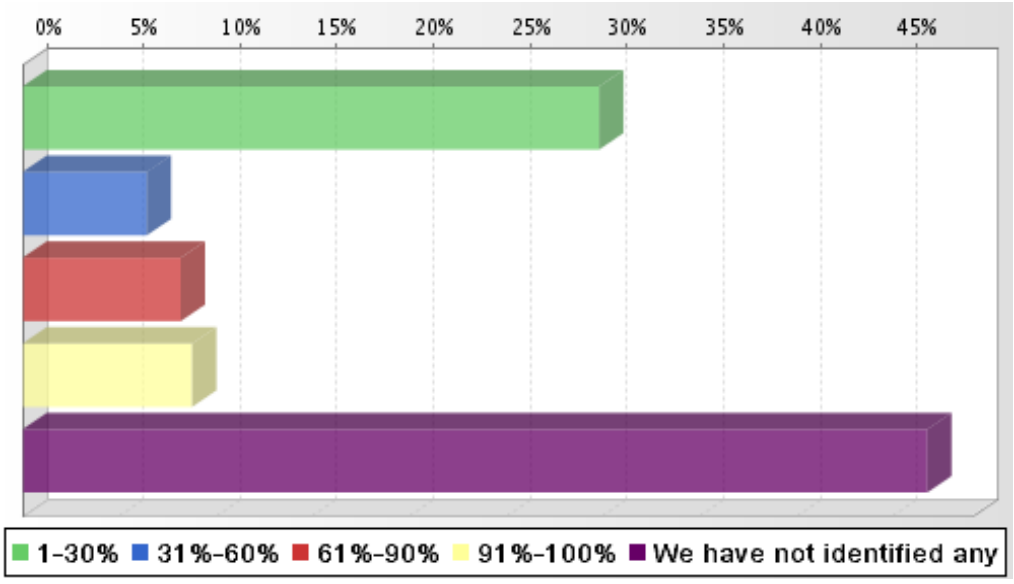
Only 23 percent of SMEs indicated that they have a policy in place, which is less than half of the rate for all pilot participants. Only 5 percent of SMEs are *encouraging* responsible sourcing from conflict and high-risk areas, and 17 percent are *eliminating* sourcing minerals from conflict and high-risk areas. More than 71 percent do not yet have an approach to minerals sourcing.

Obtaining Smelter Information

In terms of identifying smelters, exactly half of the respondents are conducting due diligence to identify smelters that produce 3TG in their supply chains. Forty four percent of the respondents are participating in industry initiatives to identify smelters and pass the information through the supply chain. While the majority of respondents indicated that they are participating in EICC and GeSI, others indicated they are participating in ITIC (Information Technology Industry Council), RJC (Responsible Jewellery Council), AIAG (Automotive Industry Action Group), WGC (World Gold Council), LBMA (London Bullion Market Association), AEM (Association of Equipment Manufacturers), and IPC (Association Connecting Electronics Industries).

Forty seven percent of respondents indicated that they have not identified any of their smelters (see Figure 28). Thirty percent indicated that between 1 and 30 percent of their suppliers had provided them with smelter information. This is significant difference from the data results from pilot participants, where 30 percent of participants have identified more than 75 percent of their smelters.

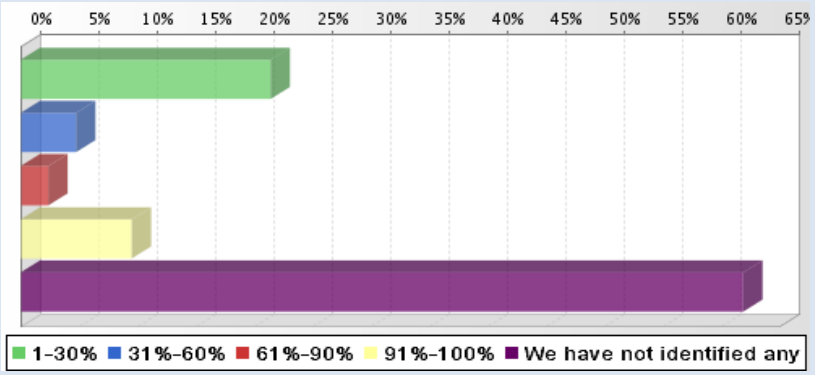
Figure 28: Percentage of suppliers that have provided smelter information



SME experiences: Obtaining smelter information

Only 23 percent of SMEs are conducting due diligence to identify smelters used in their supply chains, compared with 50 percent of the broader group of companies. Furthermore, only 14 percent of SMEs are participating in industry initiatives to identify smelters, significantly lower than 44 percent of the broader group of companies.

As shown in the graph below, while the majority of SMEs, at 62 percent, have not received any smelter information, 22 percent did indicate that they had received smelter information from up to 30 percent of their Tier 1 suppliers.



Auditing and Reporting

In response to a question about conducting audits on smelters, only 17 percent of the respondents answered that they are carrying out smelter audits on supply chain due diligence either on their own or through industry collaboration. This is drastically lower to the number of pilot participants carrying out audits either independently or collaboratively.

In terms of reporting, only 27 percent of the respondents indicated that they report on their supply chain due diligence on minerals from conflict-affected areas.

SME experiences: Auditing and reporting

Only two percent of the SMEs indicated that they are carrying out smelter audits either jointly or independently, compared to 17 percent of the broader group of companies.

Only five percent of the SMEs have started to report on their due diligence activities.

SECTION IV: LESSONS LEARNT

Pilot Learnings

- **Identification of Common Practical Steps**: A majority of participants found consensus on common practical steps that follow the Guidance. Particularly, these common steps were considered appropriate for those companies that do not have direct relationships with smelters. Reference Table p. 20.
- **Alignment of industry tools and national legislation with the OECD Guidance has created efficiencies as well as potential risks**: With the alignment of the CFS to OECD Guidance and the release of the long-awaited SEC rule implementing Dodd-Frank Section 1502, it is possible for participants to meet the legal requirements using both the Guidance and industry tools. However, participants have noted potential new risks. The SEC Rule creates a disincentive to source minerals from the DRC and its nine neighbouring countries , because those companies that do source from the region have to conduct due diligence, write a conflict minerals report and get an independent audit, while companies that do not source from the covered countries do not have to go through these steps.
- **Participants have increased their commitment to continuing responsible trade**: Over the course of the pilot phase, there has been a general shift in companies' approach to risk as they become more familiar with in-region sourcing. More specifically, some participating companies now indicate that they aim to source responsibly from the region instead of taking a purely risk averse approach that would entail ending trade with the region. Several participants have actively sought out opportunities to support responsible trade from Central Africa and demonstrate a strong commitment to continuing responsible trade from the region. Participation by pilot members in projects such as the U.S.-led Public-Private Alliance, Solutions for Hope, or the Conflict-Free Tin Initiative rose from 20 percent of the pilot participants to 30 percent between Cycle 1 to Cycle 3. The CFS Early Adopters Fund demonstrates a commitment and willingness on the part of a number of the participants to continue sourcing from the region and improve local conditions in mining communities. However, participants note that only a few leadership companies actively participate in these programmes, and the spread of such practices is challenged by the final SEC rule and by customer requirements that do not have the same approach.
- **Utilisation of standardised industry tools has created greater efficiency:** The majority of participants highlighted the Conflict Minerals Reporting Template and the CFS Program as key processes and tools for downstream companies to obtain information from direct suppliers about names and conflict-free status of smelters. Over the course of the one-year pilot period, there has been a significant push amongst the majority of participants to use the EICC and GeSI Extractives Working Group tools and collaborate with the CFS Program to engage with more smelters. Shared industry tools have lessened the burden on suppliers providing information to multiple customers. They have also enabled a shared process that allows participants to collect information through the reporting template and compare it with reference smelter lists. This and other standard industry approaches have increased efficiency of due diligence implementation at the sub-tier level of the supply chain.
- **Greater supply chain complexities were revealed through the pilot process:** Participants' attempts to obtain information from their suppliers have uncovered new insights into the depth and complexity of their supply chains. As they began to study and attempted to implement the various

steps of the OECD Guidance over the one-year pilot phase, the process revealed a lack of control and insight beyond their immediate suppliers. Therefore participants reported a decrease in accessing specific smelter due diligence information, and noted the having difficulty encouraging smelters to join the CFS.

- **Participants have chosen to exclude or include parts of the Guidance based on what is relevant for their position in the supply chain:** Participants have a greater understanding of how to use Annex II and apply elements of it that are relevant to their business and supply chain, which is in line with the intention of the OECD Guidance. Downstream companies have developed a common approach on practical due diligence steps for companies that do not have business relationships with smelters (see Table p. 20), because of the importance that the SEC rule puts on audits of companies' conformance to the Guidance. Companies with no direct relationships with smelters are concentrating their efforts on aspects of the Guidance where they can effectively *"establish internal controls over their immediate suppliers."*
- **Cross-industry cooperation has facilitated harmonisation and efficiencies:** Cross-sector collaboration has enabled more efficient and effective due diligence that advances responsible sourcing. The EICC and GeSI have proactively engaged with other industry associations about the use of the CFS Program, due diligence tools and participation in the Extractives Working Group. The participation of a broad spectrum of industries in the development of IPC 1755 conflict minerals data exchange is expected to lead to a broadly accepted and used standard. Collaboration across industries has brought more companies' approaches in line with responsible sourcing, and has the potential to reach a broader group of companies that are not subject to Dodd-Frank disclosure requirements.
- **Progress toward responsible sourcing has been dependent upon both greater incentives for smelters to participate in the CFS Program and market incentives for smelters that offer conflict-free material sourced from the region:** For companies subject to Dodd-Frank requirements the cost of SEC compliance may act as a deterrent. For companies in the upstream part of the supply chain, a hindrance is the cost of implementing in-region due diligence programs that can provide assurance of the conflict-free nature of minerals. These costs have to be absorbed somewhere in the supply chain, otherwise other minerals sources will always be less expensive.

Feedback on the Downstream Pilot Phase

Overall, the participants indicated that their participation in the downstream pilot phase helped them to advance systems and processes to implement due diligence on minerals from conflict-affected areas. There are several key areas where they received value:

- Increased understanding and awareness of process complexity
- Enabled sharing of experiences, networking, and practices, approaches and challenges amongst participants
- Supported the dissemination of practices within and across industries, such as how the EICC and GeSI Extractives Working Group programmes and EICC and GeSI tools can enable companies to meet the OECD Guidance
- Increased general understanding among various stakeholders of the challenges faced by companies
- Provided a structure for which to implement due diligence activities, identify common and practical steps and think critically about the processes being put in place
- Facilitated a better understanding of company supply chains

Participants also highlighted the following suggestions to improve the implementation process:

- Longer timelines to allow for sufficient and valuable input by companies on report drafts
- Clarification of the process on how to formulate recommendations for possible adjustment of the Guidance for consideration by OECD bodies based on the experiences in the pilot phase
- More regular feedback on how participants' efforts have been valuable to the OECD and the process
- More sharing and collaboration among the participants, which was done but only during Cycle 2 and Cycle 3.

Recommendations from Pilot Participants

Recommendations to address common implementation challenges

Participants raised the following recommendations and solutions to address some of the challenges commonly faced by participants during the downstream pilot phase. Many of the recommendations pertained to working on an industry level, directly with smelters, rather than relying solely on direct suppliers to push change in the supply chain. The ultimate goal is to enable legitimate sourcing from conflict-free mines in the DRC and the whole Great Lakes region. More specific recommendations and proposed solutions from the downstream participants included:

- **Identifying opportunities to create incentives** for suppliers to choose conflict-free, in-region sourcing, and for smelters to provide conflict-free, in-region sourcing. The EICC and GeSI have identified several ways to build incentives: 1) Smelters can designate a percentage of material as conflict-free from the DRC versus material that is not from the DRC, allowing smelters to have different pricing structures that provide incentives for in-region material purchases; 2) Governments can provide procurement incentives for products containing material from affected

countries; 3) Governments may consider mandating in-region local content requirements (assuming this is compatible with the World Trade Organization requirements).

