

Expectations for Companies' Conflict Minerals Reporting

By Darren Fenwick and Patricia Jurewicz

September 2013

By May 31, 2014, it is expected that companies, officially known as issuers, will be required to take the unprecedented step of submitting their first conflict minerals disclosures to the Securities and Exchange Commission, or SEC. This paper is intended to describe the content that certain sustainable and responsible investors, or SRIs, and nongovernmental organizations, or NGOs, expect to see in an issuer's Specialized Disclosure, or Form SD, and Conflict Minerals Report, or CMR, if a CMR is deemed necessary. Investors and NGOs have closely followed the issue of conflict minerals in the Democratic Republic of the Congo, or DRC, and engaged with the SEC throughout its rulemaking process. These stakeholders wish to understand how issuers—which are connected to the DRC through mineral sourcing—are addressing their connection to the conflict in the country's eastern region, a conflict that has resulted in millions of deaths and the rape of hundreds of thousands of women. The U.N. Group of Experts on the DRC found that due diligence works and that with the passage of the final rule for Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act—referred to as the 1502 rule—there has been a reduction in conflict financing.¹ Now that the SEC has provided the 1502 rule, continued progress can be made to eliminate the black-market trade in these minerals and create a legal trade that benefits the people of Congo and the region. For a more positive impact to be seen in the region, however, the market demand for conflict-free minerals must grow significantly.

The intent of this paper is not to create new definitions or interpret the 1502 rule. Rather, it is to articulate key reporting components that are important to many SRIs and NGOs and to suggest indicators that can be tracked over time to allow for comparability between reports and measure improvement.

This paper is divided into four sections. The first three sections address the SEC's rule on conflict minerals. The first section begins by detailing the key elements that stakeholders believe should be included in an issuer's conflict minerals policy and program, which should form the basis of its reporting to the SEC. The second section explains the steps an issuer should undertake to determine the origin of the minerals in its products.

The third section explains the four due diligence processes an issuer should undertake to ensure its supply chain practices respect human rights and do not contribute to conflict: (1) identify risks in its supply chain; (2) ensure compliance to its policy and program; (3) respond to identified risks and non-compliance; and (4) describe the policies and communication used to implement the previous processes. The fourth section asks issuers to report on the steps they are taking to ensure a conflict-free Congo, not a Congo-free product. Stakeholders expect issuers to include in their filings to the SEC any initiatives or activities they are undertaking or will undertake to support a clean mineral trade in the DRC.

This document is for guidance purposes only and should not replace professional legal advice from corporate or outside counsel.

Context

Issuers need time to gather the necessary country of origin data about tin, tantalum, tungsten, and gold, or 3TG—the four conflict minerals used in their products—from their suppliers. To allow for this, the SEC stated that for a period of two or four years—depending on the size of the company—issuers could use the designation “DRC conflict undeterminable” and would be exempt from the audit requirement. Although some or all of their 3TG may be of undeterminable origin in the first year, issuers should collect and report on the information highlighted in this document. In order to demonstrate a continuous improvement approach of transparency and accountability in the supply chain, issuers should report on the results of indicators stated in this document annually.

Determining the origin and social conditions related to the source of 3TG embedded in an issuer’s products is a time-consuming, multistep process. It is therefore important to clearly state the processes for collecting the required information, establish baselines for an issuer’s first SEC report, and demonstrate continuous improvement in subsequent reports. An issuer can use its SEC reporting to demonstrate its leadership, its proactive efforts to address conflict minerals, and its commitment to addressing egregious human rights abuses linked to the manufacturing of its products. SRIs and NGOs will look poorly upon issuers that postpone robust reporting or file a report that simply ticks a box. Conversely, stakeholders will publicly acknowledge issuers that actively demonstrate efforts to address the issue, provide transparent procedures and results, and make progress over time.

