

AmCham EU's position on the proposed EU Regulation on conflict minerals

Supporting efforts to address the responsible sourcing of conflict minerals

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's new legislative proposal on conflict minerals, addressing the responsible sourcing of these minerals originating from conflict-affected areas. This is a complex issue that requires the engagement of multiple stakeholders including governments, the private sector and civil society. There is a clear need to promote real change, and we believe the Commission's proposal is a step in the right direction.

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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 €2 trillion in 2013 and directly supports more than 4.3 million jobs in Europe.

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Introduction

AmCham EU takes the issue of responsible minerals sourcing seriously and supports the objective of EU policy makers to break the link between minerals extraction and conflict. We are pleased to see that the proposed integrated EU approach to responsible minerals sourcing aligns with the OECD Due Diligence Framework and that it will exert pressure on importers of conflict minerals to source from smelters and refiners that are verified as being conflict-free. Many of our members have experience with implementation of industry initiatives, such as the Conflict-Free Sourcing Initiative (CFSI), U.S. regulations requiring conflict-minerals disclosures to the Securities and Exchange Commission (SEC) and the OECD Due Diligence Guidance.

Companies' experience: Dodd-Frank Act

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), enacted in July 2010, is an attempt to prevent armed rebel groups in the Democratic Republic of the Congo (DRC) from illegally using profits from the minerals trade to fund their activities. The burden is on the reporting companies to determine whether their products contain conflict minerals (tin, tantalum, gold, and tungsten), and to demonstrate due diligence measures to the SEC – such as questioning their suppliers on the presence and origin of conflict minerals.

The first reports were due on June 2, 2014 and must be filed annually. The result of the first filing shows that many companies had difficulties reaching conclusions on the status of conflict minerals used in their products. For most companies, the biggest challenge in identifying products that contain conflict minerals is determining whether the conflict minerals are from the countries within the scope of Dodd-Frank. There are great challenges in tracing minerals to the smelters or refiners due to the:

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 the supply chain, especially outside the OECD membership.

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. Experience with Dodd-Frank has shown that the assumption that downstream companies have perfect knowledge of their supply chain is flawed.

Dodd-Frank required the U.S. Department of Commerce to put together a [list of facilities that process the conflict minerals](#) 30 months after the law's entry into force.¹ The list, published with delay, still fails to indicate whether or not a specific facility processes minerals that are used to finance

¹ The list prepared by the Department of Commerce includes over 400 refinery and smelter facilities. The Conflict-Free Smelter Program has identified more than 250 refiners and smelters of 3TG in the supply chain. As of October 3, 102 smelters and refiners have been validated as CFSP compliant (up from 26 in 2013) with an additional 44 smelters/refiners working towards conflict-free certification. Current CFSP indicators are available at: <http://www.conflictreesourcing.org/program-indicators/>

conflict. Like many companies, the Department of Commerce does not have the ability to distinguish such facilities. Several difficulties were identified during the process, such as the “off the grid” artisanal miners in eastern Congo and the ongoing guerrilla operations which see makeshift smelters produce an intermediary product of the minerals to be shipped overseas.

AmCham EU comments on the Commission proposal:

1. Voluntary self-certification and upstream focus

Concentrating on upstream operators and on facilitating transmission of quality information in the supply chain leverages the appropriate point in the supply chain. It is also consistent with the OECD Guidance and various industry initiatives, as well as complementing Dodd-Frank. The [Oeko Institut report](#) on ‘Conflict minerals – an evaluation of the Dodd-Frank Act’ from September 2013 concluded that a rapid introduction of mandatory downstream due diligence and an expansion of due diligence obligations are likely to cause further 'boycott strategies'.

When trying to verify the source of minerals, focus should be placed on smelters or refiners because they are the key point of contact in the minerals supply chain. Companies depend on the information held by smelters or refiners to determine the country of origin and conflict-free sourcing. AmCham EU therefore welcomes the Commission's focus on importers - the most appropriate point in the supply chain - and we strongly urge the EU institutions to maintain this focus throughout the approval process. The impact beyond importers should be avoided by maintaining the scope of the current proposal and clarifying the definition of “importers”. The definition should refer to companies that import using one of the custom codes set out in the Annex to the draft Regulation.

2. EU list of responsible smelters or refiners (“White List”)

AmCham EU supports the proposal to develop and annually publish a list of responsible smelters or refiners. The information collected would assist companies with developing responsible supply chains.

Tools such as the OECD Due Diligence Guidance and the CFSI (Conflict-Free Sourcing Initiative) Reporting template provide the foundation for companies to conduct due diligence with their suppliers. The EU can encourage smelters or refiners to join the Conflict Free Smelter Program (CFSP) or similar third-party validation programs and then pass information about their conflict-free status to the downstream supply chain. We strongly encourage the EU authorities to recognise the CFSP as one of the third party audit protocols used in order to qualify as a ‘responsible importer’. As of October 3, 2014, 102 smelters or refiners have been validated as CFSP compliant, with an additional 44 actively working towards compliance. It is important that the existing voluntary efforts be recognised and supported under the EU Regulation and in the implementation of accompanying policy measures.

