

CONFLICT MINERALS AND INTERNATIONAL BUSINESS: UNITED STATES AND INTERNATIONAL RESPONSES

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I. INTRODUCTION

A recent headline read, “Blood on Your Handset: Is your Cellphone Made with Conflict Minerals Mined in the Congo? The industry doesn’t want you to know.”¹ The message the headline purported to convey is reminiscent of a similar concern a few years back with trade in “blood diamonds,” or “clouded diamonds.”² During that period, rebel movements throughout the African continent used proceeds from such trade to finance armed conflicts and undermine legitimate governments, with the major trouble areas being the Democratic Republic of the Congo (DRC), Angola, and Sierra Leone.³ This is an unfortunate illustration of “resource curses,” a situation where in a poor country natural resource abundance creates the problem of poor governance, corruption, and nepotism.⁴

As a result of growing awareness of this grave problem and public pressures, attempts to find a solution led eventually to the Kimberley

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1. Ciara Torres-Spellisc, *Blood on Your Handset: Is Your Cellphone Made with Conflict Minerals Mined in the Congo? The Industry Doesn’t Want You to Know*, SLATE.COM (Sept. 20, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/conflict_minerals_from_the_congo_is_your_cellphone_made_with_them.html (last visited Jan. 30, 2014).

2. See Shannon K. Murphy, *Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process will Ultimately Fail in Ending Conflicts Fueled By Blood Diamonds*, 11 PEPP. DISP. RESOL. L.J. 207, 221–22 (2011).

3. *Id.*

4. *Id.*

Process Certification Scheme (KPCS), adopted by thirty-nine diamond-trading countries in 2002⁵ with implementation beginning in 2003.⁶ Under the process, “conflict diamonds” are identified and excluded from the legitimate trade.⁷ However, because of the voluntary nature of the KPCS—with self-policing, inadequate monitoring, consensus decision-making, no administrative structure, and no independent oversight—the results have been mixed and the KPCS has faced severe criticism.⁸

For some time now, trade in “conflict minerals,” which are mined in the DRC and adjoining countries in the Great Lakes region of Africa, have also been fueling armed conflicts in the region. Consumer demand for cell phones, laptops, appliances, and jewelry fuels this trade and triggers the conflicts. Several civil society groups have been actively seeking effective means to end trade in conflict minerals originating in this region as proceeds from such trade are one of the key elements responsible for the ongoing conflicts.⁹

In response, the U.S. Congress in July 2010, included conflict minerals provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁰ In May of 2010, the U.S. State Department stated in a press release:

Minerals like tungsten, tin, tantalum and gold are used in a range of industries, including electronics, jewelry and automotive. Armed groups and military units in eastern DRC have used debt, coercion and physical violence to force villagers to extract these minerals from local mines. Proceeds from the illicit sale and

5. Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 218, 224–25 (2005).

6. *Id.*

7. *Kimberley Process Certification Scheme*, KIMBERLEYPROCESS.COM, available at <http://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf> (last visited Feb. 17, 2014).

8. See Murphy, *supra* note 2, at 221; see also Julie E. Nichols, *A Conflict of Diamonds: The Kimberley Process and Zimbabwe's Marange Diamond Fields*, 40 DENV. J. INT'L L. & POL'Y 648, 650 (2012), and Ian Smillie, Symposium, *Blood Diamonds and Non-State Actors*, 46 VAND. J. TRANSNAT'L L. 1003, 1014 (2013).

9. *Breaking the Links Between Natural Resources and Conflict: The Case for EU Regulation*, GLOBALWITNESS.ORG (Sept. 2013), http://www.globalwitness.org/sites/default/files/library/BreakingtheLinks_ENG.pdf (last visited Feb. 17, 2014) [hereinafter *Breaking the Links*]; THE ENOUGH PROJECT TEAM AND GRASSROOTS RECONCILIATION GROUP, A COMPREHENSIVE APPROACH TO CONGO'S CONFLICT MINERALS 1 (Apr. 2009), available at <http://www.enoughproject.org/files/Comprehensive-Approach.pdf> (last visited Feb. 17, 2014); *Conflict Minerals*, ENOUGHPROJECT.ORG, <http://enoughproject.org/conflict-minerals> (last visited Jan. 30, 2014).

10. 15 U.S.C. § 78m(p)(5) (2012).

trade of these metals are used to perpetuate the cycle of conflict, human trafficking physical and sexual violence and human rights abuses.¹¹

After President Obama signed the Act into law, then-Secretary of State Hillary Clinton commented that:

[The] measure . . . will require corporations to publicly disclose what they are doing to ensure that their products don't contain these minerals. The DRC has formally expressed its support for this law and has thanked both the executive and legislative branches of our government. This is one of several steps we are taking to stop this illicit and deadly trade.¹²

Subsequently, the European Commission has been exploring the form of its action on the conflict minerals issue.¹³ In September 2013, European Trade Commissioner Karel De Gucht said that through “a successful . . . initiative on responsible sourcing,” the European Union (EU) would seek first to “[h]elp keep money out of the hands of rebel groups,” and second, “[h]elp ensure that revenues from natural resources instead go to the government, strengthening the rule of law and improving the provision of vital services like health and education.”¹⁴

This paper primarily focuses on the United States effort, which includes the Dodd-Frank Act and the Securities and Exchange Commission's (SEC) rule promulgated pursuant to the Act that imposes certain disclosure requirements for companies that use conflict minerals originating in DRC and the adjoining countries.¹⁵ Part II discusses the

11. *Industry Representatives Discuss Conflict Minerals at the U.S. Department of State*, U.S. DEP'T OF STATE (May 14, 2010), <http://www.state.gov/r/pa/prs/ps/2010/05/141880.htm> (last visited Feb. 20, 2014).

