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# DIAMOND SOURCE WARRANTY PROTOCOL

## Release Number 1.0, Published • 2012

**Introduction:** this Diamond Source Warranty Protocol may be used by Industry Participants in their commercial arrangements for the purchase of diamonds or items containing diamonds from other Industry Participants and for the sale of diamonds or items containing diamonds to other Industry Participants.

Use of this Protocol allows a Seller to give a Buyer a warranty that an Industry Product was not obtained from a Subject Source.

**Subject Sources:** the determination of which countries or Persons are “Subject Sources” (as that term is used in this Protocol) will be made, from time to time, on a voluntary basis by Industry Participants through their commercial negotiations with one another.

**Defined Terms:** words and phrases that have defined meanings when used in this Protocol are indicated with initial capitalization and shall have the meaning set forth in Article VI below.

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## Article I – Incorporation of Protocol by Reference

- 1.1 Buyers and Sellers may incorporate this Protocol into a Commercial Contract or a Commercial Document by reference.
- 1.2 In order to incorporate this Protocol and provide a Protocol Warranty in a Commercial Document relating to the sale of loose diamonds, a statement substantially as follows must be included in the Commercial Document:

*“To Seller’s Best Knowledge, diamonds supplied under this [insert name of Commercial Document] were not [Obtained from] [Processed by] [insert description of Subject Source] or an SDNBP. This Warranty is given under Diamond Source Warranty Protocol, Release Number 1.0.”*

- 1.3 In order to incorporate this Protocol and provide a Protocol Warranty in a Commercial Document relating to the sale of items set with diamonds, a statement substantially as follows must be included in the Commercial Document:

*“To Seller’s Best Knowledge, Industry Products supplied under this [insert name of Commercial Document] do not contain diamonds that were [Obtained from] [Processed by] [insert description of Subject Source] or an SDNBP. This Warranty is given under Diamond Source Warranty Protocol, Release Number 1.0.”*

- 1.4 When this Protocol has been incorporated into a Commercial Contract by reference, or when a Seller provides a Protocol Warranty in a Commercial Document, Seller undertakes Seller's Obligations under this Protocol and Buyer will obtain Buyers' Rights under this Protocol.

## **Article II – Seller's Obligations**

When Seller gives a Protocol Warranty, Seller shall be deemed to have made the following representations, warranties and agreements to and for the benefit of Buyer with respect to the Warranted Products:

- 2.1 Seller is giving Buyer its Protocol Warranty on its Best Knowledge and on the basis of (i) a Protocol Warranty previously given to Seller as to the same Subject Source **or** (ii) Source Documents of which Seller has had sight;
- 2.2 To Seller's Best Knowledge, items (i) and (ii) in Section 2.1, as applicable, are true and valid;
- 2.4 Seller had in place, at all times relevant to the Protocol Warranty given by Seller to Buyer, Qualified Inventory Control Procedures sufficient so that Seller could give, with reasonable assurance, such Protocol Warranty;
- 2.5 Seller will retain for the Document Retention Period, in paper or electronic form, all Commercial Documents (including all Qualified Audit Certificates) relevant to any Protocol Warranty given; and
- 2.6 Seller will, on, or promptly following, delivery of Industry Products that are subject to a Protocol Warranty, provide Buyer with a Qualified Audit Certificate.

## **Article III – Buyer's Rights**

Unless specified otherwise in a Commercial Contract, this Article III states Buyer's rights when Buyer has received a Protocol Warranty:

- 3.1 Buyer shall have the right to recover at a minimum Warranty Damages for breach of the Protocol Warranty.
- 3.2 If Seller breaches the Protocol Warranty, or any of its other obligations under Article II, Buyer shall have such rights as afforded by Contract Law.
- 3.3 No action under Sections 3.1 or 3.2 above may be initiated by Buyer more than three years following delivery of the Warranted Products.
- 3.4 Rights under a Protocol Warranty will survive delivery of the Industry Products as to which it is given.

- 3.5 Buyer shall have the right to receive from Seller a Qualified Audit Certificate on, or promptly following, delivery of Industry Products that are subject to a Protocol Warranty.