- **Government to Government engagement** to increase the awareness of the alignment between the OECD Guidance and the UN GoE on the DRC due diligence Guidelines which the UN Security Council supported taking forward with its Resolution 1952/2010.
- **Creating leverage** on an industry level to encourage the metal industry to encourage their smelter members to participate in the CFS Program. These metal industry organisations (ITRI, TIC, ITIA, etc.) in turn should encourage their members to address risk in the upstream part of the supply chain. The downstream industry organisations (EICC, GeSI, AIAG, IPC, etc.) should focus on the downstream part of the supply chain where they have an impact, and try to encourage suppliers to have an impact on the upstream organisations.
- **Encouraging direct customers of the smelters to request CFS participation**. Often times these suppliers are non-U.S. based state-owned companies and are not subject to Dodd-Frank. Individual downstream companies at the bottom of the supply chain do not have influence over smelters as they do not have a direct relationship.
- **Engaging other industry sectors that are less active**. Several other consuming industry sectors and economies that are consumers of these metals are not as active in driving expectations that suppliers follow the OECD Guidance, support conflict-free sourcing, etc. as participants in this pilot are. More work is needed.
- **Purchasing minerals only from smelters and other suppliers that can verify CFS validation**, which the Guidance suggests as an option due to the impossibility and/or impracticability of validating information from all direct suppliers.
- **Creating greater coordination** amongst all of the various existing schemes designed to operationalise the OECD Guidance and the UN Due Diligence Guidelines to improve efficiency and reduce confusion.
- Working with the 3TG industry (such as the trade associations representing smelters) to **develop and maintain a complete and correct list of all the smelters** in the world to avoid duplicative and time-intensive efforts of individual companies.
- The OECD may contemplate updating the Guidance in light of the findings of the pilot regarding the practicality of specific provisions and reflecting the desire for a differentiation of roles between companies that have direct relationships with smelters and those who do not.
- **Providing capacity training** and expert advice about the OECD Guidance for both downstream and upstream actors.
- **Encouraging more participation** in future implementation efforts from more diverse points in the downstream and upstream supply chains to ensure that the OECD Guidance is followed and understood more broadly and becomes more common practice.
- **Developing a cost/benefit analysis** of the implementation of the OECD Guidance relative to improvement on the ground in the DRC and adjoining countries.

Recommendations for clarifications/rectifications to the OECD Due Diligence Guidance based on Implementation Learning

Participants suggested that clarifications/rectifications to the OECD Guidance could be considered as part of the next steps. The following recommendations have been made:

- Alignment on the language in Step 4 and Step 5 regarding the type of audits the Guidance references – those of smelters and refiners.
- Chronological clarification between Steps 4 and 5 in the 3T Supplement (see Table p. 54).
- Clarifications on the relationships between confidentiality and reporting under Step 5 (see Table p. 54).
- Step 5, A.3. 3. recommends that downstream companies publish the audit report of their due diligence practices, with due regard taken of business confidentiality and other competitive concerns, and responses to identified risks. The Guidance only recommends audits at the smelter/refiner level. Pilot participants considered that this provision should be amended since the Guidance does not recommend that downstream companies should undergo any audits.
- Step 1 references to iTSCi (footnote 8) may need to be updated.
- The Guidance outlines some basic principles, scope, criteria and other basic information for consideration for companies to commission a supply chain-specific independent third-party audit of due diligence practices of smelters/refiners. The Guidance (footnote 23) further recommends that companies should consult ISO International Standard 19011:2002 for detailed requirements on audit programmes (including programme responsibilities, procedures, record-keeping, monitoring and reviewing) and step-by-step overview of audit activities. Pilot participants considered that the reference to ISO International Standard 19011:2002 should be replaced with ISO/IEC 17021:2011.

Annex 1 – Common Supplier Letter Template and Its Appendix

Disclaimer text: This letter is proposed by a sub-set of the downstream 3T pilot participants to promote consistency of supplier communications on sourcing minerals (3TG) from conflict-affected and high-risk areas. It is intended as a template, which companies can customise and tailor. The main letter includes optional texts which companies can choose to include or not. The main letter is followed by an Appendix with detail on specific items and a list of useful resources which companies may choose to incorporate as an Addendum to the main letter.

Dear SUPPLIER,

The purpose of this letter is to:

1) provide you with an understanding of our commitment to sourcing MINERALS from conflict-affected and high-risk areas in line with our corporate policy, legal obligations and existing international standards; and

2) ask you to collect important supply chain data to fulfil our legal obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1502).

OR

2) ask you to collect important supply chain data to satisfy the expectations of our customers, stakeholders and regulators.

OPTIONAL: 3) provide you with instructions on how and when to submit supply chain information to us.

Please provide a response by DATE.

Our commitment to sourcing minerals responsibly

COMPANY is committed to ensure that MINERALS contained in our products are sourced with due respect for human rights, the need to avoid contributing to conflict, and the desire to support development through our supply chain practices.

At the same time, COMPANY does not ban the use of MINERALS that originate in conflict-affected and high-risk areas when they are sourced in accordance with existing international standards. Avoiding the sourcing of all MINERALS from these areas would cause a *de facto* embargo with serious adverse impact on the living conditions of local populations.

OPTIONAL: Please find here a link to COMPANY's conflict minerals policy, which we expect our suppliers to follow.

We are using the OECD Due Diligence Guidance as an international framework for meeting the sourcing expectations of our customers, regulators and stakeholders.

OPTIONAL: The SEC has stated that OECD Guidance may be used as a framework for purposes of satisfying the reporting requirements under U.S. law, including the steps to be taken to determine the source and chain of custody of the conflict minerals.

OPTIONAL: COMPANY understands that you as a supplier may not be able to guarantee that the parts you deliver to us are conflict-free, but you can help to identify smelters in our common supply chain, which is a necessary step in **determining the source and chain of custody of the MINERALS in our products.** Smelters and other upstream suppliers are those who can most effectively and most directly mitigate the risks on the ground.

We are asking:

1) all our suppliers of products containing MINERALS to provide information to identify the smelters/refiners in their supply chains using [NAME OF COLLECTION TOOL such as the EICC/GeSI Conflict Minerals Reporting Template]. The [NAME OF COLLECTION TOOL] will protect confidential and business sensitive information through roll-up tools that do not require a list of all suppliers used within a company's supply chain;

OR

1) our most significant suppliers of products containing MINERALS to provide information to identify the smelters/refiners in their supply chains using [NAME OF COLLECTION TOOL]. The [NAME OF COLLECTION TOOL] will protect confidential and business sensitive information through roll-up tools that do not require a list of all suppliers used within a company's supply chain.

2) **OPTIONAL:** We are also incorporating into [our standard purchase order/contract terms and conditions/supplier expectations/other binding document] provisions requiring you to adopt a policy on the responsible sourcing of MINERALS, to implement due diligence processes in support of that policy, and to provide to us periodically information we need to support our obligations [under Dodd-Frank] and our policy.

We will compare smelters/refiners used by relevant suppliers against an independently-verified list of smelters using responsibly sourced minerals [identified through industry programs such as the Conflict Free Smelter Program]. We will specify to our direct suppliers any smelters we become aware of that have been identified as performing due diligence on their minerals in line with industry or national standards and the OECD Guidance.

Next steps and important dates:

OPTIONAL: We ask that you complete the **data gathering form** (or link) attached to this letter and return it to COMPANY by DATE. Incomplete forms will be returned for completion.

We will file our first Conflict Mineral report as required by Dodd-Frank on 31 May 2014 for the calendar year reporting period of 2013.

OR

We will publish our findings and progress on due diligence for responsible mineral sourcing on an annual basis.

We recognise that achieving a responsible supply chain will take time and effort. We expect that you take reasonable, good-faith steps toward this goal. Thank you for your cooperation and support.

COMPANY

APPENDIX ITEMS: *Note: These sections may be added into the main text if needed, or added as addendums to the main letter, based on each company's discretion*

1) The Dodd-Frank Act – Section 1502

We are working to comply with new disclosure obligations under U.S. law (Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010) applicable to U.S. stock exchange listed companies concerning the 3TG (so called "conflict minerals") used in their products to inquire into the origin of 3TG in their supply chains and report whether trade in these minerals may support conflict in the Democratic Republic of the Congo (DRC) and its 9 neighbouring countries.

The first report must be filed on May 31, 2014 based on use of 3TG in calendar year 2013.

2) OECD Due Diligence Framework – a framework to help companies source responsibly from conflict-affected and high-risk areas

The SEC has stated that OECD Guidance may be used as a framework for purposes of satisfying the reporting requirements, including the steps to be taken to determine the source and chain of custody of the conflict minerals.

Step 1: Establish strong company management systems and strengthen company engagement with suppliers

Introduce a supply chain transparency system that allows, to the best of our efforts, for the identification of the smelters in our supply chain through which information on MINERAL origin can be obtained.

We will seek to do this through various means, including but not limited to:

- Through discussions with the our immediate suppliers,
- Through the incorporation of supplier disclosure requirements into supplier contracts,
- By specifying to our direct suppliers any smelters we become aware of that have been identified as meeting the requirements of the OECD Guidance,
- When available, by using confidential information-sharing systems on suppliers [*such as the EICC-GeSI Common Reporting template*],

- Through any available industry-wide schemes to identify smelters in the supply chain [*such as the CFS Program developed by EICC-GeSI*].

Step 2: Identify and asses risk in the supply chain
We assess risk in the supply chain as information on smelters is progressively built in order to assess their due diligence practices and verify whether smelters source minerals responsibly and do not support conflict.

Step 3: Design and implement a strategy to respond to identified risk
If we become aware of a supplier whose due diligence needs improvement and we intend to continue the trade relationship, we will work with that supplier to improve its performance, including through training modules that may become available through industry organisations. We expect our suppliers to take similar measures with their suppliers to ensure alignment throughout the supply chain.

Step 4: Ensure third-party audits of smelter's due diligence
We support efforts and encourage our suppliers to also support industry organisations efforts to ensure that smelters' due diligence sourcing practices are audited by independent third party auditors.

Step 5: Report annually on supply chain due diligence
We will publish our findings and progress on an annual basis beginning with the filing of our report on 31 May 2014 for the first calendar year reporting period of 2013 on our website at PROVIDE LINK.

3. Due Diligence Tools: *Note: This is not an exhaustive list, and companies and their suppliers are encouraged to check on the websites of the key industry organisations for future updates and new tools*

- *Standard reporting tools* – EICC-GeSI Standard Reporting Template http://www.conflictfreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm
- *Conflict-Free Smelter Program:* http://www.conflictfreesmelter.org/cfshome.htm
- *The Conflict Minerals Platform Tool by iPoint* http://www.ipoint-systems.com/en/solutions/environmental-product-compliance/conflict-

4. Other resources:

Industry Association web pages: For data gathering tools, training programs, information about regulations

- Aerospace & Defense: www.aia-aerospace.org
- Electronics: http://www.eicc.info/, http://gesi.org/ and http://www.ipc.org/
- Automotive: http://www.aiag.org/scriptcontent/index.cfm

Other:

- *OECD:* The OECD webpage dedicated to helping businesses source responsibly. Key documents for companies and businesses (keyword “conflict minerals”)
- *The US Securities and Exchange Commission (SEC):* http://www.sec.gov/news/press/2010/2010-245.htm.
- *COMPANY own webpage on Conflict Minerals/Responsible Sourcing (if available)*

Annex 2 – 3T Smelter List

This 3T smelter list is intended to serve as useful baseline to help better engage smelter companies on responsible sourcing of minerals from conflict and high risk areas. Various companies and experts have provided help in identifying 3T smelters. This list has been subject to several revisions based on calls to encourage stakeholders to share input and improve content. However, given the fast moving environment and lack of cooperation of some stakeholders, the table provides a non-exhaustive list of smelters which would require constant updating and may be subject to further improvement.