12. U.S. Sec'y of State Hillary Clinton, *U.S. Financial Bill Will Require Disclosure on Conflict Minerals*, CONGOPLANET.COM (July 22, 2010), <http://www.congoplanet.com/news/1695/us-financial-bill-disclosure-conflict-minerals-hillary-clinton-barack-obama-goma.jsp> (last visited Feb. 20, 2014).

13. Katherine Llewellyn & Dynda A. Thomas, *European Union Trade Commissioner Hints at Broad Approach of EU Conflict Minerals Strategy*, LEXOLOGY.COM (Sept. 6, 2013), <http://www.lexology.com/library/detail.aspx?g=d1de7611-18a7-46aa-b48e-a75820d7094c> (last visited Feb. 20, 2014).

14. Karel De Gucht, European Trade Commissioner, Address at the Hearing of the Development Committee of the European Parliament/Brussels: Conflict Minerals: The Role of Trade (Sept. 17, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151848.pdf (last visited Feb. 20, 2014).

15. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b); David J. Levine & Raymond Paretzky, *SEC Proposes "Conflict Minerals" Disclosure*

pertinent provisions of the Dodd-Frank Act and Part III discusses the Final Rule. Part IV studies the subsequent developments, including the legal challenge to parts of the Rule by the National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable, who claim those provisions to be “arbitrary and capricious” under the Administrative Procedure Act (APA).¹⁶ They also mounted a constitutional challenge to both the Dodd-Frank Act Section 1502 and the Rule on First Amendment grounds.¹⁷ The concluding section, Part V, provides an appraisal.

II. REQUIREMENTS FOR COMPANIES UNDER SECTION 1502

Amending Section 13 of the Securities Exchange Act of 1934 (the “Exchange Act”),¹⁸ Section 1502 of the Dodd-Frank Act increases mandatory disclosure requirements relating to conflict minerals originating from the DRC.¹⁹ Senator Dick Durbin stated during the debate on the Act that the new disclosure scheme was “a reasonable step to shed some light on this literally life-and-death issue,” and that it would “encourage companies using these minerals to source them responsibly.”²⁰ Congress expressed its belief that “the exploitation and trade of conflict minerals originating in the [DRC] . . . is helping to finance conflict characterized by extreme levels of violence in the eastern [DRC], particularly sexual and gender-based violence, and [is] contributing to an emergency humanitarian situation”²¹ The statute requires the SEC to adopt regulations mandating companies that use conflict minerals, which are “necessary to

Rules to Implement Dodd-Frank Provisions, MCDERMOTT WILL & EMERY (Jan. 13, 2011), <http://www.mwe.com/SEC-Proposes-Conflict-Minerals-Disclosure-Rules-to-Implement-Dodd-Frank-Provisions-01-13-2011/?PublicationTypes=d9093adb-e95d-4f19-819a-f0bb5170ab6d> (last visited Feb. 20, 2014).

16. Delcy P. Sweet, *United States: SEC Conflict Mineral Rule Upheld By The Federal District Court*, MONDAQ.COM (Aug. 5, 2013), <http://www.mondaq.com/unitedstates/x/256164/Securities/SEC+Conflict+Minerals+Rule+Upheld+by+the+Federal+District+Court> (last visited Feb. 20, 2014).

17. *Id.*

18. 15 U.S.C. § 78m(p) (2012).

19. *Id.*

20. Dick Durbin, *Restoring American Financial Stability Act of 2010*, VOTESMART.ORG (May 17, 2010), <http://votesmart.org/public-statement/508952/restoring-american-financial-stability-act-of-2010#.Uu1AosKA0Zx> (last visited Feb. 20, 2014).

21. Melvin Ayogu & Zenia Lewis, *Opinion, Conflict Minerals: An Assessment of the Dodd-Frank Act*, BROOKINGS.EDU (Oct. 3, 2011), <http://www.brookings.edu/research/opinions/2011/10/03-conflict-minerals-ayogu> (last visited Feb. 20, 2014).

the functionality or production of a product,”²² to disclose to the Commission whether those minerals originated in the DRC or an adjoining country²³ such as: Angola, Burundi, Central African Republic, Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.²⁴

Both the Dodd-Frank Act and the Final Rule define conflict minerals as “columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives,” along with any other mineral or derivative that the Secretary of State determines is “financing conflict” in the DRC.²⁵ “The derivatives most commonly extracted from these conflict minerals are tantalum, tin, gold and tungsten.”²⁶ If such conflict minerals did originate in the DRC or an adjoining country, then companies must also submit an additional report to the Commission containing a “description of the measures taken . . . to exercise due diligence on the source and chain of custody of such minerals,” and “a description of the products manufactured or contracted to be manufactured that are not DRC conflict free.”²⁷

The statute defines “DRC conflict free” as a product that “does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country.”²⁸ The report must also describe “the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and [the] efforts to determine the mine or location of origin with the greatest possible specificity.”²⁹ An additional requirement of the statute is that the company making any disclosure or reports to the SEC under these provisions must make such disclosures or reports publicly available on the company’s own website.³⁰

In Section 1502, the statute “also created responsibilities for other federal agencies.”³¹ To illustrate, the Comptroller General is required to submit regular reports to Congress assessing “the rate of sexual and gender-based violence in war-torn areas in the DRC and adjoining countries.”³²

22. 15 U.S.C. § 78m(p)(2)(B) (2012).

23. *Id.* § 78m(p)(1)(A).