#### **Article IV – Variation of Protocol**

- 4.1 Except as provided in Section 4.2 below, any provision of this Protocol may be varied by an express, written provision of a Commercial Contract or a Commercial Document that expressly references this Protocol and expressly states that a particular provision of this Protocol is to be varied. Failing such an express written variation, the terms of this Protocol shall override and be construed to negate, to the fullest extent permissible under Contract Law, the conflicting terms or contradictory provisions in a Commercial Contract that incorporates this Protocol by reference, or in a Commercial Document that provides a Protocol Warranty.
- 4.2 Notwithstanding Section 4.1 above, no variation shall limit or otherwise deprive a Buyer of the right to recover Warranty Damages for breach of a Protocol Warranty, although Contract Law, the provisions of a Commercial Contract or both may permit a Buyer to recover other or greater damages.

#### **Article V – Rules of Construction**

- 5.1 *Release Numbers.* When the term “Diamond Source Warranty Protocol” is used in a Commercial Document without reference to a Release Number, the user shall be deemed to be referring to the most current Release Number as of the date such Commercial Document is issued. When Industry Participants conclude a Commercial Contract that incorporates or otherwise references “Diamond Source Warranty Protocol”, they will be deemed to be referring to the most current Release Number as of the date such binding arrangement is entered into. When a Release Number is specified, the provisions of such Release shall be deemed referred to, notwithstanding subsequent Releases.
- 5.2 *Use of Defined Terms.* Unless otherwise defined or the context otherwise requires, a term defined in Article VI below shall have such meaning when used in any notice or other communication delivered from time to time in connection with any Commercial Document that incorporates this Protocol.
- 5.3 *Headings Etc.* The division of this Protocol into Articles, Sections, subsections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Protocol.
- 5.4 *Number and Gender.* In this Protocol the singular shall include the plural, the plural shall include the singular and the neuter shall include both the masculine and the feminine.

- 5.5 *Severability.* If any provision of this Protocol is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect: the legality, validity or enforceability of the remaining provisions of this Protocol or the legality, validity or enforceability of that provision in any other jurisdiction.
- 5.6 *Good Faith.* All obligations under this Protocol shall be undertaken in good faith.
- 5.7 *Use of Examples.* Whenever in this Protocol the phrase “such as” is used, it shall be construed to include the qualifier “but not limited to”.

### **Article VI – Defined Terms**

As used in this Protocol or in any Commercial Document incorporating this Protocol, the following initially capitalized words and phrases shall have the following meanings:

“Applicable Law” means all laws applicable to the Industry Participant or Independent Auditor in question.

“Best Knowledge” means that a Person, after due inquiry, believes that a statement is true and has no reason to believe that it is untrue.

“Buyer” means an Industry Participant who is a buyer of Industry Products in a Commercial Transaction and who has received a Protocol Warranty from a Seller in such Transaction.

“Commercial Contract” means a contractual arrangement between Industry Participants that evidences, anticipates or concludes a Commercial Transaction.

“Commercial Document” means any writing or electronic transmission that: evidences, anticipates or concludes a Commercial Transaction or that is a Source Document, including any agreement, memorandum of agreement, purchase order, blanket purchase order, blanket purchase agreement, purchase order acknowledgment, request for proposal, warranty, representation, certification, guaranty, import documentation, Kimberley Process certificate, packing list, invoice, bill of sale, memorandum of consignment, receipt, security or lien instrument, filing, and item of correspondence.

“Commercial Transaction” means a sale of an Industry Product in which one Industry Participant is the Buyer and another Industry Participant is the Seller.

“Contract Law” means the law applicable to the formation, enforceability and interpretation of a specific Commercial Contract or governing a specific Commercial Transaction.

“Control” means the ability of one Person to control a second Person through an employment arrangement, through majority ownership of the voting stock of such second Person, or through the ability to appoint a majority of the directors of such second

Person, provided that engagement of a Person as an Independent Auditor shall not constitute Control of such Person.

“Document Retention Period” means the greater of (i) two years following the Commercial Transaction to which a Commercial Document relates and (ii) the period required by Applicable Law.

“Independent” means, with respect to one Person and the relationship of that Person to a second Person, free from the Control of such second Person and having no material relationship with such second Person (either directly or indirectly), provided that a Person who serves as the independent registered public accounting firm of a second Person shall be deemed Independent of such second Person and the Affiliates of such Person.

“Independent Auditor” means an auditing, accounting or investigatory firm that is Independent from the Person who has hired the firm.

“Industry Participant” means a Person who, in the regular course of its business, produces or buys Industry Products for sale or resale. For the avoidance of doubt, the term “Industry Participant” does not include reference to a retail consumer.

“Industry Product” means a rough diamond, a polished diamond, an item of diamond jewelry, and any other item embellished with diamonds, such as a watch.