Competitive evaluations will likely occur on these public disclosures filed with the SEC and other publicly available information. In addition to mandatory reporting requirements, the extent to which an issuer takes a holistic approach to supporting a clean minerals trade in the DRC will be noted and rewarded. This includes encouraging a peaceful and stable DRC through diplomatic engagement with the U.S. government, supporting conflict-free sourcing from the DRC, investing in capacity building and development of alternative livelihoods, and making sure that there are no conflict minerals in an issuer's products.

Stakeholders encourage issuers to include the information in this expectations document in their Form SD or CMR. This will make it easy for stakeholders to understand all of the actions a company is taking and allow for a straightforward comparison of issuers within and across industries.

If certain topics contained in the 1502 rule are not addressed here, they were purposefully omitted because the authors felt those topics are more appropriately addressed or interpreted by legal experts. In some instances, this paper recommends doing more than what the rule requires. Nevertheless, many SRIs and NGOs would like to see issuers participate in and report on these practices. Proactive efforts are described in the subsections titled "Best practices."

Conflict minerals policy and program

An issuer's policy and program set the tone and foundation for how an issuer addresses conflict minerals in its supply chain. Investors and NGOs expect to see an issuer's conflict minerals policy and program clearly stated in its SEC reporting; that way, it is easy to determine if an issuer's conflict minerals system and procedures are consistent with its policy. By including key elements in its policy and program, an issuer demonstrates that it is not just doing the minimal amount needed to comply with the law and that it understands the relationship and influence of raw-material sourcing on the ongoing conflict in the DRC. This includes an understanding that by not withdrawing from the region, an issuer is demonstrating a form of compliance. In addition, it is recommended that the policy and program should communicate an issuer's commitment to supporting peace negotiations in the DRC and neighboring countries, a responsible and sustainable minerals trade, and diverse and stable economies.

But it is not enough for an issuer to simply write a robust policy. SRIs and NGOs expect an issuer to describe the process it has created to communicate and implement the policy throughout the entire corporation, including its subsidiaries and suppliers. Relevant departments should receive training in order to implement the policy and program efficiently and successfully. In addition, it is expected that the issuer's suppliers that handle 3TG be required to have their own programs for implementing their own policies. Finally, issuers are encouraged to detail the steps that they will take to improve their communication with and adherence to their conflict minerals policies and programs from year to year.

Key elements

- The policy should articulate an issuer’s commitment to ensure that its sourcing practices do not support conflict, human rights abuses including forced labor, mass atrocities, and crimes against humanity.
- The policy should commit to exercising supply-chain due diligence.
- The issuer’s conflict minerals program should include implementing a supply-chain transparency system that allows for the identification of the smelters and/or refiners in its minerals supply chain.²
- The issuer’s conflict minerals program should include a description of the steps it will take to identify, assess, mitigate, and respond to risks. At a minimum, steps should include supply-chain surveys, supplier training, supplier and smelter encouragement, and an obligation to participate in the Conflict-Free Smelter, or CFS, Program or an equivalent—provided that such industry schemes adhere to international standards, audits, and unannounced spot checks.
- Information about an issuer’s policy and program should be publicly disclosed and easy to locate on the issuer’s website.
- The policy and program should be applicable across the company.
- The policy and supplier expectations should be referenced or included in supplier contracts and/or agreements, and suppliers should be required to adopt a robust 3TG conflict minerals policy and program equivalent to the issuer’s.