Country	Metal	Smelter Name
Austria	Tungsten (W)	Wolfram Bergbau-und Huetten-Gmbh Nfg KG
Belgium	Tin (Sn)	Metallo Chimique
Belgium	Tin (Sn)	Jean Goldcchmidt International SA
Bolivia	Tin (Sn)	EM Vinto
Bolivia	Tin (Sn)	OMSA
Bolivia	Tin (Sn)	Complejo Metalurgico Vinto S.A.
Bolivia	Tin (Sn)	Senju Metal Industry Co., Ltd.
Bolivia	Tin (Sn)	SGS
Brazil	Tin (Sn)	Taboca/Paranapanema
Brazil	Tin (Sn)	Mineracao Toboca
Brazil	Tantalum (Ta)	Mineracao Toboca
Canada	Tungsten (W)	North American Tungsten
Canada	Tin (Sn)	Vale Inco, Ltd
Chile	Tin (Sn)	Chile
China	Tantalum(Ta)	Conghua Tantalum and Niobium
China	Tantalum(Ta)	Jiujiang Tangbre Co., Ltd
China	Tantalum(Ta)	Jiangmen Fuxiang Electro-materials Limited (F&X)
China	Tantalum(Ta)	Jiujiang Jinxin Nonferrous Metals Co., Ltd.
China	Tantalum(Ta)	Ningxia Orient Tantalum Industry Co., Ltd.
China	Tantalum(Ta)	Zhaoqing Duoluoshan Non-ferrous Metals Co.,Ltd
China	Tantalum(Ta)	Fogang Jiata Metals
China	Tantalum(Ta)	Junde Technology
China	Tantalum(Ta)	King-Tan Tantalum Industry Ltd
China	Tantalum(Ta)	Taike Technology (Suzhou)
China	Tantalum(Ta)	Yichun Jin Yang Rare Metals Co., Ltd
China	Tantalum(Ta)	Zhuzhou Cemented Carbide
China	Tin (Sn)	Yunnan Chengfeng Non-ferrous metals Co.,Ltd
China	Tin (Sn)	Jiangxi Ganzhou Baita Non-ferrous Metals Powder Co.,Ltd
China	Tin (Sn)	China Tin Group Co.,Ltd

China	Tin (Sn)	Mengzi Bofa Mining & Smelting Co.,Ltd
China	Tin (Sn)	Gejiu Jinge Mining & Smelting Co.,Ltd
China	Tin (Sn)	Kunshan Chengli Tin Co., Ltd
China	Tin (Sn)	Yunnan Tin Co., Ltd
China	Tin (Sn)	China Tin Group Co.,Ltd Laibin Smelting Factory
China	Tin (Sn)	Dongguan Qiandao Tin Co.,Ltd
China	Tin (Sn)	Guixi Sanyuan Smelting Chemistry CO.,Ltd
China	Tin (Sn)	Shaoxing Tianlong Tin Materials Co.,Ltd
China	Tin (Sn)	Yuhuada Tin Co.,Ltd
China	Tin (Sn)	Hongqiao Metals (Kunshan) Co.,Ltd
China	Tin (Sn)	Shenzhen Jinpin Tin Co.,Ltd
China	Tin (Sn)	Chongqing Huahao Smelting Co.,Ltd
China	Tin (Sn)	Nankang Huashan Non-ferrous Metals Smelting Factory
China	Tin (Sn)	Foshan Nanhai Songgang Hongyang Tin Industry Co., Ltd.
China	Tin (Sn)	Shenzhen Anchen Tin Co.,Ltd
China	Tin (Sn)	Dongguan Humen Shunmao Tin Co.,Ltd
China	Tin (Sn)	Shenzhen Qianzhu New Energy Metals Co.,Ltd
China	Tin (Sn)	Zhongshi Metal Co.,Ltd
China	Tin (Sn)	Nankan Nanshan
China	Tin (Sn)	Primeyoung Metal Ind.(Zhuhai) Co.,Ltd
China	Tin (Sn)	CNMC(Guangxi) PGMA Co.Ltd
China	Tin (Sn)	Hezhou Jinwei Tin Co.,Ltd
China	Tin (Sn)	Zhongshan Jinye Smelting Co.,Ltd
China	Tin (Sn)	Shanghai Sanlian Powder Smelting Co.,Ltd
China	Tin (Sn)	Guangxi Fuchuan Smelting Factory
China	Tin (Sn)	Guilin Lingui Huipu Non-ferrous Metals Co.,Ltd
China	Tin (Sn)	Shangrao Xuri Smelting Factory
China	Tungsten (W)	Xiamen Tungsten Co., Ltd
China	Tungsten (W)	Jiangsu Dongtai Fengfeng Tungsten & Molybdenum Material Co., Ltd
China	Tungsten (W)	Ganzhou Huaxing Tungsten Co., Ltd
China	Tungsten (W)	Chaozhou Xianglu Tungsten Industry Co.,Ltd
China	Tungsten (W)	Zhangyuan Tungsten Co.,Ltd
China	Tungsten (W)	Jiangxi Xinsheng Tungsten Industry Co.,Ltd
China	Tungsten (W)	Haisheng Tungsten & Molybdenum Material Co., Ltd

China	Tungsten (W)	Ganzhou Sinda W&MO Co.,Ltd
China	Tungsten (W)	Gangzhou Haichuang Tungsten Industry Co.,Ltd
China	Tungsten (W)	Jiangxi Tungsten Co.,Ltd
China	Tungsten (W)	Wendeng Tungsten Co.,Ltd
China	Tungsten (W)	Jiangxi Jutong Co.,Ltd
China	Tungsten (W)	Shaoguan Xinhai Rendan Tungsten Industry Co.,Ltd
China	Tungsten (W)	Luoyang Kefa Non-ferrous Metals & Materials Co.,Ltd
China	Tungsten (W)	Jiangsu Dongpu Tungsten & Molybdenum Co., Ltd
China	Tungsten (W)	Luoyang Mudu Tungsten & Molybdenum Technology Co., Ltd
China	Tungsten (W)	Luoyang Yongzhuo Tungsten & Molybdenum Material Co., Ltd
China	Tungsten (W)	Luoyang Zhihang Tungsten & Molybdenum Co., Ltd
China	Tungsten (W)	Luoyang Tongxing Tungsten & Molybdenum Co., Ltd
China	Tungsten (W)	Dongtai Huihuang Tungsten & Molybdenum Co., Ltd
China	Tungsten (W)	Ganzhou Non-ferrous Metals Smelting Co., Ltd.
China	Tungsten (W)	Ganzhou Xin Yu mine smelting Ltd.
China	Tungsten (W)	Jiujiang Tanbre's Smeltery.
China	Tungsten (W)	Ganzhou Huahan Nonferrous Metals Metallurgical Co., Ltd
China	Tungsten (W)	Zhuzhou Cemented Carbide Group Corp Ltd
China	Tungsten (W)	Hunan Chun Chang Non-ferrous Smelting & Concentrating Co.,Ltd
China	Tungsten (W)	Nanchang Cemented Carbide Limited Liability Company
China	Tungsten (W)	Jiangsu Hetian Technological Material Co.,Ltd
China	Tungsten (W)	China Minmetals Nonferrous Metals Co., Ltd.
China	Tungsten (W)	Tongling Nonferrous Metals Group Holdings Co.,Ltd
China	Tungsten (W)	Xiamen Honglu Tungsten Molybdenum Industry Co.Ltd
China	Tungsten (W)	Hunan Non-ferrous Metals Corp., Ltd
Czech Republic	Tin (Sn)	KOVOHUTĚ PŘÍBRAM NÁSTUPNICKÁ, A.S.
France	Tungsten (W)	Air Product
France	Tin (Sn)	PBT
Germany	Tungsten (W)	H.C. Starck GmbH
Germany	Tungsten (W)	Sumitomo Metal Mining

Germany	Tantalum (Ta)	HC Starck GmbH
Estonia	Tantalum (Ta)	Molycorp Silmet
India	Tantalum (Ta)	Metallurgical Products
Indonesia	Tin (Sn)	CV Duta Putra Bangka
Indonesia	Tin (Sn)	CV Justindo
Indonesia	Tin (Sn)	CV Makmur Jaya
Indonesia	Tin (Sn)	CV Nurjanah
Indonesia	Tin (Sn)	CV Prima Timah Utama
Indonesia	Tin (Sn)	CV Serumpun Sebalai
Indonesia	Tin (Sn)	CV United Smelting
Indonesia	Tin (Sn)	PT Alam Lestari Kencana
Indonesia	Tin (Sn)	PT Artha Cipta Langgeng
Indonesia	Tin (Sn)	PT Babel Inti Perkasa
Indonesia	Tin (Sn)	PT Babel Surya Alam Lestari
Indonesia	Tin (Sn)	PT Bangka Global Mandiri Internasional
Indonesia	Tin (Sn)	PT Bangka Kudai Tin
Indonesia	Tin (Sn)	PT Bangka Putra Karya
Indonesia	Tin (Sn)	PT Bangka Timah Utama Sejahtera
Indonesia	Tin (Sn)	PT Belitung Industri Sejahtera
Indonesia	Tin (Sn)	PT Billiton Makmur Lestari
Indonesia	Tin (Sn)	PT Bukit Timah
Indonesia	Tin (Sn)	PT Donna Kembara Jaya
Indonesia	Tin (Sn)	PT DS Jaya Abadi
Indonesia	Tin (Sn)	PT Eunindo Usaha Mandiri
Indonesia	Tin (Sn)	PT Fang Di Multindo
Indonesia	Tin (Sn)	PT HP Metals Indonesia
Indonesia	Tin (Sn)	PT Koba Tin
Indonesia	Tin (Sn)	PT Mitra Stania Prima
Indonesia	Tin (Sn)	PT Refined Bangka Tin
Indonesia	Tin (Sn)	PT Sariwiguna Binasentosa
Indonesia	Tin (Sn)	PT Stanindo Inti Perkasa
Indonesia	Tin (Sn)	PT Sumber Jaya Indah
Indonesia	Tin (Sn)	PT Tambang Timah (subsidiary of PT Timah)
Indonesia	Tin (Sn)	PT Timah
Indonesia	Tin (Sn)	PT Timah Nusantara
Indonesia	Tin (Sn)	PT Tinindo Inter Nusa
Indonesia	Tin (Sn)	PT Yinchendo Mining Industry
Japan	Tantalum (Ta)	Nippon Mining & Metals Co. Ltd
Japan	Tantalum (Ta)	Pan Pacific Corp
Japan	Tantalum (Ta)	JX Nippon Mining & Metals
Japan	Tantalum (Ta)	Mitsui Mining and Smelting
Japan	Tantalum (Ta)	Taki Chemical CO.,CTD
Japan	Tin (Sn)	JAPAN NEW METALS CO.,LTD
Japan	Tin (Sn)	Mitsui Mining and Smelting Co., Ltd

Japan	Tin (Sn)	NIKKO
Japan	Tin (Sn)	Nippon Micrometal Cop
Japan	Tin (Sn)	Sumisho Material Corp.
Japan	Tin (Sn)	Sumitomo Metal Mining Co., Ltd.
Japan	Tin (Sn)	JX Nippon Mining & Metals
Japan	Tin (Sn)	Mitsubishi
Japan	Tin (Sn)	Pan Pacific Corp
Japan	Tin (Sn)	Senju Metal Industry Co., Ltd.
Japan	Tin (Sn)	Sumitomo Metal Mining
Japan	Tin (Sn)	Mitsubishi Material Corporation
Japan	Tungsten (W)	JAPAN NEW METALS CO.,LTD
Japan	Tungsten (W)	JX Nippon Mining & Metals Co. Ltd
Japan	Tungsten (W)	Izawa Metal Co., Ltd
Japan	Tungsten (W)	Japan New Metals Co., LTD
Japan	Tungsten (W)	Mitsubishi Material
Japan	Tungsten (W)	Pan Pacific Corp
Japan	Tungsten (W)	Saganoseki Smelter & Refinery
Japan	Tungsten (W)	Tamano Smelter, Hibi Kyodo Smelting Co., Ltd
Japan	Tungsten (W)	Sumitomo Metal Mining Co. Ltd.
Kazakhstan	Tantalum (Ta)	ULBA Metallurgical Plant
Korea	Tin (Sn)	CHANG SUNG (Hana)
Korea	Tin (Sn)	Poongsan Corporation
Korea	Tin (Sn)	Hyundai-Steel
Korea	Tin (Sn)	POSCO
Korea	Tungsten (W)	TaeguTec Ltd.
Malaysia	Tin (Sn)	Malaysia Smelting Corp (MSC). Bhd.
Malaysia	Tin (Sn)	Cookson
Malaysia	Tin (Sn)	Rahman Hydraulic Tin Sdn Bhd
Malaysia	Tin (Sn)	Senju Metal Industry Co., Ltd.
Peru	Tin (Sn)	Minsur／Minsur S.A.
Peru	Tin (Sn)	Amalgamet Inc
Peru	Tin (Sn)	PT. Refined Bangka Tin
Peru	Tin (Sn)	Senju Metal Industry Co., Ltd.
Russia	Tungsten (W)	H.C. Starck
Russia	Tungsten (W)	Wolfram Company CJSC
Russia	Tungsten (W)	Sumitomo Metal Mining
Russia	Tin (Sn)	Novosibrirsk
Russia	Tin (Sn)	CSC Pure Technologies
Russia	Tin (Sn)	Pure Technology
Russia	Tantalum (Ta)	Solikamsk Magnesium Works
Singapore	Tin (Sn)	Chengfeng Metals Co Pte Ltd

Singapore	Tin (Sn)	Electroloy Metal Pte
Singapore	Tin (Sn)	Heraeus Materials Singapore Pte Ltd
Singapore	Tin (Sn)	Mentok Smelter
South Africa	Tantalum (Ta)	Tantalite Resources
Thailand	Tin (Sn)	Thailand Smelting & Refining Co Ltd
Thailand	Tin (Sn)	Koki Products Co.,Ltd.
Thailand	Tin (Sn)	PT Bukit Timah
Thailand	Tin (Sn)	Senju Metal Industry Co., Ltd.
Thailand	Tin (Sn)	Thai Sarco
Thailand	Tantalum (Ta)	HC Starck
USA	Tungsten (W)	ATI Metalworking Products
USA	Tungsten (W)	Global Tungsten & Powders Corp
USA	Tungsten (W)	Air Product
USA	Tungsten (W)	Buffalo Tungsten
USA	Tungsten (W)	Global Tungsten & Powders Corp
USA	Tungsten (W)	H.C. Starck
USA	Tungsten (W)	Voss Metals Company, Inc
USA	Tin (Sn)	Cookson
USA	Tin (Sn)	EFD INC.
USA	Tin (Sn)	Mansur
USA	Tin (Sn)	Taboca
USA	Tin (Sn)	Technic Inc.
USA	Tantalum (Ta)	Global Advanced Metals

Annex 3 – Cycle 3 Downstream Company Questionnaire

1. What is your name?
2. What is the name of your company?

Step I: Establish Strong Company Management Systems

3. Has your company adopted a policy on minerals from conflict areas?
   - Yes (please attach the policy or provide the link to your website)
   - No

   Provide any comments: _____

4. If yes (to question 3), is this policy consistent with Annex II of the Guidance that provides a model supply chain policy for responsible global supply chain minerals from conflict-affected and high-risk areas?
   - Yes (please attach or provide the link to your website)
   - No

   Provide any comments:

5. If yes (to question 3), which elements of Annex II are referenced in your policy? (check all that apply)
   - Serious abuses associated with the extraction, transport or trade of minerals
   - Risk management of serious abuses
   - Direct or indirect support to non-state armed groups
   - Risk management of direct or indirect support to non-state armed groups
   - Public or private security forces
   - Risk management of public or private security forces
   - Bribery and fraudulent misrepresentation of the origin of minerals
   - Money laundering
   - Payment of taxes, fees and royalties due to governments
   - Risk management of bribery and fraudulent misrepresentation of the origin of minerals, money-laundering and payment of taxes, fees and royalties to governments

6. If yes (to question 3), is your company's policy on minerals from conflict areas publicly available? Where?
   - Yes, on the company website (provide link).
   - Yes, (other, please, specify).
   - No, it is not publicly available.