“Inventory Control Procedures” means record-keeping and physical control policies and procedures with respect to a Seller’s acquisition, disposal, inventory and Processing of Industry Products.

“Negative Warranty” means a warranty from a Seller to a Buyer that an Industry Product was not, to the Best Knowledge of Seller, Obtained from or Processed by, and does not contain diamonds Obtained from or Processed by, a Subject Source or an SDNBP.

“Obtained” means, (i) with reference to a diamond, that it was mined or otherwise removed from the earth, the waters or the seabed of a particular country and (ii) with reference to any Industry Product, that it was purchased or otherwise obtained from a particular Person.

“Person” means a natural person, a corporation, a partnership, a limited partnership, a trust, a limited liability company, any other form of business organization and any other organization or entity that engages in Commercial Transactions, including sovereign governments, parastatals and quasi-governmental organizations or entities.

“Processed” and “Processing” means, (i) with reference to a diamond, operations performed upon the diamond, including sawing, cutting, polishing, grading or assorting; (ii) with reference to an item containing diamonds, operations performed to create or complete the item, including fabricating, molding, machining, setting, assembling, polishing or inspecting; and (iii) with reference to either a diamond or an item containing a diamond, storing, inventorying or warehousing.

“Protocol” means this Diamond Source Warranty Protocol, Release Number 1.0.

“Protocol Warranty” means a Negative Warranty concerning an Industry Product which (i) is given in a Commercial Contract which incorporates this Protocol as provided for under Article III above, (ii) provides for the recovery of Warranty Damages for its breach and (iii) survives delivery of the Industry Product in question.

“Qualified Audit Certificate” means a document (including a copy), intended for transmittal to Buyers, the original of which was issued by an Independent Auditor, attesting to the following:

- (i) that it is an Independent Auditor under the terms of this Protocol;
- (ii) that the Independent Auditor has completed a review of Seller’s Inventory Control Procedures within the past year;
- (iii) that Seller’s Inventory Control Procedures constitute Qualified Inventory Control Procedures as to the following Subject Sources: [list Subject Sources that are included in such Inventory Control Procedures]; and
- (iv) that, based upon such review, Seller consistently applies its Inventory Control Procedures.

“Qualified Inventory Control Procedures” means Inventory Control Procedures maintained by a Seller of Industry Products, while such Industry Products are within Seller’s custody and control, which provide reasonable assurance that:

- (i) diamonds from Subject Sources and USPs, if any, are identified so as to be distinct, or otherwise segregated, from other diamonds through all stages of Processing;
- (ii) Industry Products containing diamonds from Subject Sources and USPs, if any, are identified so as to be distinct, or otherwise segregated, from other Industry Products through all stages of Processing; and
- (iii) Protocol Warranties given by such Seller are accurate; and

include provisions for retention of Commercial Documents: which specify where a an Industry Product was Obtained; or provide a prior Protocol Warranty with respect to such Industry Product as to the Subject Source in question.

“SDNBP” means a Person who is designated as a “Specially Designated National and Blocked Person” by the Office of Foreign Assets Control (“OFAC”) of the U.S. Department of Treasury.

“Seller” means an Industry Participant who is the seller of Industry Products in a Commercial Transaction.

“Seller’s Obligations” means the representations and obligations of a Seller who has provided a Protocol Warranty, as set forth in Article II above.

“Source Document” means a Commercial Document or other instrument, certificate or report that affirmatively evidences where an Industry Product was Obtained or Processed. The term Source Document includes Kimberley Process Certificates.

“Subject Source” means a country or Person that is designated a Subject Source under a Commercial Contract, a Commercial Document or in a Protocol Warranty.

“Unknown Source Products” or “USPs” means diamonds or other Industry Products for which Source Documents or prior Protocol Warranties are not available to the Seller.

“Warranted Products” means Industry Products that are the subject of a Protocol Warranty.

“Warranty Damages” means the difference in value between an Industry Product that bears a Protocol Warranty and that same Industry Product if it were sold without a Protocol Warranty. For the avoidance of doubt, Warranty Damages are minimum damages and may be supplemented as provided in Section 4.2 above.

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The most recent Release of this Protocol was developed by the following organizations and is published on their respective websites:

Jewelers of America: [www.jewelers.org](http://www.jewelers.org)

Jewelers Vigilance Committee: [www.jvclegal.org](http://www.jvclegal.org)

Diamond Manufacturers & Importers Association of America: [www.dmia.net](http://www.dmia.net)

It may be downloaded and used without charge.