24. *Id.*

25. H.R. 4173, 111th Cong. § 1502(c)(4) (2010).

26. *The Conflicts Minerals Rule*, AM. COATINGS ASS’N (Sept. 2013), http://www.paint.org/component/docman/cat_view/53-backgrounder.html?start=10 (last visited Feb. 20, 2014).

27. 15 U.S.C. § 78m(p)(1)(A)(i)–(ii) (2012).

28. *Id.* § 78m(p)(1)(D).

29. *Id.* § 78m(p)(1)(A)(ii).

30. *Id.* § 78m(p)(1)(E).

31. Nat’l Ass’n of Mfrs. v. S.E.C., 956 F. Supp. 2d 43, 47 (D.C. Cir. 2013).

32. H.R. 4173, 111th Cong. § 1502(d)(1) (2010).

The Secretary of State is also required to “submit to the appropriate congressional committees a strategy to assess the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products.”³³ The statute also requires the Secretary to produce and make publicly available “a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the [DRC] and adjoining countries.”³⁴

III. REQUIREMENTS UNDER THE SEC RULE

Companies are required to follow three overall steps to comply with the Section 1502 requirements. Step one requires the company to determine whether it is covered by the Rule’s requirements.³⁵ The Rule applies to issuers that “file reports with the Commission under Section 13(a) or Section 15(c) of the Exchange Act,”³⁶ and for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted by that issuer to be manufactured.³⁷ The Final Rule clarifies that for a company to be considered as “contracting to manufacture” a product, it should have some actual influence over the manufacturing of that product.³⁸

The SEC gave examples as to when an issuer would not be viewed as “contracting to manufacture a product”:

[I]f the company’s actions involve no more than . . . [s]pecifying or negotiating contractual terms . . . that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution, or other like terms . . . ; [a]ffixing its brand, marks, logo, or label to a generic product manufactured by a third party; . . . [s]ervicing, maintaining, or repairing a product manufactured by a third party.³⁹

The Commission clarified the reason for this approach is that it avoids sweeping a pure retailer into the Rule’s scope because companies that simply offer a “generic product under [its] own name or a separate brand

33. *Id.* § 1502(c)(1).

34. *Id.* § 1502(c)(2)(A)(i).

35. *See* Conflict Minerals, 77 Fed. Reg. at 56,274.

36. *Id.* at 56,287.

37. *Id.* at 56,279.

38. *Id.* at 56,291.

39. *Id.*

name” generally do not exert a sufficient degree of influence over the manufacturing process.⁴⁰

Also, despite many comments asking the Commission to adopt a *de minimis* exception to the Rule’s coverage, the Commission declined to adopt any type of categorical exception.⁴¹ The SEC concluded that a *de minimis* exception would be contrary to the Rule’s purpose because the standard “focuses on whether the conflict mineral is ‘necessary’ to a product’s functionality or production,” rather than “the amount of a conflict mineral contained in the product.”⁴² It should be noted that the Commission did not define when a conflict mineral is “necessary” to the functionality or production of a product in the proposed rule.

Issuers subject to the conflict minerals rule must then conduct a “reasonable country of origin inquiry.”⁴³ The inquiry has to be “reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries or are from recycled or scrap sources, and perform[ed] in good faith.”⁴⁴ The Commission explained that it would “view an issuer as satisfying the reasonable country of origin inquiry standard if it seeks and obtains reasonably reliable representations . . . directly from that facility or indirectly through the issuer’s immediate suppliers”⁴⁵

Thus, the issuer must “[indicate] the facility at which its conflict minerals were processed and demonstrat[e] that those conflict minerals did not originate in the Covered Countries or c[o]me from recycled or scrap sources.”⁴⁶ As to the reasonable country of origin inquiry, the Commission clarified that such inquiry “is consistent with the supplier engagement approach in the [Organisation for Economic Co-operation and Development] OECD Guidance where issuers use a range of tools and methods to engage with their suppliers. The results of the inquiry may or may not trigger due diligence.”⁴⁷ The *OECD Due Diligence Guidance for Reasonable Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*⁴⁸ will be discussed later. The Commission expects issuers to be

40. See Conflict Minerals, 77 Fed. Reg. at 56,290.

41. See *id.* at 56,295.

42. *Id.* at 56,298.

43. *Id.* at 56,299.

44. *Id.* at 56,280.

45. See Conflict Minerals, 77 Fed. Reg. at 56,312.

46. *Id.*

47. *Id.*

48. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD DUE DILIGENCE GUIDANCE FOR REASONABLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 1* (2013), available at <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>

aware of the “warning signs” and “red flags,” which may suggest that their minerals originated in the Covered Countries, or otherwise cast doubt on the source of their minerals.⁴⁹ Through such an inquiry, if an issuer:

[K]nows that its conflict minerals did not originate in the Covered Countries or knows that they came from recycled or scrap sources, or the issuer has no reason to believe its conflict minerals may have originated in the Covered Countries, or the issuer reasonably believes its conflict minerals came from recycled or scrap sources, then in all such cases the issuer must disclose its determination and describe briefly in the body Form SD, the reasonable country of origin inquiry it undertook and the results of the inquiry.⁵⁰

On the other hand, if a company knows or has reason to believe that the minerals “may have originated in the Covered Countries and may not have come from recycled or scrap sources” then the issuer must proceed to the third step of the Rule.⁵¹

It is then that the issuer must perform “due diligence” on the source and supply chain of its minerals and deliver a Conflict Minerals Report (CMR).⁵² The issuer is required “to use a nationally or internationally recognized due diligence framework, if such a framework is available for the specific conflict mineral.”⁵³ According to the Commission, the OECD Due Diligence Guidance satisfies its 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.”⁵⁴ Also, as a “critical component of due diligence,” an independent, “private sector audit is required.”⁵⁵ The audit is designed to ensure that the issuer’s due diligence “is in conformity with . . . [a] nationally or internationally recognized due diligence framework” and that the issuer’s actual due diligence efforts comport with the due diligence approach, as described in its report.⁵⁶

(last visited Feb. 20, 2014) [hereinafter OECD DUE DILIGENCE GUIDANCE] (addressing supply chain management for “tin, tantalum, tungsten, their ores, and mineral derivatives, and gold”).