7. If no (to question 3), if your company has not adopted a specific policy on minerals from conflict areas, do you incorporate guidance on conflict-free mineral supply chains into existing corporate policies (i.e. sustainability policy, code of conduct, human rights policy, supplier code, etc.)?
   - No, none of our existing corporate policies address minerals from conflict areas.
   - Yes, we have other corporate policies that address minerals from conflict areas. (please attach the policy or provide a link to the policy on your website)

8. Please check which bullet best matches your approach on minerals from conflict areas:
   - Not applicable: no defined approach exists
   - To source minerals responsibly in accordance with available international standards contained in the OECD Guidance, working through various means including industry programmes (e.g. CFS) and constructive engagement with suppliers
   - Not to source minerals from conflict-affected areas in any region
   - Not to source minerals from Africa's Great Lakes region
   - Not to source minerals from conflict-affected areas in the DRC
   - Not to source any minerals from anywhere in the DRC
   - Other:

9. Describe the level and role of senior management that is accountable for the performance of conflict-free mineral supply chains.
   - No one has been designated to the conflict-free minerals programme.

- Yes, someone has been designated to performance on conflict-free mineral supply chains. (describe the level and role)

10. What accountability procedures have you developed?

11. Are resources available to support this responsibility? To what degree? Please describe resources available in each field below.

12. What **internal communication** process on conflict-free mineral supply chains have you developed? (check all that apply)
    - No internal communications on conflict-free mineral supply chains has taken place.
    - Communications with staff. Specify type of communication process in place.
    - Communication with relevant supplier account managers (senior buyers).
    - Communications with management. Specify target population: senior management, all management, only certain departments, etc. and type of communication process in place.
    - Communication in purchasing organisation with CPOs at group and sector level.
    - Communications with board members.
    - Other:_____

13. Have you established a method for identifying smelters/refiners in your supply chains through which relevant information on minerals from "red flag locations of mineral origin and transit" should be obtained? (refer to the box above for a definition on "red flag" locations)
    - Yes
    - No

14. Have you established a method for identifying smelters/refiners sourcing minerals from "red flag suppliers"? (refer to the box above for a definition on "red flag" suppliers)
    - Yes (please describe the system you use for identifying smelters/refiners sourcing minerals from "red flag suppliers")
    - No

15. On which basis do you decide which products and associated suppliers to identify? (check all that apply)
    - Bill of materials
    - Product category
    - Known suppliers of tin, tantalum and tungsten
    - Geographic location (please define or describe parameters)
    - Political situation
    - Other (please describe): _____

16. What level of visibility do you have in your supply chain?
    - Unknown
    - Tier 1
    - Tier 2 (suppliers to your direct Tier 1 suppliers)
    - Tier 3 and beyond (suppliers to your Tier 2 suppliers and beyond) (please specify):

17. Have you established a data collection system to collect and store data from your suppliers on supply chain due diligence?
    - Yes
    - No

    Provide any comments: _____

18. Are you relying on existing data collection tools for monitoring/reviewing downstream supply systems?
    - Yes
    - No

19. If yes (to question 18), how is it incorporated into your company's existing monitoring/review systems?

20. Are you relying on an industry-wide scheme?

21. When did you start storing records/data? (year)

22. How long are records stored for? (i.e. minimum of five years, preferably on a computerised database)

23. What type of data is collected specific to the 3Ts? (please list the top five types of data)

24. Do you have a list of products containing 3Ts? If yes, please attach.

25. Please describe your company relationship with suppliers who are subject to due diligence.
    - Generally one-off contracts (under 3 months)
    - Seasonal and/or short term (under 1 year)
    - Long term relationships (more than 1 year, or multi-year relationships)

26. What methods have you used to communicate to your suppliers on the issue of minerals from conflict areas?
    - Letters sent directly to suppliers
    - Through industry associations
    - Other (please specify, e.g. supplier workshops):

27. What have you communicated?
    - Company's policy expectations
    - Expectations on information collection and sharing
    - Expectations on communicating with their suppliers
    - Dodd Frank Section 1502 requirements
    - Other (please explain): _____

28. Have you communicated your **policy** on minerals from conflict areas to your suppliers?
    - Yes, we have communicated as part of our external communication process.
    - Not yet, but we plan to. (If so, please tell us when – year)
    - Not applicable (We do not have a policy on minerals from conflict areas policy.)

29. If yes (to question 28), with which suppliers do you communicate your policy?
    - Tier 1
    - Tier 2
    - Tier 3
    - Beyond Tier 3

30. Have you incorporated a policy or specific clauses on minerals from conflict areas into your contractual relationships?
    - Yes, please provide examples
    - No

31. Do you have improvement plans/corrective action plans in place regarding relationships with suppliers?
    - Yes
    - No
    - Not applicable (if N/A, why?):

    Provide any comments: _____

32. Do you have a grievance mechanism available to report any problems/non conformance regarding your policy on minerals from conflict areas?
    - Yes
    - No
    - Not applicable

33. If yes (to question 32), please describe the grievance mechanisms in place.
    - Toll free number

- Direct contact point
- Whistle blower access
- Ombudsman
- Other (please describe)

34. If yes (to question 32), is the availability of your grievance mechanism publicly communicated?
    - Yes
    - No
    - Not applicable

35. Please describe the challenges you encountered when following and implementing Step 1 of the OECD Guidance.

Step II: Identify and Assess Risk in the Supply Chain

36. What efforts have you used to identify the smelters/refiners in your supply chain? (check all that apply)
    - Direct communications with the companies' immediate suppliers and sub-suppliers (please provide details)
    - Data collection from 1st tier suppliers, using the EICC-GeSI Due Diligence Reporting Template
    - Incorporated (confidential) supplier disclosure requirements into supplier contracts (please provide details)
    - Specify to direct suppliers the smelters/refiners that meet the requirements of the OECD Guidance, including through the CFS (please provide details)
    - Utilize electronic information-sharing systems on suppliers and/or industry wide schemes to disclose upstream actors within the supply chain (please provide details)
    - Other (please describe): _____

37. If necessary, please provide any comments to the question above.

38. Have you identified any smelters/refiners in your supply chain?
    - Yes
    - No (please describe why)

39. If yes (to question 38), what tools or methodologies were used to identify the smelters/refiners in your supply chain?

40. If yes (to question 38), how have you addressed the challenges you faced in identifying those smelters/refiners (e.g. any new processes, contracts, languages, etc).

41. If yes (to question 38), in what percentage of your total products containing tin, tantalum and/or tungsten have the smelters/refiners been identified? (please provide your best estimate)
    - < 5%
    - 6% - 15%
    - 16% - 30%
    - 31% - 50 %
    - 51% – 75%
    - > 75%

42. Have you obtained initial information from the identified smelters/refiners in your supply chain on country of mineral origin, transit and transportation routes used between mine and smelters/refiners?
    - Yes
    - No

43. If yes (to question 42), please provide details on how you have done so and the challenges you faced in obtaining that information.

44. If no (to question 42), why not?

45. What process do you use to verify countries of mineral origin and transit in the supply chain of those smelter/refiners that have been identified?

46. Do you have a process to evaluate information from "red flag" countries, suppliers or smelters?
    - Yes
    - No

    Provide any comments: _____

47. Have you assessed whether identified smelters have carried out due diligence for conflict-free mineral supply chains?
    - Yes
    - No

48. If yes (to question 47), have you cross-checked evidence of due diligence practices of the smelter/refiner against the supply chain policy and due diligence processes contained in the OECD Guidance. (Please provide examples of how you have reviewed each due diligence step (1-5) of the smelter.)
    - Yes
    - No

49. What mechanisms do you use to verify smelter due diligence processes (e.g. self-assessment questionnaires; electronic tools and dashboards; external verifications and documentation reviews; interviews and/or other follow-up)

50. Have you participated in any capacity building (such as supplier training) efforts with/for identified smelters, including through industry collaborative initiatives? Please describe:

51. Please specify whether you have carried out joint spot checks, including through participation in industry-driven programmes. (If so please list which programmes.)

52. Please describe the challenges you encountered when following and implementing Step 2 of the OECD Guidance.

Step III: Design and Implement a Strategy to Respond to Identified Risks

53. Is there a communication process that has been put in place to ensure that findings of the actual and potential risk from supply chain risk assessments are reported to designated senior management?
    - No
    - Yes (please describe)

54. Please list the actual and potential risk categories arising in the upstream supply chain, if any, that have been raised at the board or senior executive level in the last three years (2009-2011). (check all that apply)
    - Serious abuses associated with the extraction, transport or trade of minerals
    - Risk management of serious abuses
    - Direct or indirect support to non-state armed group
    - Risk management of direct or indirect support to non-state armed groups
    - Public or private security forces
    - Risk management of public or private security forces
    - Bribery and fraudulent misrepresentation of the origin of minerals
    - Money laundering
    - Payment of taxes, fees and royalties due to governments
    - Risk management of bribery and fraudulent misrepresentation of the origin of minerals, money-laundering and payment of taxes, fees and royalties to governments
    - Other (please describe)

55. What is your company's approach to managing risk of sourcing from minerals from conflict areas? Please choose one.
    - Approach not yet defined
    - We use the model supply chain policy from Annex II of the OECD Guidance to determine whether the identified risks can be mitigated by continuing, suspending or terminating the relationship with suppliers.
    - We use our own company defined factors on risks. (please define)

56. How do you support (or build leverage over) your suppliers and/or smelters in managing risk identified in the supply chain as a result of their due diligence process? (check all that apply)
    - Provide capability-training to enable suppliers to conduct and improve due diligence performance within their supply chain
    - Participate in industry membership organisations' supplier training/improvement programmes to develop and implement due diligence capability-training modules in cooperation with relevant international organisations, NGOs, stakeholders and other experts.
    - Provide financial assistance to suppliers to participate in external trainings or industry available support (please describe)
    - Other (please describe)

57. Do you track the performance of risk mitigation?
    - We do this through a process already in place. (please specify)
    - We do not track performance. (please explain why)

58. If yes (to question 57), do you conduct a risk assessment/follow-up once corrective plans/trainings have occurred?

59. Please describe the challenges you encountered when following and implementing Step 3 of the OECD Guidance.

Step IV: Third-Party Audit of Smelters/Refiners' Due Diligence Practices

60. Within your supply chain of tin, tantalum and tungsten, who conducts the audits of smelters?
    - We conduct smelter audits internally.
    - Our suppliers conduct the audit.
    - Our 3T smelters are part of the EICC/GeSI Conflict-Free Smelter Programme
    - We rely on an industry initiative other than the Conflict-Free Smelter Programme that conducts the smelter audit for its members (please name)
    - We do not know if our smelters are audited or by whom
    - Other (please describe): _____

61. If you **conduct your own audits of smelters**, please describe your approach:
    - Based on OECD Guidance
    - Company-own guidance (please describe)
    - 3rd party/Industry guidance (please describe)
    - Other (please describe): _____

62. If you **do not conduct your own audit of smelters**, how do you obtain information that the smelter within your supply chain conducts appropriate due diligence?
    - Our suppliers provide us with validated audits/reports on the smelters in question.
    - We participate in an industry scheme which provides proof that the smelter is conflict-free. (Please describe which scheme and means of data sharing report, validated audit, certification scheme, etc.).
    - We do not have this information.
    - Other means (please describe): _____

63. If you **do not conduct your own audit of smelters but rely on 3rd parties**, do you know if these audits are based on:
    - OECD Guidance
    - Some other, independent/non OECD guidance (please describe or name)
    - We do not know what the 3rd party audit is based on.