Best practices

SRI and NGOs recommend inclusion of the following points in an issuer’s conflict minerals policy and program:

- Commitment to source conflict-free 3TG from the “covered countries”³
- Commitment to only using 3TG minerals from smelters that have been audited and verified as conflict free by the CFS Program or an equivalent as they become available
- A contractual obligation for suppliers and suppliers’ suppliers to only source 3TG minerals from conflict-free smelters, when possible

- Commitment to identifying and eliminating any other minerals in the supply chain that may support human rights violations
- Records maintained for a minimum of five years

Indicators

- A policy that is publicly disclosed and easy to find and access
- Key elements in this expectations document that are included in an issuer's policy and/or program
- Percentage of need-to-know company staff that have been made aware of and educated on the policy and program
- Percentage of suppliers that have received a copy of the policy and program⁴
- Percentage of suppliers that have been educated on the issuer's policy and program

Reasonable Country of Origin Inquiry

The 1502 rule gives issuers some flexibility in implementing the Reasonable Country of Origin Inquiry, or RCOI. The SEC purposefully did this so that issuers can implement procedures appropriate to their circumstances. The rule states that, “The reasonable country of origin inquiry standard does not require an issuer to determine to a certainty that all its conflict minerals did not originate in the Covered Countries.”⁵ The rule, however, also says that issuers must report on the processes they used to determine the RCOI for all of the 3TG in their products. The processes implemented to determine RCOI, according to the rule, “must be reasonably designed” and “must be performed in good faith.”⁶

The RCOI is a crucial component of the rule. It requires issuers to put systems in place to determine the origin of the ores at the smelter level. Since issuers will be relying on suppliers and smelters that are deeply embedded in the supply chain to provide the RCOI information, stakeholders stress the necessity of developing processes, establishing systems to collect consistent data, and communicating the processes and baselines in the first-year report so that progress can be demonstrated from year to year. While it is highly recommended that issuers use standardized tools and coordinate their activities with industry and multistakeholder initiatives so that the data collected is as accurate and as complete as possible, each issuer must take responsibility for its own due diligence.

Key elements

- Consistent with an issuer’s conflict minerals policy and program to identify 3TG and assess risks in its supply chain, an issuer must create a supply-chain transparency system that allows for the identification of its 3TG smelters and refiners. Such a system could include use of the reporting template developed by the Conflict-Free Sourcing Initiative, or CFSI, or an equivalent mechanism to collect information on the origin of 3TG minerals in an issuer’s products.⁷
- Identify and publish general product categories that contain necessary 3TG and/or disclose the percentage of affected products for each mineral. Indicate, for example, that “40 percent of our X product line contains tin.” This gives stakeholders a baseline with which to measure progress over time.
- In each report filing, issuers should describe what steps they will take to reduce the percentage of affected products containing 3TG material of undeterminable origin.
- Issuers should include a discussion of what tools will be employed to prevent and respond to red flags identified in the collection of the country of origin information from its suppliers. These red flags include, but are not limited to:
 - Incomplete CFSI reporting templates
 - Email responses that state to the best of a supplier’s knowledge that its minerals do not originate in the covered countries without supporting documentation or evidence
 - Responses identifying smelters that do not source from the covered countries but are publicly known to source from the covered countries
 - Responses inconsistent with publicly available information—a supplier that, for example, produces a part that contains tin, but the smelter that the supplier discloses does not process tin, only tungsten
 - Responses that list country of origin but do not identify a smelter
 - Responses that do not identify smelters

Best practices

- Engage with industry groups or multistakeholder groups that focus on identifying country of origin. Examples include CFSI, the CFS Program working group, and the Organisation for Economic Co-operation and Development, or OECD, due diligence working group.
- Identify and publicly release the list of 3TG smelters in an issuer’s supply chain.
- List country of origin information for all 3TG minerals.

Indicators

- Overall estimated quantity of products being produced, which would be used to calculate the percentages mentioned below
 - Listing indicators by product category is also an option
- Percentage of products containing 3TG
- Number of 3TG products that have had their supply chains surveyed
- Percentage of 3TG products with indeterminate 3TG
- Percentage of 3TG products that have had the smelters identified
- Percentage of 3TG suppliers that have responded to a supplier survey
- Percentage of suppliers using material from CFS-verified smelters⁸
- Participation in the CFS Program or an equivalent program
- Publicly available list of identified smelters and/or refiners

