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AmCham EU's position on EU initiatives for responsible sourcing of conflict minerals

The American Chamber of Commerce to the European Union (AmCham EU) supports the European Commission's focus on addressing responsible sourcing of minerals from conflict-affected areas. Conflict minerals have reportedly been a source of income for armed groups in central Africa, particularly in the eastern Democratic Republic of Congo (DRC). In order to promote real change, the problem must be approached in a manner that addresses the economic, political and security causes of the conflict.

In 2010, the US Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which contains Section 1502 on conflict minerals. Section 1502 requires companies to disclose the use of conflict minerals, and whether those minerals are sourced from the DRC and its adjoining countries.

Members of AmCham EU have been conducting supplier inquiries regarding 3TG (tantalum, tin, tungsten and gold) conflict minerals and whether they are sourced from the DRC and adjoining countries to meet the reporting requirements under the Dodd-Frank Act. Some members have also implemented voluntary due diligence schemes. Our member companies support responsible sourcing of minerals through company internal policies, corporate social responsibility programmes, participation in a number of industry-wide initiatives, such as the Conflict Free Sourcing Initiative, participation in conflict-free in-region sourcing channels, such as Solutions for Hope, and joint government-industry programs, such as the Public-Private Alliance for Responsible Minerals Trade.

This paper follows AmCham EU's June 2013 input to the Commission's consultation on a potential conflict minerals initiative. We hope that additional information provided will be helpful in shaping a policy that complements existing US law, OECD due diligence guidelines and industry-led initiatives to create effective means for helping the people of the DRC and the Great Lakes Region (GLR) of Africa.



Companies' experience: Dodd-Frank Act

In conjunction with rules implementing Dodd-Frank Act Section 1502, the Securities and Exchange Commission (SEC) estimated the implementation cost for companies to be \$3-4 billion. Industry, on the other hand, calculated compliance costs of \$16 billion.¹ An independent study by Tulane University affirmed an estimate substantially higher than the SEC's, concluding it would cost \$7.93 billion, with most of the cost borne by suppliers not directly subject to SEC jurisdiction.² At this stage many companies are expected to report 'DRC conflict undeterminable' for most of their conflict minerals in the first two years, and unable to declare 'DRC conflict free' for the foreseeable future. We fear any EU initiative focusing on the supply chain in the same manner could involve comparable costs, without added clarity on the origin of those minerals.

The Dodd-Frank Act also did not clarify from the outset whether companies should additionally report products containing non-metal derivatives of conflict minerals. Including such chemical compounds could increase the complexity of correctly identifying materials that contain conflict minerals, and impose additional costs without providing a corresponding benefit. Any potential EU proposal should therefore make clear that further derivatives of conflict minerals, such as chemical compounds that include an elemental conflict mineral, are not themselves conflict minerals.

For most companies, the biggest challenge for products that contain conflict minerals is to definitively state whether the conflict minerals are from the countries in the scope of Dodd-Frank. There are significant challenges in tracing minerals to the smelters or refiners (SOR) for some of the reasons below:

1. Highly complex nature of the end product;
2. Length, breadth and complexity of supply chains;
3. Intermixing and complexity of products;
4. Supplier/supply chain capacity and capability limitations for passing information up and down the chain; and
5. Non-cooperation by entities in non-OECD countries.

Companies further upstream in the supply chain may not necessarily disclose to downstream parties the materials used to manufacture the part, component or subsystem. Companies may also be unwilling to share information on the source of supply due to confidentiality concerns.

Many companies' supply chains are complex and multi-tiered, purchasing materials from tens of thousands of suppliers, often far removed from the smelters and mines. It is incorrect to assume that they have full knowledge of,

¹ National Association of Manufacturers report (2011), page 23, http://www.nam.org/~media/DE6DA95D7CA5475BB24F80869A643CD3/NAM_Comments_on_Conflict_minerals_3_2_11_as_submitted.pdf (accessed 3 December 2013).

² Tulane University (2011), *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a Third Model in View of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*, <http://lawprofessors.typepad.com/files/tulane-study.pdf> (accessed 3 December 2013).

or control over, the multi-tier upstream supply chain, even more so the smelter or mines. Downstream companies' decisions are therefore unlikely to influence either mines or smelters. Furthermore, manufacturers often operate in a just-in-time manner. All of these challenges lead to significant costs associated with supply chain inquiry and determining the smelters or refiners (SORs).

Companies depend on information held by SORs in order to determine the mines of origin. Accordingly, many AmCham EU companies have joined the Conflict Free Sourcing Initiative. This effort was started by the Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative (EICC-GeSI) and encourages SORs to join the Conflict Free Sourcing (CFS) programme. The CFS program involves an independent third-party audit of the SOR so that they can be designated as 'conflict free'. Similar auditing programmes are now being implemented for refiners through the Responsible Jewelry Council and the London Bullion Markets, in cooperation with the CFS programme. The EU can encourage SORs to join the CFS program or similar third-party verified programs and then pass information about their conflict-free status to the downstream supply chain.