64. Please describe the challenges you encountered when following and implementing Step 4 of the OECD Guidance.

Step V: Report Annually on Supply Chain Due Diligence

65. Do you report publically on your due diligence policies and practices?
    - Yes
    - No

66. How is information reported?

- Annual Report
- CSR/Sustainability report
- Other report specific to conflict-free mineral sourcing
- Published on company website
- Internal documents only
- Information is not reported

67. How frequently do you report?
    - Annually
    - Quarterly
    - Only when there is something to report
    - Information is not reported

68. Please describe the challenges you encountered when following and implementing Step 5 of the OECD Guidance.

Closing questions

69. What are your next steps to carry out due diligence?

70. How has your participation in this process helped you to advance systems and processes to implement due diligence on minerals from conflict-affected areas?

71. What do you consider to be emerging good practices that have enabled you and/or other downstream companies to progress on implementation of the Guidance?

72. Pursuant to the OECD Action Plan agreed upon at the May meeting, would you be interested in participating in a small group to explore the possibility of developing common content and model principles for supplier outreach in the downstream supply chain?
    - Yes
    - No

73. If yes (to question 72), which elements do you think should be included in a common supply chain letter? Please check as many that apply.
    - Information on Section 1502 of Dodd Frank and its relationship with the OECD Guidance
    - Common position on minerals sourcing (to commit to sourcing responsibly from conflict-free mines in the DRC)
    - Explain company's actions to undertake due diligence
    - List specific due diligence expectations of the supplier
    - Instructions for submitting due diligence information
    - None of the above
    - Additional element: please describe
    - Comments:

74. If yes (to question 72), please indicate whether common content should be developed for:
    - Initial supplier outreach letter
    - Follow-up supplier letter (for suppliers that failed to submit a response to initial letter; or submitted incomplete information; or submitted incorrect information)

75. If yes (to question 72), what other types of materials should be developed as common content? Please describe.

Annex 4 – Cycle 3 Industry Association Questionnaire

Policy

1. Does your industry association currently advocate a common policy defining common expectations throughout the supply chain on risk of supporting conflict through the activities of suppliers in the supply chain of tin, tungsten, tantalum and gold?
    - o No, we have no common policy
    - o Yes, to source these minerals responsibly from any conflict-affected and high-risk areas, (including DRC and Great Lakes region covered under US Dodd-Frank Section 1502) in accordance with the due diligence process described in the OECD Due Diligence Guidance
    - o Yes, not to source these minerals from any conflict-affected and high-risk areas.
    - o Yes, not to source *conflict minerals* from specific country or specific region (please, indicate which countries/regions and why)
    - o Not to source these minerals from the DRC and Great Lakes region given the associated reporting requirements under Dodd Frank Section 1502
    - o Other (please describe)

2. If necessary, please provide any comments to the previous question.

3. Is this policy consistent with Annex II of the Guidance that provides a model supply chain policy for responsible global supply chain minerals from conflict-affected and high-risk areas?
    - o Yes (please attach or provide the link to your website)
    - o No

      Comments: _____

4. If yes (to question 3), which risk and corresponding management strategy under Annex II are referenced in your policy? (check all that apply)
    - o Serious abuses associated with the extraction, transport or trade of minerals as defined in the OECD Guidance
    - o Risk management of serious abuses as defined in the OECD Guidance
    - o Direct or indirect support to non-state armed groups as defined in the OECD Guidance
    - o Risk management of direct or indirect support to non-state armed groups as defined in the OECD Guidance
    - o Direct or indirect support to public or private security forces as defined in the OECD Guidance
    - o Risk management of public or private security forces as defined in the OECD Guidance
    - o Bribery and fraudulent misrepresentation of the origin of minerals as defined in the OECD Guidance
    - o Money laundering
    - o Payment of taxes, fees and royalties due to governments
    - o Risk management of bribery and fraudulent misrepresentation of the origin of minerals, money-laundering and payment of taxes, fees and royalties to governments

Industry Tools

5. Has your industry association promoted/participated in the development of tools/schemes for responsible supply chain due diligence (i.e. traceability, conflict-free smelter programme, E-Tasc questionnaire etc.)?
    - o Yes (please list which ones)
    - o No

6. Is your industry association developing any industry-specific tools, methodologies, and/or best practices to help your members carry out responsible supply chain due diligence?
    - o Yes (please describe how such tools/methodologies can help your members meet specific due diligence recommendations under the OECD Guidance, and provide links/attachments)
    - o No

Supplier Communications

7. Have members of your industry association disseminated any joint communications to shared suppliers on expectations for responsible supply chain due diligence?
    - Yes (please describe)
    - No
8. Have members of your industry association collaborated to exchange supplier information and/or identify suppliers that are likely to be subject to/affected by the US Dodd Frank Section 1502 on "conflict minerals" and related SEC regulations?
    - Yes
    - No
    - Not sure

Member Support

9. How is your industry association currently supporting members to understand the 3Ts due diligence and encourage transparency in the supply chain? (check all that apply)
    - Refer them to the OECD Guidance
    - Provide other policy guidance (please describe the policy guidance in the comment field of the next question)
    - Provide training
    - Provide access to tools developed by the Association
    - Provide access to tools developed by other sources (please list the tools in the comment field of the next question)
    - Access to experts/latest developments via
    - In-person meetings
    - Webinars
    - Conference calls
    - Online and traditional communications (website, newsletters, mailings, e-mailings)
    - Other (please describe)

10. If necessary, please provide any comments to the previous question.

11. What type of support have members requested from your industry association to develop due diligence activities?
    - Policy guidance
    - Training
    - Industry tools
    - Funding
    - Stakeholder engagement
    - In-person meetings
    - Online communications
    - Webinars
    - Conference calls
    - Other (please describe)

OECD Pilot Implementation Phase (August 2011-August 2012)

12. Have you found the pilot implementation phase useful to get a better understanding of due diligence processes in the 3T supply chain?

13. Notwithstanding pending regulations, do you think this will help members subject or affected by Dodd-Frank Section 1502 to build their capacity to meet regulatory expectations?

14. Do you think that industry associations have a role to play in orienting members' procurement practices so as to help companies contribute to sustainable development in conflict-prone areas through responsible mineral sourcing from conflict and high-risk areas? Or, has your association taken a different approach? If so, please describe:

15. What other tools would you find useful for your industry? (please describe)

16. Pursuant to the OECD Action Plan agreed upon at the May meeting, would you be interested in participating in a small group to explore the possibility of developing common content and model principles for supplier outreach in the downstream supply chain?
    - Yes
    - No

17. If yes (to question 16), which elements do you think should be included in a common supply chain letter? Please check as many that apply.
    - Information on Section 1502 of Dodd Frank and its relationship with the OECD Guidance
    - Common position on minerals sourcing (to commit to sourcing responsibly from conflict-free mines in the DRC)
    - Explain company's actions to undertake due diligence
    - List specific due diligence expectations of the supplier
    - Instructions for submitting due diligence information
    - None of the above
    - Additional element (please describe):

18. If yes (to question 16), please indicate whether common content should be developed for:
    - Initial supplier outreach letter
    - Follow-up supplier letter (for suppliers that failed to submit a response to initial letter; or submitted incomplete information; or submitted incorrect information)

19. If yes (to question 16), what other types of materials should be developed as common content? Please describe.

Annex 5 – Cycle 3 Industry Association Member Questionnaire

1. Please indicate the industry (ies) in which you operate. (Check all that apply)

    - Aerospace

    - Automotive
    - Consumer products
    - Energy
    - Extractives
    - Information, communications & technology
    - Medical devices
    - Retail
    - Other (please describe):

2. Please indicate which of the following minerals you use in your products and/or manufacturing processes:
    - Gold (Au)
    - Tantalum (Ta)
    - Tin (Sn)
    - Tungsten (W)
    - I don't know

3. Please indicate the number of employees in your company globally:
    - More than 100,000 employees
    - 50,001-99,999 employees
    - 10,001-50,000 employees
    - 500-10,000 employees
    - 250-500 employees
    - 50-249 employees
    - 49 employees or less

4. Please indicate your company's 2011 turnover (annual sales volume net of all discounts and sales taxes):
    - More than 1 billion euro (USD 1,248 billion)
    - 500 million - 1 billion euro (USD 624 million - 1,248 billion)
    - 100 million - 500 million euro (USD 125 million - 624 million)
    - 50 million - 100 million euro (USD 62.4 million - USD 125 million)
    - 10 million - 50 million euro (USD 12.48 million - 62.4 million)
    - 2 million - 10 million euro (USD 2.5 million - 12.48 million)

5. Are you aware of the growing concern by regulators in the US and EU and international bodies on metals around the link between trade in tin, tungsten, tantalum and gold (commonly referred to as "conflict minerals") and potential risk of conflict financing, with particular regard to the situation in the Democratic Republic of Congo (DRC)?
    - Yes
    - No

6. Are you aware of the International Organisation for Economic Co-Operation and Development (*OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas*?
    - Yes
    - No

7. Have you ever considered or are you aware of potential risk of supporting conflict through the activities of the suppliers in your supply chain?
    - Yes
    - No

8. Are you aware that you can use the OECD Guidance to become aware of risks in your supply chain and manage them in accordance with international standards?

- Yes
- No

9. Have your customers communicated about or requested information on “conflict minerals” in your products, or requested smelter level information about your products?
    - We have NOT received requests for information.
    - We have received a limited number of requests for information (less than 25% of your customers have requested information).
    - We are receiving a growing number of requests for information.

10. Do you have any specific policy on conflict minerals or another policy that explicitly addresses conflict minerals (i.e. supply chain, human rights, procurement policy, etc.)?
    - Yes
    - No

11. The purpose of the OECD Due Diligence Guidance is to “help companies contribute to sustainable development and source responsibly from conflict affected and high-risk areas”. If you have a conflict minerals policy, would you describe your policy as:
    - Encouraging responsible sourcing from conflict and high-risk areas (e.g. the DRC and surrounding region under US Dodd Frank Section 1502)
    - Eliminating sourcing minerals from conflict and high-risk areas (e.g. the DRC and surrounding region under US Dodd Frank Section 1502)
    - Not applicable
    - Other (please specify)

12. Are you conducting due diligence to identify the smelters/refiners that produce tin, tantalum, tungsten, and gold in your supply chain?
    - Yes
    - No

13. Are you taking part in any industry collaboration schemes/initiatives/efforts to identify smelters and pass due diligence information through the supply chain?
    - Yes
    - No

14. If the answer to Question 13 is “yes", please specify which, if any, collaborative industry process(es) you participate in.

15. Approximately what percentage of your 1st tier suppliers have provided you smelter/refiner information for the products they supply to you?
    - 1-30%
    - 31-60%
    - 61-90%
    - 91-100%
    - We haven’t identified any.

16. Do you carry out any smelter audits on supply chain due diligence regarding minerals sourcing from conflict-affected areas either on your own or through industry collaboration?
    - Yes
    - No

17. Do you report on your supply chain due diligence regarding conflict minerals?
    - Yes
    - No

18. Are you a listed company on US stock exchanges subject to disclosing to the SEC on conflict minerals under Section 1502 of the Dodd-Frank Act?

- Yes
- No
- I don't know.

19. If the answer to Question 18 is "no" or "don't know", are any of your customers subject to the SEC disclosure requirements for conflict minerals?
    - Yes
    - No

www.oecd.org/daf/investment/mining

Public Company Hot Topics

8. Other Materials

- SRZ Annual Meeting Form of Domestic Public Company Director and Executive Officer Questionnaire

SRZ Annual Meeting Form of Domestic Public Company Director and Executive Officer Questionnaire

[**SRZ Annual Meeting Form of Non-Emerging Growth Domestic Public Company Director and Executive Officer Questionnaire January 2013**]

For Directors and Executive Officers of

[COMPANY NAME]

The purpose of this questionnaire is to provide [COMPANY NAME] and its counsel, Schulte Roth & Zabel LLP, with information (or confirmation of information) that will be used in the preparation of the Company's [2012] Annual Report on Form 10-K and [2013] Proxy Statement. This questionnaire is required to be completed by Directors and Executive Officers of the Company, and all persons who have been nominated or chosen to become Directors and who have consented to act in that capacity.