49. Conflict Minerals, 77 Red. Reg. at 56,313.

50. *Id.* at 56,359.

51. *Id.* at 56,281.

52. *Id.*

53. *Id.*

54. *See* Conflict Minerals, 77 Red. Reg. at 56,326.

55. *Id.* at 56,320.

56. *Id.* at 56,328.

If the issuer's due diligence shows that its minerals did originate in the Covered Countries and did not come from recycled or scrap sources, or if the issuer is unable to determine the source of its conflict minerals through due diligence, the issuer must prepare and submit a CMR to the SEC.⁵⁷ However, following due diligence, if an "issuer determines that its conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources, the issuer is not required to submit a [CMR]" but the issuer must still prepare and submit a Form SD to the Commission describing the scope and results of its due diligence efforts.⁵⁸

The CMR must include a description of the issuer's products that "have not been found to be 'DRC conflict free,'"⁵⁹ and must include "a description of the measures the issuer has taken to exercise due diligence on the source and chain of custody of" its conflict minerals, which must be accompanied by "a certified independent private sector audit."⁶⁰ Also, if the company's products cannot be identified as "DRC conflict free," the Report must provide "a description of the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity."⁶¹ The Commission also authorized a temporary transition period of two years for those companies unable to determine the origin of their conflict minerals, which are to be described as those minerals as "DRC conflict undeterminable," rather than as having not been found to be 'DRC' conflict free.⁶² Smaller companies are given a temporary transition period of four years.⁶³

Companies are not required to place any type of label or disclosure on products, although a copy of the CMR must be publicly posted on the company's website.⁶⁴ The Final Rule became effective on November 13, 2012, and the first reports and disclosures are due to be filed with the Commission by May 31, 2014.⁶⁵ OECD's *Due Diligence Guidance* provides guidelines for companies that build on the general due diligence principle and supply chains provisions contained in the OECD Guidelines

57. See *id.* at 56,345.

58. *Id.* at 56,315.

59. See Conflict Minerals, 77 Red. Reg. at 56,360.

60. *Id.* at 56,320.

61. *Id.*

62. *Id.* at 56,322.

63. *Id.* at 56,323.

64. See Conflict Minerals, 77 Red. Reg. at 56,333.

65. See *id.*

for Multinational Enterprises.⁶⁶ As a multi-stakeholder initiative, the *Due Diligence Guidance*, which involved the OECD, the United Nations, governments of the Great Lakes region of Africa, the business community, and civil society representatives, provides recommendations to companies operating in or sourcing minerals from conflict-affected and high-risk areas that is designed to help them avoid contributing to the conflicts fueled by natural resources.⁶⁷

Due diligence processes for supply chains of minerals must be consistent with relevant international standards and applicable law.⁶⁸ Under the *Due Diligence Guidance*, the “nature and extent of due diligence that is appropriate will depend on individual circumstances and be affected by factors such as the size of the enterprise, the location of the activities, the situation in a particular country, [and] the sector and nature of the products or services involved.”⁶⁹ The *Due Diligence Guidance* consists of a five-step framework for risk-based due diligence in supply chains of minerals from conflict affected and high-risk areas:

- 1) Establish strong company management systems;
- 2) Identify and assess risk in the supply chain;
- 3) Design and implement a strategy to respond to identified risks;
- 4) Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and
- 5) Report on supply chain due diligence.⁷⁰

The *Due Diligence Guidance* recommends a model mineral supply chain policy, which provides a common set of clear expectations on responsible sourcing and risk management strategies in order to respond to identified risks that contribute to conflict or serious human rights abuses by sourcing practices.⁷¹ It suggests measures for risk mitigation and indicators for measuring improvement.⁷² It also provides a separate supplement on tin, tantalum, and tungsten.⁷³

66. Lahra Liberti, *OECD 50th Anniversary: The Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendation on Due Diligence Guidance for Conflict-Free Minerals Supply Chains*, 13 *BUS. L. INT'L* 35, 35–36 (2012).

67. OECD DUE DILIGENCE GUIDANCE, *supra* note 48, at 3, 9.

68. *See id.* at 66–68.

69. *Id.* at 15.

70. *Id.* at 17–19.

71. *Id.* at 20.

72. OECD DUE DILIGENCE GUIDANCE, *supra* note 48, at 25.

73. *Id.* at 31–34.

IV. SUBSEQUENT DEVELOPMENTS

A. *Legal Challenge*

In *Nat'l Ass'n of Mfrs. v. S.E.C.*,⁷⁴ the National Association of Manufacturers, joined by the Chamber of Commerce and the Business Roundtable, challenged several aspects of the SEC's Final Rule, claiming that the Commission had ignored its obligations under the Exchange Act in issuing the Rule and that the Commission's rule-making was arbitrary and capricious under the APA.⁷⁵ They also challenged the Final Rule, as well as Dodd-Frank, Section 1502 on constitutional grounds, arguing that the publication of disclosures on the companies' websites, required by both the SEC and Congress, compel speech in violation of the First Amendment.⁷⁶ The District Court rejected both these challenges, upholding the Final Rule implementing Section 1502.⁷⁷

The Court conducted a detailed and thorough analysis, separately addressing the plaintiffs' two claims. Rejecting the challenge to the SEC's cost-benefits analysis, the Court commented on the benefits aspects:

[U]pon review of the record, the Court is convinced that the Commission appropriately considered the various factors that Sections 3(f) and 23(a)(2) of the Exchange Act actually require. No statutory directive obligated the Commission to reevaluate and independently confirm that the Final Rule would actually achieve the humanitarian benefits Congress intended. Rather, the SEC appropriately deferred to Congress's determination on this point, and its conclusion was not arbitrary, capricious, or contrary to law⁷⁸

On the SEC's cost analysis, the Court said that "the Commission weighed comments received from the various parties and exercised its discretion in concluding which figures were most appropriate . . . the Court cannot say that the SEC acted arbitrarily or capriciously in reaching this particular estimate."⁷⁹ The Court rejected the plaintiffs' argument that the Final Rule should have included a *de minimis* clause exempting companies using small amounts of conflict minerals from reporting under the law,

74. See *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 46.

75. *Id.* at 54.

76. *Id.*

77. *Id.*

78. *Id.* at 59.

79. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 61.

stating that given the SEC's "broader conclusion" that conflict minerals are often used in minute amounts, the SEC believed that any type of categorical *de minimis* exception had the potential to swallow the rule and would be inappropriate; this analysis was sufficient to satisfy the Commission's obligations under the APA.⁸⁰ Thus, the Court concluded, "the Commission's choice not to include a *de minimis* exception in the Final Rule was the product of reasoned decision-making, and the Court finds no basis under the APA to subjugate the Commission's prerogative on this point."⁸¹

Rejecting the plaintiffs' challenge to the Final Rule's "reasonable country of origin inquiry," the Court concluded the SEC's adoption of this rule "is based on a reasonable and permissible construction of Section 1502, and is not otherwise arbitrary or capricious in contravention of the APA."⁸² The Court also upheld the Commission's extension of the Final Rule to companies that "contract to manufacture" products with necessary conflict minerals, rather than applying it to only those issuers or companies that themselves manufacture such products, as it found the SEC's decision to be "a perfectly permissible construction of Section 1502."⁸³ Similarly, the Court upheld the Commission's adoption of a different phase-in period of four years for small companies, declining "to substitute its judgment on this question for the Commission's."⁸⁴

Finally, on the plaintiffs' separate constitutional challenge that the disclosure requirements under the Final Rule and Dodd-Frank Section, Section 1502 "improperly compel 'burdensome and stigmatizing speech' in violation of the First Amendment," the Court found that the disclosure scheme "directly and materially" advanced Congress's interest in promoting peace and security in the DRC and the adjoining countries, and rejected the challenge.⁸⁵ The plaintiffs appealed the Court's decision, and oral arguments were scheduled for January 7, 2014.⁸⁶ A dozen current and former members of Congress are among those who submitted an amicus brief in support of the decision.⁸⁷ Acknowledging that the implementation

80. *Id.* at 62.

81. *Id.* at 66.

82. *Id.* at 70.

83. *Id.* at 72.

84. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 73.

85. *Id.*

86. Reply Brief for Petitioner, at 1, *Nat'l Ass'n of Mfrs. v. S.E.C.*, 956 F. Supp. 2d 43 (D.C. Cir.) (No. 13-5252).

87. Notice of Intent to File as Amici Curiae, *Nat'l Ass'n of Mfrs. v. S.E.C.*, 956 F. Supp. 2d 43 (D.C. Cir.) (No. 13-5252).

of the requirements is difficult, Representative Eliot Engel (D-NY) said in a statement, “[b]ut we felt and continue to feel that these challenges are worth it to protect the human and labor rights of very vulnerable individuals in remote areas of the world, particularly the [DRC].”⁸⁸ Representative Jim McDermott (D-WA) added, “[h]opefully, it will also create transparency that consumers and investors deserve.”⁸⁹

B. Other Developments

Non-government organizations (NGO) have remained active in lobbying for effective action to end trade in conflict minerals. To illustrate, as mentioned above, several NGOs called on the European Commission to adopt legislation, which would mandate European companies to undertake due diligence so that those in their supply chain do not engage in production and trade in such minerals.⁹⁰ Such a legislative framework would “clarify the responsibilities of European companies and . . . provide the basis for appropriate oversight by regulators, markets and consumers.”⁹¹ The NGOs called for the legislation to be binding, to apply to all segments of the supply chain, and to have a global geographic scope and a broad material scope applicable to all natural resources.⁹²

Another initiative contrasts Dodd-Frank, Section 1502 with the Due Diligence Guidance, as the former is seen to have “the unfortunate unintended consequence of reducing formal trade in minerals, so depriving tens of thousands of artisanal miners of their livelihood,” due to the Due Diligence Guidance “place[ing] the focus on responsible processes . . . support[ing] a responsible minerals trade in conflict-affected areas, [and] helping to improve economic and social conditions.”⁹³

It suggests that the EU should undertake the following three linked initiatives:

- 1) The EU should “encourage all companies to publicly disclose their conflict-sensitive production or sourcing

88. *Lawmakers Join Fight Over Conflict Minerals Regulation*, THEHILL.COM (Oct. 31, 2013), <http://thehill.com/blogs/regwatch/court-battles/188923-lawmakers-join-fight-over-conflict-minerals-regulation> (last visited Feb. 20, 2014).

89. *Id.*

90. *Breaking the Links*, *supra* note 9.

91. *Id.*

92. *Id.*

93. *Addressing Human Rights Abuses From Gold Mining Without Stigmatisation*, EURACTIV.COM (June 13, 2013), <http://www.euractiv.com/print/trade/gold-council-eu-needs-business-h-analysis-528511> (last visited Feb. 1, 2014).