3. Geographical and minerals scope

AmCham EU supports the proposed scope of minerals, which is clear and consistent with the minerals that are the focus of the OECD Due Diligence Guidance and Dodd-Frank. However, the term “conflict-affected and high-risk areas” used in the proposal is ambiguous and is likely to lead to uncertainties for companies and their global supply chains. A clear process and criteria for identifying areas should be defined.

Current programs dealing with responsible minerals sourcing are largely focused on the DRC and Great Lakes Region. Given that the implementation of smelter or refiner third-party auditing programs is at an early stage and that securing participation of smelters or refiners in these programs remains a challenge, expanding the scope of covered minerals or geographic areas could complicate and delay the implementation of the overall auditing programs. The EU should develop a transparent assessment and designation process before considering any expansion of geographical scope.

It will take time and resources to build the infrastructure in conflict-affected regions to demonstrate responsible sourcing. The European Commission and Member States should work with these countries in advance to help build the necessary infrastructure.

4. International cooperation

Ultimately, the policy approach must focus on the lack of rule of law and governance as well as security challenges in conflict-affected and high-risk areas that extract and trade in natural resources. In the eastern DRC and some adjoining countries in particular, armed groups and rogue military forces make it difficult to source responsibly. We encourage the EU, Member States and other international bodies 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 and until certification and traceability systems are in place in the region, smelters or refiners may have little choice but to avoid sourcing from potentially affected mines so as not to support conflict inadvertently.

A successful approach to the underlying issue should also involve all relevant economies that have significant smelter or refiner capacity. The EU draft Regulation correctly recognises this and tries to identify opportunities to engage with relevant economies both bilaterally and through multilateral organisations such as the OECD. 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.

The biggest challenge facing downstream companies in acquiring reliable information is getting smelter or refiners to participate in due diligence activity and third-party validation programs, including the CFSI's Conflict-Free Smelter Program and other similar programs. We call for the EU and member state governments to use diplomatic channels to reinforce existing programs, such as bringing more compliant smelters into the CFSP and supporting capacity building activities to help smelters or refiners implement due diligence efforts consistent with the OECD Framework

5. Public procurement & other incentives (EU Joint Communication)

The link between the EU Joint Communication and the draft Regulation should be clarified in order to avoid fragmented initiatives at the Member State level. AmCham EU recommends that any potential incentives focus on companies, rather than on products, respecting the OECD Guidelines.

Potential EU public procurement rules should be in line with the OECD approach, which provides the flexibility to allow appropriate processes depending on where a company is in the supply chain and other facts and circumstances. The reports filed with the US SEC could serve as a model to demonstrate that a company has a due diligence program in place in conformity with OECD guidance and to meet public procurement requirements in the EU. Any mandatory requirements should be avoided.

EU Timber Regulation (EUTR) should not be used as a model

The nature of the problem with conflict minerals is very different from the timber situation. In the case of conflict minerals, the dominant factor is the lack of rule of law on the ground and the power of rebel groups and rogue militias. This makes it extremely difficult to source minerals in a responsible manner. Also, there are existing sustainability sourcing schemes for timber, such as the Forest Stewardship Council (FSC) Forest Management Certification; the Programme for the Endorsement of Forest Certification (PEFC), and others. Comparable programs are only now being developed for conflict minerals due to Dodd-Frank, and there is a lot of work still left to do.

Additionally, the EUTR is focused on the 'evidence of legality'. Since using conflict minerals is not illegal - unlike illegally harvested timber products - the EUTR is not an appropriate model. The only way to demonstrate 'legality' given the paucity of information and infrastructure would be for reporting issuers to impose an embargo on conflict minerals from the geographical area(s) outlined in the scope.

Recycled minerals should be exempted

In line with Dodd-Frank, the need to trace back the origin of material should not be applied to recycled scrap. The Regulation should specifically exempt recycled minerals, as downstream users have no ability to trace the source of the original minerals. Sustainable manufacturing calls for the greatest use of recycled materials possible, especially those that encroach on natural resources. Recycled metals are generally sourced from reclaimed end-user or post-consumer products, excluding partially processed or unprocessed minerals. Recycled metal includes excess, obsolete, defective and scrap metal materials which contain refined metal s that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold. All of these should be exempt from tracing back to the mine of origin.

Conclusion

AmCham EU encourages the EU institutions to help deploy and expand on existing systems and programs such as the CFSI and to complement ongoing activities in order to help break the link between minerals extraction and conflict. It is essential that the scope of minerals covered is maintained to ensure consistency with the OECD Guidance. The EU Regulation should initially focus on conflict areas within the DRC before broadening its scope to address and define global conflict-affected and high-risk areas elsewhere. Efforts to develop and scale a system to validate responsible sources from the DRC and other conflict-affected and high-risk areas should be a priority. Until such a system is in place and is recognised as legitimate by local and international governments, purchases of raw materials will have a disincentive.