THE DODD FRANK ACT’S SECTION 1502 ON CONFLICT MINERALS

For decades, the trade in conflict minerals has fueled human rights abuses and promoted insecurity in the eastern Democratic Republic of the Congo (DRC). The Dodd Frank Wall Street Reform and Consumer Protection Act, passed in July 2010, includes a provision that addresses the need for action to be taken to stop the national army and rebel groups in the DRC from profiting from the minerals trade. Section 1502, the Conflict Minerals provision, is a disclosure requirement that calls on companies to determine if their products contain conflict minerals and to report this to the SEC.

This legislation has the potential to make a significant impact on the ground in the DRC; however, there has been considerable misinformation and fear-mongering spread about its requirements and likely impact. This document seeks to clarify some of the most common misconceptions.

1. Dodd Frank 1502 does not place a de facto embargo on minerals from the DRC

Dodd Frank 1502 is a disclosure requirement only and places no ban or penalty on the use of conflict minerals. If companies discover they have been sourcing conflict minerals from DRC or adjoining countries, they can continue to do so; however, they must report this to the SEC.

Critics of the law are arguing that whatever its intentions, it will in practice end the trade in minerals mined in the east of Congo. It is true that trade in minerals from the region has dropped significantly in recent months, and that this is damaging the livelihoods of Congolese miners and their families. The downturn stems from a six month suspension of the mining industry by the Congolese government and an overly restrictive interpretation of Dodd Frank by industry associations. It has serious implications for miners and their families, and is not an outcome that anyone wants to see.

The idea that the current hiatus is a permanent shut-down of the trade is misplaced, however. Indeed, despite alarmist talk of an end to eastern Congo’s minerals sector, the past few weeks have seen major international companies unveiling plans to invest in and source from mines in areas of Congo covered by the law.

Amidst all the claims of some international observers that the law is a disaster for Congo, it is worth noting that the Congolese government has publicly expressed its support for Dodd Frank in a submission to the SEC and the measure is also backed by officials in eastern areas of the country that are most directly affected. As the Governor of North Kivu province said to Global Witness researchers in April this year: the war has been going on since 1996, why didn’t the US government pass this law ten years ago?
2. Implementation of the law should not be delayed; companies have had ample time to prepare

The problem of conflict minerals has been widely recognised for a decade now and businesses have long been aware of the harmful impact their purchases can have. Despite having many years to put the necessary control measures in place, most companies did not begin even paying lip service to changing their practices until the threat of a US law materialised two years ago. The sad reality is that the majority of businesses will not live up to their responsibilities until legally compelled by law to do so. A delay in the implementation of the law means further scope for armed groups in Congo that kill and rape to finance themselves via the minerals trade. The conflict minerals trade contributes to a dire humanitarian situation in the east of Congo. Human rights abuses, including gender-based violence such as sexual slavery, forced recruitment, forced prostitution, and rape, have reached catastrophic proportions. The UN Joint Human Rights Office in the DRC reported that over 300 civilians were raped by armed groups in an incident that took place in August 2010, in three villages located close to mining sites. The UN investigation revealed a direct link between the violence and competition over access to minerals. In June this year, several people were killed in the same region during fighting between two armed groups contesting a lucrative mining site.

It is well understood that many companies, in the first year of the law’s implementation, may not be able to say if they are sourcing from DRC or adjoining countries. However, through full compliance with the law, companies can lay a foundation for following years and improve on their supply chain due diligence and the data they are able to generate. Here it is worth recalling, once more, that there is no penalty if companies cannot determine whether the minerals they use come from DRC or neighbouring countries. The consequence for businesses that find themselves in this situation is that they have to submit to the SEC a ‘conflict minerals report’.

Delays to the implementation of the law may also deter and even undermine companies that have begun making efforts to improve their supply chain controls, for example via the industry association-driven Conflict Free Smelter programme. This concern is voiced in a letter to the SEC in June this year from a major international smelter of tantalum: “We urge the SEC to issue the final regulation for Section 1502 as soon as possible so that industry has certainty regarding the implementation process, and so that companies that currently source conflict minerals do not enjoy a competitive advantage.”

3. Dodd Frank 1502 targets abusive units of the Congolese army as much as it does militias

A recent New York Times article argued that the law is no longer relevant because militias or rebels it was designed to target have now joined the government army. This assertion is completely misplaced. Dodd Frank 1502 targets units of the Congolese army as much as it does militias precisely because the army is comprised largely of ex-rebels, is the major player in the conflict minerals trade and regularly commits appalling crimes against the civilian population.

4. It is possible for manufacturing companies to adhere to the law by tracing the metal they use back to the minerals smelter that produced it
There are actually only a handful of refineries globally that deal with tin, tantalum and tungsten. According to the Information Technology Industry Council (ITIC) there are less than 20 major tantalum processors, and research done by Global Witness indicates that there are fewer than 20 major tin smelters and less than 15 major tungsten smelters.

In February, Apple released its “2011 Supplier Responsibility Report” in which the firm details how it traced its supply chain, first to the suppliers that create the subcomponents to their products and then to the smelters that processed the ores. Intel has already conducted “on-site reviews on 11 tantalum smelters in six different countries”.

5. It is crucial that Dodd Frank requires companies to identify the origin of the minerals and metals they are using

The country of origin requirement simply asks that companies take steps to determine if the minerals in their products originate from DRC or adjoining countries. They must 1) disclose their processors; 2) verify the processor’s chain of custody documents; and 3) watch out for ‘red flags’ which may indicate their minerals come from DRC and adjoining countries. Some companies have stated that this process is too costly and difficult to undertake. However, Global Witness field researchers have been able to track supply chains into DRC countries, with significantly less resources and funds than are available to multi-national corporations. To establish these tracking and reporting systems companies could pool their resources and work together to comply with the legislation.

Additionally, weak infrastructure and institutions in DRC countries speaks to the need for more stringent country of origin requirements, rather than more lenient ones. Since these systems are currently under development, more effort will be needed to ensure that the information disclosed by the country of origin requirements is accurate and reliable.

6. The SEC should lay down a common standard for supply chain due diligence that applies to all four minerals covered by the law.

Although there is some variance amongst supply chains, they do not differ significantly enough to warrant different due diligence requirements. In the 2010 report, Do No Harm, Global Witness maps out the route, from mine to manufacturer, which minerals travel to demonstrate that the supply chain is not as complex as some corporations would have it seem.

A clear due diligence standard is necessary in order to provide accurate, consistent and reliable information in the Conflict Minerals Report. If issuers are allowed to choose from a variety of different measures, they are likely chose the ones with the least stringent requirements. Global Witness is recommending that the SEC, in its regulations, states unequivocally that the due diligence requirements of the Dodd Frank Act are exactly the same as those already adopted by the OECD and the UN Security Council. In July the OECD sent a letter to the SEC signed by nearly 200 companies, governments and Congolese and international NGOs which makes the same recommendation.

The due diligence standards adopted by the OECD and the UN Security Council consist of a five point framework that includes on the ground risk assessments and audits. They are the product of a tripartite working group comprising companies, governments and NGOs. More information on the standards can be found at http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html.