- practices,” regarding all minerals, countries, and supply chains, without mandating their use of a specific instrument;⁹⁴
- 2) The EU should give consideration to creating a public-private alliance aimed at actively supporting and encouraging a responsible minerals trade;⁹⁵ and
 - 3) The EU’s development aid should support appropriate “formalization programmes” in order to reduce the risk of fueling unlawful armed conflict arising from illegal mining.⁹⁶ This initiative would promote responsible sourcing and address the development needs of resource-rich countries.⁹⁷

Another report, *Coming Clean: A Proposal for Getting Conflict Minerals Back on Track*,⁹⁸ used field research to reveal that governments in the Great Lakes Region, including the Congo and Rwanda, have not yet fulfilled their commitments to the mineral certification process designed by the International Conference on the Great Lakes Region (ICGLR) to ensure accountability and transparency, which is undermining the credibility of the system.⁹⁹ The ICGLR’s framework is called the ICGLR Regional Initiative against the Exploitation of Natural Resources, and its mineral certification scheme, called the Regional Certification Mechanism (RCM), is a main part of the initiative.¹⁰⁰ The RCM has four components:

- 1) Mine inspection and traceability;
- 2) A regional mineral tracking database;
- 3) Audits which are overseen by the ICGLR Audit Committee, a committee of electronics companies, regional governments, and NGOs which is not yet finalized; and
- 4) Independent monitoring, by the Mineral Chain Auditor which has not yet been brought together.¹⁰¹

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Aaron Hall & Sasha Lezhnev, *Coming Clean: A Proposal for Getting Conflict Minerals Certification on Track*, ENOUGHPROJECT.ORG (Nov. 2013), <http://www.enoughproject.org/files/ComingClean-Getting-Conflict-Minerals-Certification-on-Track.pdf> (last visited Feb. 20, 2013)

99. *Id.*

100. *Id.*

101. *Id.*

The report warned that without the full application of this process, these countries risk disengagement from multinational companies, which might halt consumption from those mines that are not certified as conflict free. The report made recommendations to the United States, the EU, and other governments, as well as donors, to provide necessary help so that these governments implement the certification process.¹⁰² Aaron Hall, co-author of the report, stated:

Certification is the most critical component of the entire conflict-free minerals system. If minerals from the Great Lakes region cannot be certified as conflict-free, then efforts to trace and audit become moot. Without functioning regional audits or an independent Mineral Chain Auditor, minerals cannot be credibly certified according to regional and international standards.¹⁰³

Dodd-Frank, Section 1502 has indeed been a catalyst to international efforts addressing conflict minerals issues. In addition to the EU, Canada has been exploring certification schemes to prevent the sale of conflict minerals to their companies.¹⁰⁴ On March 27, 2013, the European Commission launched a public consultation on conflict minerals to get views on “a potential EU initiative for responsible sourcing of minerals coming from conflict zones and high-risk areas.”¹⁰⁵ The focus of such an initiative in Europe is on being “reasonable and effective,” and it is aimed at complementing and continuing “ongoing due diligence initiatives and support for good governance in mineral mining, especially in developing countries affected by conflict.”¹⁰⁶

The EU is considering replicating its own initiative after Dodd-Frank and is also looking for guidance to the OECD.¹⁰⁷ European Trade

102. *Id.*

103. Carine Umuhumuza, *Conflict Minerals: Companies May Stop Buying Unless Certification is Sped Up*, ENOUGHPROJECT.ORG (Nov. 11, 2013), <http://www.enoughproject.org/node/6918> (last visited Feb. 1, 2014).

104. Zachary Hawley, *Reducing Violence Associated with Conflict Minerals*, GLICA.ORG (Feb. 1, 2014), <http://www.glica.org/topics/show/93> (last visited Feb. 20, 2014).

105. *EU Calls For Input On Conflict Minerals*, EUROPEAN COMMISSION (Mar. 27, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=882> (last visited Feb. 1, 2014).

106. *Id.* (The EU received 280 replies, of which 80% of businesses indicated an interest in responsible sourcing); see Karel De Gucht, European Trade Commissioner, Address at the BDI Event: Responsible Sourcing of Minerals from Conflict-Affected Regions/Brussels: Conflict Minerals: The Need to Act (Sept. 3, 2013), available at http://europa.eu/rapid/press-release_SPEECH-13-673_en.htm (last visited Feb. 20, 2014).

107. Kristen Wallerstedt, *EU and Canada Consider Conflict Minerals Rules*, 3COMPANY (Apr. 4, 2013), <http://3ecompany.com/blog/?p=172> (last visited Feb. 20, 2014).

Commissioner De Gucht has indicated that the EU's initiative will have a broader coverage than Dodd-Frank, as he stated, "[c]onflict minerals is not a problem exclusive to the Great Lakes Region," because the guerillas in Colombia and Venezuela have reportedly been using production of both gold and the tantalum ore, coltan, to continue their campaign since the production of cocaine has become more difficult."¹⁰⁸ He also preferred the European focus on "providing smelters—the narrowest point in the supply chain—with incentives to carry out due diligence on their upstream suppliers."¹⁰⁹ A consensus seemed to be emerging that after conducting an impact assessment of the potential EU Directive, the OECD Due Diligence Guidance should be used "as a reference in terms of both relevant products and scope," and the likely target would be the upstream part of the supply chain, that is, from mine to smelter.¹¹⁰

Canada has also been considering action on conflict minerals to ensure that they are not used by Canadian companies in their supply chain.¹¹¹ A comprehensive "private member's bill" was introduced in the Canadian Parliament on March 26, 2013 that addresses corporate practices related to conflict minerals from the Great Lakes Region, including their "extraction, processing, purchase, trade, and use."¹¹²