Unless otherwise indicated, capitalized terms used in this questionnaire have the meanings ascribed to them in Appendix A. For purposes of this questionnaire, as indicated in Appendix A, the term "**Company**" means, unless the context indicates otherwise, [COMPANY NAME] and its Subsidiaries (and their respective predecessors, if any).

Information requested in this questionnaire is to be provided as of the date you complete the questionnaire, unless otherwise indicated. If additional space is required to complete an answer, please attach additional pages as needed. The information supplied in response to this questionnaire will be used to ensure that certain information to be included in the Form 10-K and Proxy Statement will be correct. Under certain circumstances, Executive Officers and Directors are subject to personal liability if the Form 10-K or Proxy Statement misrepresents or omits a material fact.

PLEASE ANSWER EVERY QUESTION AND FILL IN ALL BLANKS, UNLESS A QUESTION OTHERWISE SPECIFICALLY PROVIDES. IF THE ANSWER TO ANY QUESTION IS "N/A," "0" OR "NONE," PLEASE SO STATE. SHOULD YOU FAIL TO PROVIDE AN ANSWER, WE WILL ASSUME THAT THE ANSWER IS IN THE NEGATIVE.

The completed, signed and dated questionnaire should be returned as soon as possible, but not later than [DATE], 2013, to [GENERAL COUNSEL NAME], at [ADDRESS], by email at [EMAIL ADDRESS] or facsimile at [FAX NUMBER]. If you have any questions regarding the questionnaire, please call [GENERAL COUNSEL NAME] at [TELEPHONE NUMBER].

Please retain a completed copy of this questionnaire for your files. If, following your return of this questionnaire, any events occur or information comes to your attention that would affect the accuracy of any of your answers in this questionnaire, please notify [GENERAL COUNSEL], at the telephone number above, of any such event or information as soon as possible.

PLEASE COMPLETE AND RETURN THIS QUESTIONNAIRE NO LATER THAN [DATE], 2013.

Table of Contents

BEFORE YOU COMPLETE THIS QUESTIONNAIRE, PLEASE REVIEW THE DEFINITIONS OF CERTAIN TERMS THAT ARE LISTED IN APPENDIX A.

Question 1. General Information. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Your full name: _____

Your date of birth: _____

Your business address: _____

APPENDIX B (IF ATTACHED) LISTS CERTAIN BIOGRAPHICAL INFORMATION CONCERNING YOU. PLEASE REVIEW THAT APPENDIX. PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION 1 ONLY IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) List all positions and offices you currently hold with the Company and its Affiliates, all positions and offices previously held with the Company and its Affiliates during the last five years and the time periods during which you served in any current and previous positions or offices.

Positions or Offices Held and Name of Entity	Period of Service (month and year)

(b) If you have been nominated to become a Director of the Company, do you consent to being named as such and to serve in such capacity if elected?

Yes_____ No_____

(c) Describe the nature of any arrangement or understanding between you and any other Person(s) (naming such Person(s)) pursuant to which you were or will be selected as a Director or Executive Officer of the Company (excluding arrangements or understandings with Directors or Executive Officers of the Company acting solely in their capacity as such).

_____

_____

(d) State the nature of any Family Relationship between you and any other Director, Executive Officer or person nominated or chosen to become a Director or Executive Officer.

_____

_____

(e) To the extent not addressed in (a) above, briefly describe your business experience during the past five years, including your principal occupation(s) and employment during that period and the name and principal business of any corporation or other organization in which such occupation(s) and employment were carried on. Please indicate whether any such corporation or organization is an Affiliate of the Company. In addition, for any position listed below, give a brief explanation as to the nature of the responsibilities undertaken by you in such position.

Position(s) Held	Name of Entity	Affiliate of the Company?	Period of Service (month and year)	Principal Business	Nature of Your Responsibilities

(f) Indicate any other directorships held by you during the past five years, including any committees upon which you serve or have served, with any company that (i) has a class of securities listed on a national securities exchange or otherwise registered pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), (ii) is subject to the requirements of Section 15(d) of the Exchange Act or (iii) is registered as an investment company under the Investment Company Act of 1940, as amended.

Position(s) Held	Name of Entity	Period of Service (month and year)

(g) Please indicate whether during the last ten years:

(i) a petition under any Federal bankruptcy law or any state insolvency law was filed by or against (A) you or your business, (B) any partnership in which you were a general partner at or within two years before the time of such filing, or (C) any corporation or business association of which you were an Executive Officer at or within two years before the time of such filing.

Yes_____ No_____

(ii) a receiver, fiscal agent or similar officer was appointed by a court for (A) you or your business, (B) any partnership in which you were a general partner at or within two years before the time of such appointment, or (C) any corporation or business association of which you were an Executive Officer at or within two years before the time of such appointment.

Yes_____ No_____

(iii) you were convicted in a criminal proceeding or are a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses).

Yes_____ No_____

(iv) you were convicted of fraud.

Yes_____ No_____

(v) you were the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining you from, or otherwise limiting, the following activities:

(A) acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission (the "**CFTC**") or an associated person of any of the foregoing, or as an investment advisor, underwriter, broker or dealer in securities or as an Affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activity.

Yes_____ No_____

(B) engaging in any type of business practice.

Yes_____ No_____

(C) engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of any Federal or state securities laws, or Federal commodity laws.

Yes_____ No_____

(vi) you were the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or state authority barring, suspending or otherwise limiting for more than 60 days your right to engage in any activity described in paragraph (v) above, or to be associated with Persons engaged in any such activity.

Yes_____ No_____

(vii) you were found by a court of competent jurisdiction in a civil action or by the Securities and Exchange Commission (the "**SEC**") to have violated any Federal or state securities law, and the judgment in such civil action or finding by the SEC has not been subsequently reversed, suspended or vacated.

Yes_____ No_____

(viii) you were found by a court of competent jurisdiction in a civil action or by the CFTC to have violated any Federal commodities law, and the judgment in such civil action or finding by the CFTC has not been subsequently reversed, suspended or vacated.

Yes_____ No_____

(ix) you were the subject of, or a party to, any Federal or state judicial or administrative order, judgment, decree or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of:

(A) any Federal or state securities or commodities law or regulation.

Yes_____ No_____

(B) any law or regulation respecting financial institutions or insurance companies, including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty, temporary or permanent cease-and-desist order, or removal or prohibition order.

Yes_____ No_____

(C) any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity.

Yes_____ No_____

(x) You were the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any Self-Regulatory Organization, any Registered Entity or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or Persons associated with a member.

Yes_____ No_____

If you answered "Yes" to any of the foregoing questions, please explain the circumstances in detail on a separate sheet of paper.

Question 2. Legal Proceedings. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Are there any pending or threatened legal proceedings (including administrative proceedings and investigations by governmental authorities) in which you or any of your Associates is a party adverse to the Company or any of its Affiliates, or in which you or such Associate has any interest adverse to the Company or any of its Affiliates?

Yes_____ No_____

If you answered "Yes" to the foregoing question, please describe the circumstances on a separate sheet of paper.

Question 3. Compensation of Executive Officers. If you are an Executive Officer of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) ***Annual Compensation.*** Indicate the dollar value of your annual compensation for the most recently completed fiscal year. If you served as an Executive Officer during any part of the fiscal year, then information should be provided as to all of your compensation for the full fiscal year.

(i) ***Salary (Cash and Non-Cash).***

_____

(ii) ***Bonus (Cash and Non-Cash).***

_____

(iii) ***Awards of Stock.*** The date of award and number of shares awarded for any award of stock of the Company or any Affiliate thereof.

_____

_____

(iv) ***Options/SARs Awarded.*** If you received any grants of stock options (whether or not in tandem with stock appreciation rights ("**SARs**")) or freestanding SARs, please provide the date of award, the exercise price of such options and the number of options/SARs awarded, as applicable.

_____

_____

(v) ***NEIP Compensation.*** If you received any compensation under a non-equity incentive plan ("**NEIP**"), please provide the dollar value of amounts earned during the fiscal year or calculated with respect to the fiscal year.

_____

_____

(vi) ***Above-Market or Preferential Earnings.*** If you received above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans, please indicate such earnings.

Interest on deferred compensation is "above-market" only if the rate of interest exceeds 120% of the applicable Federal long-term rate, with compounding at the rate that corresponds most closely to the rate under the plan at the time the interest rate or formula is set. Dividends (and dividend equivalents) on deferred compensation denominated in Company stock are preferential only if earned at a rate higher than dividends on the Company's common stock.

_____

_____

(vii) ***Modification of Awards.*** At any time during the last fiscal year, did the Company or its Affiliates reprice or otherwise materially modify any outstanding option or other equity-based award (such as by extension of the exercise period, change of vesting or forfeiture conditions, change or elimination of applicable performance criteria or change of the bases upon which returns are determined)?

Yes_____ No_____

If your answer is "Yes," please describe each repricing or other material modification.

_____

_____

(viii) ***All Other Annual Compensation.*** Except as otherwise specified in this questionnaire, this category of compensation includes, without limitation, all compensation not properly categorized as stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings.

Examples include:

All Other Compensation	Amount/ Description
Perquisites and other personal benefits, securities or property.	
All gross-ups and other amounts reimbursed during the fiscal year for the payment of taxes.	

All Other Compensation	Amount/ Description
The compensation cost, if any, for any security of the Company or any of its Affiliates purchased from the Company or any of its Affiliates (through the deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the Company.	
The amount paid or accrued in accordance with a plan or arrangement in connection with (A) a termination, including, without limitation, through retirement, resignation, severance or constructive termination (including a change in responsibilities), of employment with the Company or any of its Affiliates, or (B) a change in control of the Company.	
Company contributions or other allocations to vested or unvested defined contribution plans.	
The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit.	
The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award.	
Any other compensation not covered in Question 3, stating the type of compensation and amount.	

(b) ***Employment Agreements.*** Are you a party to an employment agreement with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please provide the date of such agreement.

_____

(c) ***Option Exercises and Stock Vested.***

(i) Have you exercised any stock options or similar instruments during the last fiscal year?

Yes_____ No_____

If your answer is "Yes," please provide for each exercise the date and the number of shares or other securities received upon exercise.

_____

_____

(ii) Indicate the number of shares of stock that have vested during the last fiscal year, whether in the form of restricted stock grants or options.

_____

_____

(d) ***Pension Benefits.*** Are you a participant in any defined benefit or actuarial plan in connection with your services to the Company or its Affiliates?

Yes_____ No_____

If your answer is "Yes," please indicate:

(i) the plan's title.

_____

(ii) whether the benefits are determined primarily by final or average final compensation and years of service.

_____

(iii) your estimated credited years of service.

_____

(iv) your estimated annual benefits payable upon retirement.

_____

(v) the number of actual years of service you have given under the plan (if different from the number of years of credited service).

_____

(vi) the dollar amount of any payments and benefits paid to you during the last fiscal year.

_____

(e) ***Non-Qualified Deferred Compensation.*** Please provide the following information with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified:

(i) the dollar amount of your aggregate contributions during the last fiscal year.

_____

(ii) the aggregate dollar amount of interest or other earnings earned during the last fiscal year.

_____

(iii) the dollar amount of all withdrawals by and distributions to you during the last fiscal year.

_____

(iv) the dollar amount of the total balance of your account as of the end of the last fiscal year.

_____

(f) ***Personal Benefits.*** Have you received any of the following personal benefits from the Company or its Affiliates directly or through third parties during the last fiscal year? If so, check the applicable column for each benefit below.

Benefit	Yes	No
Home repairs and improvements (includes security systems).		
Housing or other living expenses (includes mortgage and rental payments and the cost of domestic servants) at your principal or vacation residence.		
Personal loans, including extensions of credit and renewals (including the arrangement of a loan from a third party).		
Personal use of a Company furnished automobile or other motor vehicle (includes commuting to and from home).		
Personal use of a Company furnished airplane.		
Personal use of a Company furnished boat or yacht.		
Personal use of a Company furnished apartment, hotel/motel room or suite, hunting or fishing lodge, or vacation home.		
Personal use of any other Company furnished property.		
Personal vacation or travel expenses.		
Personal entertainment and related expenses.		
Personal legal, accounting or other professional services for matters unrelated to the Company.		
Personal use of the staff or employees of the Company.		
Membership in a country club, luncheon club or other social or recreational club (excluding civic or service clubs).		
The ability to obtain benefits from third parties because the Company directly or indirectly compensates the third party for the benefit or discount.		
Other personal benefits not listed above.		

If your answer with respect to any of the above benefits is "Yes," or if you received any non-cash compensation from the Company or from any other source for or in connection with services that were provided to the Company or any of its Affiliates in the last fiscal year, please provide the following information for each such benefit.