Due diligence

Due diligence is an ongoing, proactive, and reactive process that issuers can implement to ensure that their supply-chain practices respect human rights and do not contribute to conflict.⁹ The 1502 rule requires an issuer, under certain circumstances, to exercise due diligence on the conflict minerals in its products and to describe and disclose the due diligence it undertook. It also requires that issuers' due diligence programs follow a nationally or internationally recognized framework.¹⁰

Key elements

SRI and NGOs expect issuers to undertake due diligence as described in the OECD “Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas.”¹¹ Specifically, an issuer should describe the process it has in place and the steps it will take to:

1. Identify risks in its supply chain
 - a. Downstream issuers—companies manufacturing or contracting to manufacture—that have identified the smelters (or refiners, in the case of gold) in their supply chains should—through industry schemes, supplier engagement, or on their own—assess the smelters’ due diligence procedures against the OECD “Due Diligence Guidance.” It is understood that many issuers will seek to reduce costs, establish business relationships directly with smelters, and increase pressure on their supply chains by participating in or creating industry schemes.
 - b. In cases where an issuer joins an industry smelter-validation scheme such as the CFS Program, an issuer should describe the steps it has taken or will take to ensure that smelters are complying with the issuer’s conflict minerals policy and program and/or appear on the “CFS validated conflict-free smelter” lists.¹²
2. Ensure compliance with its policy and program. An issuer is expected to describe the steps it has taken to ensure that its suppliers are complying with the issuer’s conflict minerals policy and program. Such steps should include but not be limited to:
 - a. As they become available, contractually obligating suppliers to source from conflict-free smelters per the CFS Program or other schemes that independently demonstrate their due diligence as defined in the OECD “Due Diligence Guidance”
 - b. Obligating suppliers to create and implement a policy and program that is aligned with the OECD “Due Diligence Guidance”
 - c. Providing subsupplier surveys
 - d. Assessing the quality of the information obtained and the processes undertaken by suppliers to obtain their information, including, as appropriate, conducting supply-chain audits with unannounced spot checks
3. Respond to identified risks, including instances of noncompliance with its policy and program
 - a. An issuer should disclose the steps it has taken or will take to remediate issues of noncompliance. This could include efforts to build supplier capacity to comply and other measures as appropriate.
4. Disclose and describe the contractual language, supplier-agreement language, and/or policies it is using to implement the steps above

Best practices

- An issuer should support smelters in becoming verified as conflict free. This can be accomplished by encouraging smelters to be audited through the CFS Program or its equivalent. Issuers can also participate in the CFS Early-Adopters Fund, or equivalent, which subsidizes smelter audits.¹³
- To assist smaller suppliers in meeting issuers' requirements, increasing survey responses, and improving the quality of survey responses, issuers could implement an incentive program to provide tools, training, and other resources to build suppliers' capacities.

Indicators

- Number of supplier audits conducted and the results of the audits
 - The results can be provided in percentage format. An issuer might say in its CMR, for example, that, “Issuer conducted 35 supply-chain audits to assess suppliers’ compliance with their contractual obligations to source from conflict-free smelters and/or comply with its conflict minerals policy and program, which include the adoption and implementation, by the supplier, of a conflict minerals policy and program, consistent with the OECD guidance. Fifty percent of suppliers complied with issuer’s obligations; the remaining 50 percent did not meet contractual obligations because of X, Y, and Z.”
- Percentage and/or number of suppliers not in compliance with the issuer’s policy or program
- Percentage and/or number of suppliers that have adopted a conflict minerals policy and program consistent with the OECD guidance
- Percentage and/or number of suppliers that have adopted a conflict minerals policy and program consistent with an issuer’s conflict minerals policy and program
- Percentage and/or number of suppliers undergoing remediation to bring them into compliance with an issuer’s policy or program
- Percentage and/or number of smelters in the supply chain that are not participating in an independent verification program such as the CFS
 - Of the nonvalidated smelters included in the above point, number of smelters that source from the covered countries