Among other industry groups, the World Gold Council has undertaken initiatives to combat potential misuse of gold to fuel armed conflicts.¹¹³ In October 2012, it established the Conflict-Free Gold Standard, providing a common approach for gold producers to assess the ways their gold has been extracted, and a way to show that the gold they mine is conflict-free.¹¹⁴ The process includes a human rights commitment, transparency about payments to government officials, and steps to report any infringements of this process to resolve grievances that local people might raise, with a yearly external assessment.¹¹⁵

108. De Gucht, *supra* note 14, at 3.

109. De Gucht, *supra* note 106, at 4.

110. Harrison Mitchell, *A Quick Update on a Possible EU Directive on Conflict Minerals*, RCSGLOBAL.COM (Oct. 7, 2013), <http://www.rcsglobal.com/blog/a-quick-update-on-a-possible-eu-directive-on-conflict-minerals/> (last visited Feb. 20, 2014).

111. See Wallerstedt, *supra* note 107.

112. *Id.*

113. Aram Shishmanian, *World Gold Council Conflict-Free Gold Standard: An Introduction*, WORLD GOLD COUNCIL (Mar. 2012), http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/World_Gold_Council_Conflict_Free_Gold_Standard.pdf (last visited Feb. 20, 2014).

114. See Sue George, *Conflict Minerals: What Can The Mining Industry Do?*, THE GUARDIAN (May 15, 2013), <http://www.theguardian.com/sustainable-business/conflict-minerals-mining-industry> (last visited Feb. 20, 2014).

115. See *id.*

Another similar initiative is the Responsible Jewelry Council's Code of Practice (RJC), which encompasses both gold and diamonds, and is a mandatory requirement for all RJC members.¹¹⁶ Fiona Solomon, Director of Standards Development of RJC, said that it "welcomes gold, diamonds and platinum group metals companies from all parts of the supply chain, geographies, and size of business to find out how they can play their part in implementing responsible standards on the ground."¹¹⁷

These initiatives are important because the researchers have a new map showing mining sites in the eastern DRC controlled by armed groups and the Congolese armies, which show that "the number one conflict mineral from the region is now gold, which is harder to trace than the other minerals from the area."¹¹⁸

With the May 3, 2014 deadline for companies to make their first conflict minerals disclosures, the race is on to find effective software tools, but the available supply chain management software is not considered adequate to meet the disclosure requirements. Moreover, tracking the long chain of middlemen, smelters, and refiners is not easily automated, and most suppliers are unable to track the origins of their metals themselves. The issue is that "if people know where they get their ore from, their competitors will go to the source and cut them out of the supply chain."¹¹⁹ However, many consultants are currently providing the necessary advice to companies to meet the requirements.¹²⁰

116. *Id.*

117. *Id.*

118. Nick Long, *Map Shows Gold is Top Conflict Mineral in Eastern Congo*, VOICE OF AMERICA (Nov. 21, 2013), <http://www.voanews.com/articleprintview/1794975.html> (last visited Feb. 20, 2014).

119. *Deadline Looms for Conflict Minerals Reporting*, APICS.ORG (Nov. 19, 2013), <http://www.apics.org/apics-news/2013/11/19/deadline-looms-for-conflict-minerals-reporting> (last visited Feb. 1, 2014).

120. See generally SOURCE INTELLIGENCE, CONFLICT MINERALS COMPLIANCE: DATA ASSESSMENT AND ASSURANCE (Nov. 2013), available at http://www.sourceintelligence.com/userfiles/file/Data_Assessment_Assurance_White_Paper_Nov15.pdf (last visited Feb. 20, 2014); see generally ERNST & YOUNG, CONFLICT MINERALS: WHAT YOU NEED TO KNOW ABOUT THE NEW DISCLOSURE AND REPORTING REQUIREMENTS AND HOW ERNST & YOUNG CAN HELP (2012), available at [http://www.ey.com/Publication/vwLUAssets/Conflict_minerals/\\$FILE/Conflict_Minerals_US.pdf](http://www.ey.com/Publication/vwLUAssets/Conflict_minerals/$FILE/Conflict_Minerals_US.pdf) (last visited Feb. 20, 2014); see generally GIBSON DUNN, CONFLICT MINERALS: UNDERSTANDING THE SEC'S FINAL RULES (Sept. 14, 2012), available at <http://gibsondunn.com/publications/Documents/ConflictMinerals-UnderstandingFinalSECRules.pdf> (last visited Feb. 20, 2014); see generally Kristen Wallerstedt, *15 Tips for Complying with the Conflict Minerals Provision of the Dodd Frank Act*, ENVIRONMENTALLEADER.COM (Apr. 1, 2013), <http://www.environmentalleader.com/2013/04/01/15-tips-for-complying-with-the-conflict-minerals-provision-of-the-dodd-frank-act/> (last visited Feb. 20, 2014); see generally GRAINGER, CONFLICT MINERALS POLICY

V. APPRAISAL

It seems appropriate to begin this section by noting that the disclosure requirements in Dodd-Frank, Section 1502 do not fit the SEC's mission, as the purpose of the SEC's corporate disclosure is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."¹²¹ The purpose and scope of the requirement were described in the SEC's proposed rule in December 2010, which implemented Dodd-Frank Section, 1502: "It appears [to be] for the disclosure of certain information to help end the emergency humanitarian situation in the eastern DRC that is financed by the exploitation of trade of conflict minerals originating in the DRC countries"¹²² However, it also acknowledged that the requirement "is qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act."¹²³

Of course, there can be no challenge to the objective that Congress intended to accomplish. The horrors the armed gangs have inflicted upon the Congolese people are well known and have created a wide awareness that action must be taken to curb violence. Thus, the question is not whether action should be taken, but rather the form and nature of the action. What is questionable, however, is the choice of the SEC as the institution to require company disclosure to accomplish the task.