Description of Benefit	Recipient of Benefit	Estimated Value of Benefit to Recipient	Company's Actual Cost of Providing Benefit

Question 4. Compensation of Directors. If you are a Director, please provide the following in respect of the Company's most recently completed fiscal year.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) The aggregate dollar amount of all fees earned or paid in cash for your services as a Director, including annual retainer fees, committee and/or chairmanship fees and meeting fees.

_____

(b) For awards of stock, the dates of award, the exercise price of such options and the number of shares you were given with respect to the fiscal year, as applicable.

_____

_____

(c) For awards of stock options, with or without tandem SARs (stock appreciation rights), the dates of award and number of options given to you.

_____

_____

(d) The dollar value of all of your earnings for services performed during the fiscal year pursuant to NEIPs (non-equity incentive plans) and all earnings on any outstanding awards.

_____

_____

(e) Any above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including earnings on nonqualified defined contribution plans. (See Question 3(a)(vi) for additional explanatory information.)

_____

_____

(f) All other compensation, including:

All Other Compensation	Amount/ Description
Perquisites and other personal benefits, securities or property.	
All gross-ups and other amounts reimbursed during the fiscal year for the payment of taxes.	
The compensation cost, if any, for any security of the Company or any of its Affiliates purchased from the Company or any of its Affiliates (through the deferral of Director compensation or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the Company.	
The amount paid or accrued in accordance with a plan or arrangement in connection with a change in control of the Company.	
Company contributions or other allocations to vested or unvested defined contribution plans.	
The dollar value of any insurance premiums paid by, or on behalf of, the Company during the fiscal year with respect to life insurance for your benefit.	
Consulting fees earned from, paid by or payable by the Company.	
The cost of payments and promises to you of payments pursuant to director legacy programs and similar charitable award programs.	
The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award.	
Any other compensation not covered in Question 4, stating the type of compensation and amount.	

(g) Have you received any of the following personal benefits from the Company or any of its Affiliates directly or through third parties during the last fiscal year? If so, check the applicable column for each benefit below.

Benefit	Yes	No
Home repairs and improvements (includes security systems).		
Housing or other living expenses (includes mortgage and rental payments and the cost of domestic servants) at your principal or vacation residence.		
Personal loans, including extensions of credit and renewals (including the arrangement of a loan from a third party).		
Personal use of a Company furnished automobile or other motor vehicle (includes commuting to and from home).		
Personal use of a Company furnished airplane.		
Personal use of a Company furnished boat or yacht.		
Personal use of a Company furnished apartment, hotel/motel room or suite, hunting or fishing lodge, or vacation home.		
Personal use of any other Company furnished property.		
Personal vacation or travel expenses.		
Personal entertainment and related expenses.		
Personal legal, accounting or other professional services for matters unrelated to the Company.		
Personal use of the staff or employees of the Company.		
Membership in a country club, luncheon club or other social or recreational club (excluding civic or service clubs).		
The ability to obtain benefits from third parties because the Company directly or indirectly compensates the third party for the benefit or discount.		
Other personal benefits not listed above.		

If your answer with respect to any of the above benefits is "Yes," or if you received any non-cash compensation from the Company or from any other source, for or in connection with services that were provided to the Company or any of its Affiliates in the last fiscal year, please provide the following information for each such benefit.

Description of Benefit	Recipient of Benefit	Estimated Value of Benefit to Recipient	Company's Actual Cost of Providing Benefit

Question 5. Security Ownership of Certain Beneficial Owners and Management. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

(a) ***Beneficial Ownership.*** Please state, as of the most recent practicable date, as to each class of Equity Securities of the Company or any Parent, the amount of which you are the Beneficial Owner. See Question 5(f) for information concerning the disclaimer of beneficial ownership.

(i) Amount Beneficially Owned:

	Class of Stock	Amount of Stock	Amount Pledged As Security
Shares Beneficially Owned by you.			
Shares as to which you have sole voting power.			
Shares as to which you have shared voting power.			
Shares as to which you have sole investment power.			
Shares as to which you have shared investment power.			

(ii) Shares pledged as security:

If your answer to Question 5(a)(i) includes any shares pledged as security, please provide the name of the pledgee, the date when such pledge arose and the number of shares pledged.

_____

_____

(b) ***Change in Control.*** Please describe any arrangements to which you or any of your Affiliates are a party, including any pledge to any Person of Equity Securities of the Company or any Parent of the Company, the operation of which may at a subsequent date result in a change in control of the Company.

_____

_____

(c) ***Shared Voting Power or Investment Power.*** If you share voting power or investment power with respect to any of the Equity Securities referred to in Question 5(a)(i), please briefly describe below the contract, arrangement, understanding, relationship or other basis on which your voting or investment power is shared.

_____

_____

(d) ***Voting Trust.*** If the Equity Securities are held by you or any of your Affiliates subject to any voting trust or other similar agreement, please state the amount held pursuant to the trust or other agreement and the duration of the agreement. Please also provide the name and address of the trustees and outline briefly their voting rights and other powers under the trust or agreement.

_____

_____

(e) ***Right to Acquire Beneficial Ownership of Securities.*** If you included in your answer to Question 5(a)(i) any Equity Securities as to which you have a right to acquire Beneficial Ownership within 60 days (see the definition of "Beneficial Owner"), please set forth the affected number of Equity Securities, the date when such right to acquire Beneficial Ownership arose or will arise and any other relevant information.

_____

_____

(f) ***Disclaimer of Beneficial Ownership.*** In certain circumstances, it is possible to disclaim Beneficial Ownership of Equity Securities. Whether you make such a disclaimer is entirely a matter of your own decision. You may wish to consult your own counsel in connection with any such determination; a disclaimer may be important not only in connection with the securities

laws, but also because, without it, your reporting ownership of such Equity Securities might be construed as an admission of ownership by you for other purposes.

Do you disclaim Beneficial Ownership of any Equity Securities of the Company that are held by any of the following Persons:

- your spouse,
- your minor children,
- a relative of yours who lives in your home,
- a relative of your spouse who lives in your home,
- a partnership in which you are a member, or
- a corporation in which you have controlling influence.

Yes_____ No_____

If the answer is "Yes," please furnish the following information with respect to the Person(s) who should be shown as the Beneficial Owner(s) of the Equity Securities in question.

Class of Securities	Name of Beneficial Owner	Relationship of Such Person to You	Number of Shares Beneficially Owned by Such Person	Reason for Disclaiming Beneficial Ownership

Question 6. Relationships With Compensation Advisers. If you are a Director or an Executive Officer of the Company or have been nominated to become a Director of the Company, please answer this Question.

(a) Appendix C lists the compensation consultants, legal counsel or other advisers that have been engaged to advise on compensation matters by the Company, the Board of Directors or any committee of the Board of Directors. Are you aware of any compensation consultants, legal counsel or other advisers that are not listed on Appendix C that have been engaged to advise on compensation matters by the Company, the Board of Directors or any committee of the Board of Directors?

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

(b) Do you have any business or personal relationships with the compensation consultants, legal counsel or other advisers described in (a) above? For purposes of this Question, your response should take into account relationships with both the individual(s) providing such services and the firm(s) employing them. In addition, for purposes of this Question, you can exclude any business arrangements arising out of your service as a Director or an Executive Officer.

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

Question 7. Related Party Transactions. If you are a Director or an Executive Officer of the Company or have been nominated to become a Director of the Company, please answer this Question.

IF THE INFORMATION CALLED FOR BY THIS QUESTION IS CONTAINED IN APPENDIX B, YOU ONLY NEED TO PROVIDE INFORMATION IN RESPONSE TO THIS QUESTION IF YOU ARE CORRECTING OR ADDING ADDITIONAL INFORMATION.

All of the information contained in Appendix B is correct and complete. Accordingly, I have not furnished any additional information below in response to this Question.

Yes_____ No_____

Information should be furnished in answer to Question 7 with respect to transactions that involve remuneration from the Company or its Affiliates, directly or indirectly, to any of the Persons specified in Question 7(a) for services in any capacity, unless the interest of such Person arises solely from the ownership of less than 10% of any class of Equity Securities of another Person furnishing services to the Company or its Affiliates.

(a) ***Transactions With Directors, Management and Others.*** Since the beginning of the Company's last fiscal year, have you or any member of your Immediate Family or your Associates had a direct or indirect material interest in any transaction, or any currently proposed transaction, or series of similar transactions, to which the Company or its Affiliates was or is to be a party in which the amount involved exceeds $120,000? [Smaller Reporting Companies can replace "$120,000" with the following "the lesser of (i) $120,000 and (ii) one percent (1%) of the average of the Company's total assets at year end for the last two completed fiscal years?"]

Yes_____ No_____

If your answer is "Yes," in each such case, please provide below the name of such Person, such Person's relationship to you (if you are not such Person) and to the Company or its Affiliates, the nature of such Person's interest in such transaction, the approximate dollar amount of such

transaction and, where practicable, the approximate dollar amount of such Person's interest in the transaction.

_____

_____

(b) ***Other Material Information*.** Please provide any other information regarding the transaction, or you or members of your Immediate Family or your Associates in the context of the transaction, that may be material to investors in light of the circumstances of the particular transaction.

_____

_____

Question 8. Indebtedness to the Company or its Affiliates. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

(a) Indicate whether you have received an extension of credit or loan directly or indirectly through the Company or arranged by the Company.

Yes_____ No_____

If your answer is "Yes," please describe:

_____

_____

(b) At any time since the beginning of the last fiscal year, have any of your Affiliates, Associates or Immediate Family been indebted to the Company or its Affiliates in an amount exceeding $120,000? [Smaller Reporting Companies can replace "$120,000" with the following "the lesser of (i) $120,000 and (ii) one percent (1%) of the average of the Company's total assets at year end for the last two completed fiscal years?"] The amount of indebtedness is the largest aggregate amount of all debt outstanding for the transaction at any time since the beginning of the Company's last fiscal year, including all amounts of interest payable in respect of the transaction during the last fiscal year. In the case of any lease or other transaction involving periodic payments or installments, the aggregate amount is the amount of all periodic payments or installments due on or after the beginning of the last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transaction providing for periodic payments or installments. You may exclude from indebtedness all amounts due for purchases of goods and services subject to usual trade terms, for ordinary travel and expense payments and for other transactions in the ordinary course of business.

Yes_____ No_____

If the answer is "Yes," please state in each case:

(i) The name of the indebted Person and the nature of the Person's relationship to you and to the Company by reason of which such Person's indebtedness is required to be described.

_____

_____

(ii) The largest aggregate amount of principal outstanding at any time during such period.

_____

_____

(iii) The amount of indebtedness presently outstanding as of the latest practicable date.

_____

_____

(iv) The rate of interest, if any, paid or charged on the indebtedness and the amount of interest paid during any such period.

_____

_____

(v) The nature of the indebtedness and of the transaction in which it was incurred.

_____

_____

(vi) The date on which the indebtedness was incurred.

_____

_____

Question 9. Section 16 Reporting Compliance. If you are a Director or an Executive Officer of the Company, you are required to make an annual Form 5 filing with the SEC within 45 days of the end of the Company's last fiscal year reflecting:

- any transactions in the Company's Equity Securities that you consummated during the past year that were not required to be reported on Form 4 (*e.g.*, certain gifts and inheritances) or
- any transactions in the Company's Equity Securities which you should have reported during the past year but did not **AND**
- your aggregate ownership of the Company's Equity Securities as of the end of the Company's fiscal year.

The annual Form 5 filing is not required if:

- you have not engaged in any transactions in the Company's securities during the past year which required reporting on Form 5 or
- all such transactions were previously reported on a Form 4 prior to the date the Form 5 was due **AND**
- you do not have any holdings or transactions which were otherwise required to be reported during the past year and which were not reported to the SEC.

(a) Were you required to file a Form 5 with the SEC for the past fiscal year?

Yes_____ No_____

(b) If you answered "Yes" to (a) above, did you file a Form 5 or was one filed on your behalf?

Yes_____ No_____

(c) Was the Form 5 complete and accurate?

Yes _____ No_____

If "No," please explain.

_____

_____

(d) Were any of your Section 16 filings (Forms 3, 4 or 5) filed after the date on which they were due to be filed? If so, please indicate the number of late filings, the number of transactions that were not reported on a timely basis and any other known failure to file a required form.

_____

_____

(e) Have you engaged in any transactions in the Company's Equity Securities that have not yet been reported in the most recent Form 4 or Form 5 that you filed?

Yes _____ No _____

If your answer is "Yes," please describe the transactions.

_____

_____

Question 10. Compensation Committee Interlocks. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question as applicable. [Note that this Question 10 can be omitted for Smaller Reporting Companies.]