- Number of validated smelters in the supply chain that are not sourcing from the covered countries
- Number of validated smelters in the supply chain that are sourcing from the covered countries
 - Of the validated smelters included in the above point, number of smelters that process conflict-free certified 3TG from the covered countries

In-region clean minerals trade

In addition to cutting off revenues from armed groups in the region, it is equally important to build up a conflict-free minerals trade and support peace and security efforts in the region. Electronics companies, the electronics industry, the U.S. government, regional governments, the European Union, and the OECD have all worked to support a clean minerals trade in the DRC and adjoining countries. A few nonelectronics companies and associations are also supporting the multistakeholder or industry efforts that are being implemented. Some of the catalytic initiatives these groups have implemented are listed here:

- Section 1502 of the Dodd-Frank Act and final rule¹⁴
- OECD “Due Diligence Guidance”¹⁵
- CFS Program, which validates smelters and refiners as conflict free¹⁶
- Development of a regional conflict-free certification scheme by the International Conference on the Great Lakes Region, or ICGLR¹⁷
- Solutions for Hope Project, which sources conflict-free tantalum from the DRC¹⁸
- Conflict-Free Tin Initiative, which sources conflict-free tin from the DRC¹⁹
- Public-Private Alliance for Responsible Minerals Trade, or PPA²⁰
- The European Union, which provides support for the ICGLR’s natural-resources unit and for raising awareness about due diligence on the ground in the region
- KEMET Partnership for Social and Economic Sustainability²¹
- BGR Certified Trading Chains²²

- ITRI Tin Supply Chain Initiative, or iTSCi²³
- Select economic-development projects, which promote alternative livelihoods

The DRC government issued a circular that requires in-region actors involved in the minerals trade to comply with the OECD “Due Diligence Guidance.”²⁴ The U.S. government has awarded contracts to NGOs working in eastern Congo to support alternative livelihoods. When communities are simultaneously engaged and supported in the areas of economic development, democracy, and peacebuilding, they are empowered to develop thriving and stable environments. While much has been done to achieve a conflict-free Congo, there is still more to do.

Best practices

Issuers are encouraged to support clean minerals trade initiatives in the covered countries and report on these activities in their Form SDs and/or CMRs. Support for a clean minerals trade can occur through the involvement in or establishment of closed-pipe supply-chain projects such as those listed above. Issuers can also join the PPA, the aim of which is to support certified conflict-free sourcing from eastern Congo. There are a number of projects issuers can champion that support economic development, alternative livelihoods, and capacity building that will contribute to stable and robust communities in the covered countries. Lastly, issuers can join the Multi-Stakeholder Group’s, or MSG, Policy Working Group or Diplomacy Working Group to collectively engage the U.S. and other governments to promote peace, security, and stability in the region.²⁵

Indicators

- List of initiatives in which an issuer is participating that help build a responsible, conflict-free minerals trade from the DRC and the Great Lakes region, such as the PPA and others
- Quantity of products an issuer is producing with minerals that are sourced from the DRC through one of the closed-pipe, conflict-free supply-chain initiatives
- Amount of financial support, thought leadership, and participation an issuer is investing in responsible supply-chain initiatives and/or regional alternative-livelihood initiatives
- Participation in the MSG Policy or Diplomacy Working Groups

Conclusion

Although stakeholders understand that implementing accountability mechanisms throughout supply chains will take time, it is urgent to begin immediately. This paper is meant to give issuers guidance on the information that certain investors and NGOs will look for in issuers' Form SDs and CMRs annually. The listed indicators will allow stakeholders to easily compare reports and measure progress. Investors and NGOs expect issuers to disclose this and other information to create transparency and accountability in their supply chains. These disclosures will help sever the link between issuers and the economic incentives that exist for armed groups to commit human rights abuses and mass atrocities, and they will also allow stakeholders to acknowledge proactive issuers that will benefit from public sentiment and brand recognition.