Because the implementation of SOR third-party auditing programmes is at an early stage, expanding the types of minerals included, or the geographic scope of areas covered, could complicate and delay the implementation of the overall auditing programmes. The EU should develop a transparent assessment and designation process before considering any expansion of geographical scope for compliance requirements. It will take time to build the infrastructure (including funding and auditing capacity) to expand this effort beyond its current scope. The largest collective challenge for downstream companies in order to have reliable information is getting the SORs into the CFS and similar programs.

Ultimately, the biggest difficulty is the lack of rule of law in mining countries. Especially in the eastern DRC and some adjoining countries, armed groups and rogue military forces make it difficult to source responsibly. This issue is beyond the control of companies in the minerals supply chain. We encourage the EU, and others, to provide aid and other assistance to support the rule of law in the DRC Region (through appropriate diplomatic, economic and other measures). We are concerned that until there is effective rule of law in the region, smelters/refiners may have little choice but to avoid sourcing from potentially affected mines so as not to support conflict inadvertently.

Overall, if the EU is to adopt a supply-chain transparency approach, in the manner of Dodd-Frank, the approach should follow three criteria:

1. First, the approach should be voluntary, particularly in early years of implementation. Experience with Dodd-Frank has shown that the infrastructure and systems needed for compliance take time to design and build.
2. Second, any EU programme should avoid diverging from existing US legislation and not create conflicting reporting requirements. If a reporting system is implemented, it should recognise the efforts already



undertaken by US entities to comply with Dodd Frank as fulfilling EU obligations as well. AmCham EU would support the EU in seeking reciprocal recognition for compliance with such an EU obligation.

3. Third, any reporting measure should consider the position of targeted actors in the supply chain and their potential to address the issue of financing conflicts or contributing to human right abuses in conflict areas. For example, Option 3(a) contained in the April 2003 roadmap would require '[o]perators to exercise supply chain due diligence when placing selected minerals (ores, concentrates, and metals) for the first time on the EU market'.

Targeting minerals rather than manufactured products would capture most of the benefits of a reporting scheme while avoiding most of the cost. The minerals should be clearly defined (by regulated amounts, and above any 'de minimis' level) and by nature of the minerals (e.g., excluding chemical compounds). Since the underlying goal of reporting is to encourage smelter certification, by far the most effective way to influence them is through their direct customers, not original equipment manufacturers's (OEM) many layers down the supply chain. Reporting requirements further down the supply chain increases costs exponentially and decreases effectiveness exponentially.

Conclusion

AmCham EU encourages the Commission to help deploy existing systems and programs and to complement the ongoing implementation of Dodd-Frank Act. It is essential that any EU initiative focus on conflict in the DRC before broadening its scope to address global conflict-affected, and high-risk, areas elsewhere or expanding the list of minerals addressed. Expansion at this time would delay or impede efforts to get SORs to join the CFS program, create confusion in the supply chain, and could have unintended consequences for global small scale mining in conflict or high-risk areas.

Efforts to develop and scale a system to validate responsible sources from the DRC should be a priority. Until such a system is in place, and is recognised as legitimate by local and international governments, purchasers of raw materials will have a disincentive to source from the region.

Tools such as the OECD Due Diligence Guidance (DDG) and the EICC-GeSI Conflict-Free Sourcing Initiative Conflict Minerals Reporting Template provide the foundation for companies, at all points in the supply chain, to conduct due diligence with their suppliers. An EU initiative could support a system of voluntary commitments based on solutions developed by industry.

Initiatives such as the iTSCi (ITRI Tin Supply Chain Initiative) Bag and Tag Program and the Conflict Free Smelter (CFS) Program address the minerals early in the supply chain, which is much more effective than downstream, where there are too many layers of suppliers in between the source and the end



product manufacturer. These are joint initiatives that assist upstream companies (from mine to the smelter) to institute the actions, structures, and processes necessary to conform with the OECD DDG at a very practical level.

At the same time, a successful approach to the underlying issue should involve all relevant economies that have significant smelting and refining capacity. An EU initiative should recognise this and identify opportunities to engage with relevant economies both bilaterally and through multilateral organizations such as the OECD.³ A successful approach needs to be based on existing international policies, consider any overlaps, and avoid inconsistencies or conflicting requirements. Multiple initiatives to drive supply-chain transparency would not contribute to the desired end result; rather, they would fragment and complicate the efforts currently underway.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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³ Here it is also important to reference the UN Security Council's Group of Experts on the DRC's Guidelines that are applicable to these countries even if they are not full members of the OECD. These Guidelines are similar to and are agreed to be in line with the OECD Guidance.