(a) If you are an Executive Officer of the Company, during the most recently completed fiscal year, did you serve as a member of the board or compensation committee (or other board committee performing equivalent functions) of another entity, one of whose Executive Officers served as a Director on the Board of Directors or compensation committee of the Company?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(b) If you are a Director who is not an Executive Officer of the Company, during the Company's most recently completed fiscal year, did an Executive Officer of the Company serve as a member of the board or compensation committee (or other board committee performing equivalent functions) of another entity of which you are an Executive Officer?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

Question 11. Director Independence. Except as indicated in the next paragraph, if you are a Director, or have been nominated to become a Director of the Company, please answer this Question.

YOU ARE NOT REQUIRED TO COMPLETE THIS QUESTION IF IT ALREADY HAS BEEN DETERMINED THAT YOU ARE NOT AN INDEPENDENT DIRECTOR.

For purposes of this Question, "material relationships" can include commercial, industrial, banking, consulting, legal, accounting, charitable, familial and other relationships. A Director can have this relationship directly with the Company or its Affiliates, or a Director can be a partner, stockholder, officer or employee of an organization that has such a relationship.

(a) Are you, or is a member of your Immediate Family, or have you, or has a member of your Immediate Family, been within the past five years, a partner, stockholder, officer or employee of an organization that has a material relationship with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(b) Do you currently have, or have you had within the past three years, a direct business relationship (*e.g.*, as a consultant) with the Company or any of its Affiliates?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(c) Are you currently, or at any time during the last three years were you, an employee of the Company, or is a member of your Immediate Family currently, or at any time during the last three years was a member of your Immediate Family, an Executive Officer of the Company?

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

(d) Do you, or does a member of your Immediate Family, have any other relationship not described in (a) or (b) above, either directly or indirectly, with the Company or any of its Affiliates? For purposes of this Question, you can exclude any arrangements arising out of your service as a Director.

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

(e) [**NYSE Only** — Have you or any member of your Immediate Family received any compensation from the Company or any Subsidiary or Parent in excess of $120,000 during any 12-month period within the past three years, other than (i) compensation for service as a Director or as member of a board committee or (ii) a pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way upon continued service)?]

[**NASDAQ Only** — Have you or any member of your Immediate Family accepted any compensation (including indirect benefits such as a donation to a charity with which you are Affiliated or a contribution to a Immediate Family member's political campaign) from the Company or any Subsidiary or Parent in excess of $120,000 during any 12-month period within the past three years, other than (i) compensation for service as a Director or a member of a board committee, (ii) compensation paid to a Immediate Family member who is an employee of the Company but not an Executive Officer or (iii) benefits under a tax-qualified retirement plan or non-discretionary compensation, or do you or any members of your Immediate Family expect to

receive such payments during the current fiscal year?]

Yes_____ No_____

If your answer is "Yes," please describe the compensation or refer to the portion of this Question above where it is described.

_____

_____

(f) [**NYSE Only** — Please state whether (i) you are or any Immediate Family member is currently a partner in the Company's internal or external auditing firm, (ii) you are a current employee of such firm, (iii) any Immediate Family member is a current employee of such firm and personally works on the Company's audit or (iv) you or any Immediate Family member was a partner or employee of such firm who personally worked on the Company's audit at any time during any of the past three years.]

[**NASDAQ Only** — Please state whether you or any Immediate Family member (i) is currently a partner in the Company's outside auditing firm or (ii) was a partner or employee of the Company's current or former outside auditing firm who worked on the Company's audit at any time during any of the past three years.]

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(g) [**NYSE Only** — Did you or any member of your Immediate Family serve, in the last three years, as an Executive Officer of another company where any of the Company's present Executive Officers at the same time serve or served on that company's compensation committee?]

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(h) [**NYSE Only** — Are you a current employee, or is any Immediate Family member a current Executive Officer, of any organization (including any non-profit entity) that has made payments to, or received payments from, the Company or any Subsidiary or Parent for property or services in an amount which, in any of the last three fiscal years, exceeded the greater of (i) $1 million or (ii) 2% of such other organization's consolidated gross revenues?]

[**NASDAQ Only** — Have you or any Immediate Family member been, or are you or any Immediate Family member currently, a partner in, or a controlling shareholder or Executive

Officer of, any for-profit or non-profit organization that has made payments to or received payments from the Company or any Parent or Subsidiary for property or services during the current fiscal year or any of the last three fiscal years, in excess of the greater of (i) $200,000 or (ii) 5% of the recipient's consolidated gross revenues for such fiscal year (other than payments arising solely from an investment in Company securities and payments under non-discretionary charitable contribution matching programs)?]

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

(i) [**NYSE Only** - Are you an executive officer of a charitable organization which received contributions from the Company in any of the three preceding years in an amount which exceeds the greater of $1 million or 2% of the charitable organization's consolidated gross revenues?]

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

(j) Are you aware of any other relationships that could potentially interfere, or could appear to interfere, with your exercise of independent judgment in carrying out the responsibilities of a Director, including (i) any transaction, arrangement or relationship since the beginning of the Company's last fiscal year involving you or any member of your Immediate Family and any other Executive Officer or Director of the Company or any of its Affiliates or (ii) any other relationship with the Company or any of its Affiliates, either directly or as a shareholder, Executive Officer or partner of an organization that has such a relationship**]**, including any relationships with charitable, educational, political or other not-for-profit organizations?

Yes_____ No_____

If your answer is "Yes," please describe the nature of the relationship.

_____

_____

Question 12. Audit Committee Independence. If you are a Director who is on the Audit Committee or expects to become a member of the Audit Committee, or if you have been nominated to become a

Director of the Company and expect to become a member of the Audit Committee, please answer this Question.

(a) Are you currently serving as a member of the audit committee of any other corporation or organization?

Yes_____ No_____

If your answer is "Yes," please list the name(s).

_____

(b) Has the Company paid, or do you expect it to pay, any consulting, advisory or other compensatory fee (other than compensation for your Board service) directly or indirectly to (i) you, (ii) any members of your Immediate Family, or (iii) any entity that provides accounting, consulting, legal, investment banking or financial advisory services to the Company and in which you are a member, partner, Executive Officer, managing director, or serve in a similar position?

Yes_____ No_____

If your answer is "Yes," please describe.

_____

_____

(c) Are you an Executive Officer, Director who is also an employee, general partner, managing member or otherwise in control, in each case of the Company or any entity that Controls, is controlled by or is under common control with the Company?

Yes_____ No_____

If your answer is "Yes," please explain.

_____

_____

Question 13. Certain Activities. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Are you aware of any of the following:

(a) any political contributions by the Company or from its assets, whether legal or illegal;

(b) the disbursement or receipt of the Company's funds outside the normal system of accountability;

(c) the improper or inaccurate recording of payments and receipts on the books of the Company;

(d) payments, whether direct or indirect, to or from any foreign or domestic government, official, employee (excluding anyone whose duties are essentially ministerial or clerical), agent, political party, official thereof or candidate to (i) influence an act or decision by the payee in an official

capacity (including a decision not to perform official functions) or (ii) induce him or her to use his or her influence with any governmental instrumentality, in order to assist the payor in obtaining, retaining or directing business;

(e) any transaction which has as its intended effect the transfer of Company assets for the purpose of effecting a payment described in (d) above; and

(f) any other matters of a similar nature involving disbursements of the Company's assets?

Yes_____ No_____

If you answered "Yes," please describe.

_____

_____

Question 14. Indemnification Agreements. If you are a Director or an Executive Officer of the Company, or have been nominated to become a Director of the Company, please answer this Question.

Describe any plan or agreement pursuant to which any Person has agreed to insure or indemnify you against any liability that you may incur in your capacity as a Director or Executive Officer of the Company. For purposes of this Question, you do not need to describe any indemnification pursuant to the Company's charter or bylaws or any indemnification agreement between you and the Company.

_____

_____

Question 15. Board and Committee Meetings. If you are a current Director, please answer this Question.

Appendix D sets forth a list of all meetings of the Board of Directors and committees of the Board of Directors held during the Company's most recent fiscal year and indicates which of those meetings you attended as reflected in the Company's records. Please review Appendix D to confirm that it is complete and accurate.

Appendix D is complete and accurate. _____

I have made corrections to Appendix D. _____

SIGNATURE PAGE

My answers to the Questions in this questionnaire are correctly stated to the best of my information and belief. I understand that material misstatements or the omission of material facts in the Form 10-K and/or Proxy Statement may give rise to civil and/or criminal liabilities to the Company, to each Director of the Company and to certain of its officers and other Persons. I will notify the Company of any such misstatement or omission known to me, as soon as practicable after a copy of the Form 10-K or Proxy Statement or any amendment thereto has been provided to me.

Dated: _____, 2013

_____
Signature of Signatory

_____
Typed or Printed Name of Signatory

Relationship to the Company:

_____

APPENDIX A

Definitions

1. An ***"Affiliate"*** of a Person is any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the first such Person. See also the definitions of "Parent" and "Subsidiary" below.

   The term ***"Affiliated"*** has a correlative meaning.

2. An ***"Associate"*** of yours means any of the following:

   (a) Any corporation or organization (other than the Company);

      (i) of which you are an officer or partner, or

      (ii) in which you Beneficially Own, directly or indirectly, 10% or more of any class of Equity Securities.

   (b) Any trust or other estate:

      (i) in which you have a substantial beneficial interest, or

      (ii) as to which you serve as trustee or in a similar capacity.

   (c) Your spouse, or any relative of your spouse, who has the same home as you or who is a director or officer of the Company or its Parent.

3. A ***"Beneficial Owner"*** of a security includes a Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares:

   (a) voting power, which includes the power to vote, or to direct the voting of, such security, and/or

   (b) investment power, which includes the power to dispose, or direct the disposition of, such security.

   The terms ***"Beneficially Owned"*** and ***"Beneficial Ownership"*** have correlative meanings.

   Note that a Person will be deemed to be the Beneficial Owner of a security if that Person has the right to acquire Beneficial Ownership within 60 days, including, but not limited to, rights to acquire Equity Securities through the exercise of an option or warrant, through conversion, or pursuant to the power to revoke a trust or discretionary account.

4. The ***"Company"*** refers collectively to [COMPANY NAME] and its Subsidiaries.

5. ***"Control"*** (including the terms ***"controlling"*** ***"controlled by"*** or ***"under common control with"***) means the possession, directly or indirectly, of the power to direct or cause to be directed the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

6. An ***"Equity Security"*** is (a) any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest,

interest in a joint venture or certificate of interest in a business trust, (b) any security future on any such security, (c) any security convertible, with or without consideration, into such a security or carrying any warrant or right to subscribe to or purchase such a security, (d) any such warrant or right, or (e) any put, call, straddle or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

7. *"**Executive Officer**"* means an entity's president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy-making functions. For purposes of completing this questionnaire, the Company may designate additional employees as Executive Officers.

8. *"**Family Relationship**"* means any relationship by blood, marriage or adoption not more remote than first cousin.

9. *"**Immediate Family**"* means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of a Director, Executive Officer or nominee for Director, and any Person (other than a tenant or employee) sharing the household of such Director, Executive Officer or nominee for Director.

10. A *"**Parent**"* of a Person is any corporation, partnership, association or other entity that directly, or indirectly through one or more intermediaries, Controls such Person.

11. *"**Person**"* means, as applicable, (a) an individual, (b) a corporation, limited liability company, partnership, association, joint-stock company, trust, unincorporated organization or other entity, or (c) a government or political subdivision thereof.

12. *"**Plan**"* includes, but is not limited to, any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which cash, stock, restricted stock, restricted stock units, phantom stock, stock options, stock appreciation rights, stock options in tandem with stock appreciation rights, warrants, convertible securities, performance units, performance shares or similar instruments may be received. A plan may be applicable to one Person. For purposes hereof, a "plan" does not include group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in favor of Executive Officers or Directors and that are available generally to all salaried employees.

13. *"**Registered Entity**"* means (i) a board of trade designated as a contract market under Section 5 of the Commodity Exchange Act (the "CEA"), (ii) a derivatives transaction execution facility registered under Section 5(a) of the CEA, (iii) a derivatives clearing organization registered under Section 5(b) of the CEA, (iv) a board of trade designated as a contract market under Section 5(f) of the CEA and (v) with respect to a contract that the CFTC determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

14. *"**Self-Regulatory Organization**"* means any national securities exchange, registered securities association or registered clearing agency.

15. A *"**Subsidiary**"* of a Person is any corporation, limited liability company, partnership, association or other entity that is directly, or indirectly through one or more intermediaries, controlled by the first such Person.

APPENDIX B

Biographical Information

APPENDIX C

Compensation Consultants, Legal Counsel or Other Advisers That Have Been Engaged to Advise on Compensation Matters

APPENDIX D

Board and Committee Meetings

Schulte Roth&Zabel

Schulte Roth & Zabel LLP
New York
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Schulte Roth & Zabel LLP
Washington, DC
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

Schulte Roth & Zabel International LLP
London
Heathcoat House, 20 Savile Row
London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

www.srz.com