As the legislative history of Section 13 of the Exchange Act,¹²⁴ which was amended by Dodd-Frank, Section 1502, shows its disclosure requirements were aimed at the "furnishing of complete information relative to the financial condition of the issuer . . . which . . . [should] be kept up to date by adequate periodic reports."¹²⁵ Thus, the purpose was that reporting by a company would warn the potential investor about risks associated with investing in the company. In contrast, Section 1502 is aimed not at investor protection but prevention of exploitation and trade in

STATEMENT (Aug. 2013), available at <http://www.graingercsr.com/wp-content/uploads/2013/08/Conflict-Minerals-Policy.pdf> (last visited Feb. 20, 2014).

121. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC.GOV (June 10, 2013), <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 17, 2014).

122. Conflict Minerals, 75 Fed. Reg. 80,948, 80,960 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229 and 249).

123. *Id.*

124. 15 U.S.C. § 78a (1934).

125. Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315, 1322 (2012) (quoting S. REP. NO. 73-792, at 10 (1934)).

conflict minerals responsible for financing armed conflict in the DRC and contiguous countries in the region, thus curbing violence. Whether conflict minerals are present in a company's product is not material to investor.

Daniel M. Gallagher, one of the dissenting Commissioners, stated at an SEC Open Meeting when the rule was made implementing Section 1502:

Unfortunately, Section 1502 is about curtailing violence in the DRC; it is not about investor protection, promoting fair and efficient markets, or capital formation. Warlords and armed criminals need to fund their nefarious operations. Their funding is their lifeline; it's a chokepoint that should be cut off. That is a perfectly reasonable foreign policy objective. But it's not an objective that fits anywhere within the SEC's threefold statutory mission I do not like to see social or foreign policy provisions engrafted onto the securities laws. I have serious doubt, in any event, about the efficacy of using the securities laws to effect social and foreign policy aims, however noble and urgent. I do think it is incumbent on the Commission to identify and evaluate specifically the benefits of any rule we consider, including those driven by a congressional mandate. In that connection, I also believe that the limits of the SEC's statutory mission are relevant. For these reasons, I cannot support the rule.¹²⁶

On October 4, 2013, SEC Chairman Mary Jo White said in a speech at Fordham Law School in New York, "[s]eeking to improve safety in mines for workers or to end horrible human rights atrocities in the [DRC] are compelling objectives, which, as a citizen, I wholeheartedly share."¹²⁷ She added, however, that "as the chair of the SEC, I must question as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals."¹²⁸

Questions have also been raised about the efficacy of Section 1502 in accomplishing its purpose. To illustrate, at a House hearing on May 21, 2013, several participants expressed skepticism. David Aronson, a

126. Comm'r Daniel M. Gallagher, *Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd-Frank Act—The "Conflict Minerals" Provision*, SEC.GOV (Aug. 22, 2012), http://www.sec.gov/News/Speech/Detail/Speech/1365171490886#UwaJ_Hlakds (last visited Feb. 20, 2014).

127. *SEC Chairman: New Rules Could Lead to 'Information Overload,'* CFO J., THE WALL ST. J. (Oct. 4, 2013, 12:39 PM), <http://blogs.wsj.com/cfo/2013/10/04/sec-chairman-new-rules-could-lead-to-information-overload/tab/print/?KEYWORDS=conflict+minerals> (last visited Feb. 20, 2014).

128. *Id.*

freelance writer who has worked and lived in Central Africa for twenty-five years, was one of the critics who stated that Dodd-Frank, Section 1502:

[I]mposed a de facto embargo on mineral production that impoverished the region's million or so artisanal miners. It also drove the trade into the hands of militia and predatory Congolese army units. The military situation on the ground has considerably worsened since passage of the law, and the SEC's promulgation of the implementation guidelines.¹²⁹

On April 14, 2014 the United States Court of Appeals District of Columbia Circuit determined the outcome of the industry's challenge to the validity of Dodd-Frank Section 1502 as it affirmed the District Court's judgment in part and reversed in part.¹³⁰ It affirmed the ruling regarding claims under the APA and the Exchange Act,¹³¹ however, it reversed the holding that the rule's disclosure requirement interferes with the right of freedom of speech and hence violates "the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have "not found to be 'DCR conflict free.'""¹³²

129. *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Policy and Trade of the Comm. on Fin. Serv.*, 105th Cong. 6 (May 21, 2013), available at <http://financialservices.house.gov/uploadedfiles/113-23.pdf> (last visited Feb. 20, 2014); see also Simon Propper & Peter Knight, 'Conflict Free' Minerals From The DRC Will Only Be Possible if Companies Stay, *THE GUARDIAN* (Dec. 4, 2013), <http://www.theguardian.com/sustainable-business/conflict-free-minerals-drc-companies-stay> (last visited Feb. 20, 2014), stating that:

A select few electronics companies have energized [sic.] the initiative to encourage conflict-free mining. But many companies that use the minerals, notably car and plane-makers [sic.], have stood back and refused to use their buying power to bring change. Unless a broader coalition of industries gets behind pioneering conflict-free sourcing work, the DRC may remain in economic darkness.

130. *Nat'l Ass'n of Mfrs. v. S.E.C.*, No. 13-5252, 2014 U.S. App. LEXIS 6840, at *34 (D.C. Cir. Apr. 14, 2014).

131. See generally *id.* at *9-24.

132. *Id.* at *33-34.