Acknowledgements

Responsible Sourcing Network would like to thank The Moriah Fund and individual donors for their support in making this paper possible.

The authors would like to thank the following people who provided input for this paper: Andrew Behar, CEO, As You Sow; Marshall Chase, associate director, advisory services, BSR; Lauren Compere, managing director, Boston Common Asset Management, LLC; Bennett Freeman, senior vice president, sustainability research and policy, Calvert Investments; and Ruth Rosenbaum, T.C., Ph.D., executive director of CREA: Center for Reflection, Education and Action.

Endnotes

- 1 Letter from Mary Schapiro to David Briggs, October 21, 2011, available at <http://www.sec.gov/comments/s7-40-10/s74010-346.pdf>, p. 2.
- 2 At a minimum, this means compliance with the Organisation for Economic Co-operation and Development's, or OECD's, "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas" (2011), available at <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>, p. 39.
- 3 "Covered countries" refers to the Democratic Republic of the Congo and adjoining countries.
- 4 "Percentage of suppliers" can be based on the overall quantity of suppliers that use 3TG in the products they produce or assemble, or can be based on supply-chain spend with suppliers using 3TG or on another supplier group the issuer clearly defines. It is understood that in the first years of reporting, approximations of percentages will be used.
- 5 Securities and Exchange Commission, "Final Rule: Conflict Minerals," release number 34-67716, available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>, p. 157.
- 6 *Ibid.*, pp. 147-148.
- 7 "The Conflict-Free Sourcing Initiative," available at <http://www.conflictreesmelter.org/ConflictMineralsReporting-TemplateDashboard.htm> (last accessed August 2013).
- 8 It is understood that this number/percentage can only be as high as smelters that are verified by the issuer, the CFS program, and posted on its website and/or by an equivalent program.
- 9 OECD, "OECD Guidelines for Multinational Enterprises" (2011), available at <http://dx.doi.org/10.1787/9789264115415-en>, p. 13.
- 10 SEC, "Final Rule," p. 205.
- 11 OECD, "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas."
- 12 "The Conflict-Free Sourcing Initiative."
- 13 "Conflict-Free Smelters: Early-Adopters Fund," available at <http://solutions-network.org/site-cfs/> (last accessed August 2013).
- 14 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, H.R. 4173, 111 Cong. 2 sess., available at <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>, pp. 838-843; SEC, "Final Rule."
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- 16 "The Conflict-Free Sourcing Initiative."
- 17 International Conference on the Great Lakes Region and Partnership Africa Canada, "Briefing Note on the ICGLR Regional Certifications Mechanism" (2012), available at http://www.pacweb.org/Documents/icglr/PAC_Briefing_Note_on_the_ICGLR_Regional_Certification_Mechanism_June_2012.pdf.
- 18 "Conflict-Free Smelters: Early-Adopters Fund."
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- 20 "Public-Private Alliance for Responsible Minerals Trade," available at <http://www.resolv.org/site-ppa/> (last accessed August 2013).
- 21 KEMET, "KEMET Leads the Way with the 'Partnership for Social and Economic Sustainability' Conflict-Free Tantalum Sourcing Initiative," available at <http://www.kemet.com/conflictfree> (last accessed August 2013).
- 22 BGR, "Mineral Certification at the BGR," available at http://www.bgr.bund.de/EN/Themen/Min_rohstoffe/CTC/Home/CTC_node_en.html (last accessed August 2013).
- 23 International Tin Research Institute, "iTSCi Project Overview," available at https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=2192&Itemid=189 (last accessed August 2013).
- 24 Democratic Republic of the Congo Ministry of Mines, circular 002, September 6, 2011, available at <http://www.globalwitness.org/sites/default/files/library/Ministry%20of%20Mines%20DRC.pdf>.
- 25 Responsible Sourcing Network, "Conflict Minerals Program Overview," available at <http://www.sourcingnetwork.org/minerals/> (last accessed August 2013).