



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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March 17, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Acting Chairman Piwowar's January 31, 2017, Statement on the
Commission's Conflict Minerals Rule**

Dear Mr. Fields:

The U.S. Chamber of Commerce (the "Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.* The CCMC welcomes the opportunity to comment on the final rules issued by the Securities and Exchange Commission (the "SEC" or "Commission") under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), concerning so-called conflict minerals.

The Chamber believes that the continuing decades old human rights crisis in the Congo needs to be resolved. However the regulation implementing Section 1502 fails to do so while imposing substantial reporting requirements upon companies, despite parts of the disclosure being struck down as violating the First Amendment.

* The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region

In fact, substantial evidence shows that the conflict minerals rule has exacerbated the humanitarian crisis on the ground in the Democratic Republic of the Congo (the “Congo” or the “DRC”). The reports public companies are mandated to file also contribute to “information overload” and create further disincentives for businesses to go public or remain public companies. Accordingly, the Chamber strongly supports Congressional repeal of Section 1502 due to its all-advised and fundamentally flawed approach to solving a geopolitical crisis, and the substantial burden it imposes upon public companies and their shareholders. Absent full repeal by Congress, the reports should be scaled in light of the D.C. Circuit’s ruling.¹

As long as Section 1502 remains in place, we respectfully urge the Commission to consider the following modifications to the implementation of the rule:

- Form an interagency working group with the State Department to study the complex technical, humanitarian, diplomatic and geopolitical issues associated with the rule.
- Provide that a reporting company is only subject to the rule to the extent it exercises a significant level of direct control over the manufacturing of its products which would help ensure that the rule applies in situations where conflict minerals may be material to a company’s business.
- In light of the lack of a disclosure, have information furnished rather than filed.
- Implement safe harbor and *de minimis* standards.
- Provide a more definite statement that scrap and recycled sources are out of scope and.
- Simplify required reporting on Form SD.

Discussion

The goal of Section 1502 was to “promote peace and security” in the Congo by “reducing the use of . . . conflict minerals . . . to help reduce funding for the armed groups contributing to the conflict and thereby put pressure on such groups to end the conflict” and by “help[ing] American consumers and investors make more

¹ *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

informed decisions.”² However, the mandated disclosure has failed to provide investors with material information and has caused a multitude of unintended and damaging consequences for the people of the Congo.³ It also has frustrated local efforts to implement due diligence programs and increase transparency.

Given the substantial complexity and regulatory burdens associated with tracking the source of materials through multiple tiers of the supply chain,⁴ particularly in an environment mired in civil war and corruption, the conflict minerals rule “inadvertently incentivizes buyers on the international market to pull out of the region altogether and source their minerals elsewhere,”⁵ resulting in a de facto embargo on minerals sourced from these regions.

Simply put, the mechanism contained in Section 1502 encourages companies to avoid the region, while layering regulatory burdens and costs on those that stay. Even companies that source cleanly from the covered region must submit a full Conflict Minerals Report to the SEC, and must further subject that report to an independent private sector audit. Companies that elect to exit the region altogether can avoid these obligations. This has led to a de facto embargo on minerals from the covered region, with serious consequences for local populations.⁶

Experts on the Congo have criticized the SEC for “fail[ing] to minimize the inordinate compliance costs of its rule for issuers, who must undertake burdensome yet possibly inconclusive investigations into whether even trace amounts of tin, tantalum, tungsten, and gold in their products came from mines controlled by armed groups . . . thereby all but guarantee[ing] that the de facto embargo will become permanent.”⁷ Congress and the SEC also have been criticized for developing a

² U.S. Government Accountability Office, Report to Congressional Committees, SEC Conflict Minerals Rule: Companies Face Continuing Challenges in Determining Whether Their Conflict Minerals Benefit Armed Groups, GAO-16-805, at 9 (Aug. 2016) (quoting 77 Fed. Reg. 56,274) (“GAO 2016 Report”).

³ See Exhibit A for detailed commentary on the unintended consequences of the conflict minerals rule.

⁴ See e.g., GAO 2016 Report, *supra* note 2, at 19.

⁵ Open Letter, from 70 local stakeholders and DRC experts (Sept. 9, 2014), *available at* <http://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf> (“September 2014 Open Letter”). A list of signatories is provided on pages 4-5.

⁶ Rick Goss, SVP of Environment and Sustainability, Information Technology Industry Council (ITI), testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision, at 4 (May 21, 2013).

⁷ Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in support of Petitioners in *Nat’l Ass’n of Mfrs. v. SEC* (D.C. Cir.) (Jan. 23, 2013) (“DRC amicus brief”).

conflict minerals policy crafted by western activists that ignored the views of local stakeholders and “fail[ed] to take into account the effects this legislation would have on the Congolese economy in the absence of the security and institutional frameworks needed to enforce the law, and in the absence of a coordinated effort to address the political, social, and economic root causes of the conflict.”⁸

While causing conditions on the ground to further deteriorate, the Commission’s reporting rule under Section 1502 has not produced decision-useful information for investors. The Chamber has long been concerned about the problem of “information overload” for investors as SEC filing requirements have grown in size and complexity over the years. The conflict minerals rule only exacerbates that problem by requiring an immaterial and costly disclosure that can distract investors from the most salient information about a company’s operations.

Reporting companies must bear substantial compliance and reporting costs in an effort to complete required country of origin inquiries, related due diligence, and prepare Forms SD. Even non-reporting companies that are in the supply chain for U.S. registrants must incur considerable time and expense responding to due diligence questionnaires from their publicly traded customers.

Impact of the Conflict Minerals Rule on Affected Countries

Consistent with repeated warnings by Congolese experts of the dangers the conflict minerals campaign posed to the people of the Congo, Section 1502 and the conflict minerals rule halted the entire artisanal mining trade in the Congo, driving millions of miners and their families deeper into poverty and causing greater instability in the area.⁹ These conditions have been documented by numerous commenters and local stakeholders. For example, in an open letter to President Obama and then-SEC Chairman Mary Schapiro, fifty religious, civil society and business leaders in South Kivu Province, DRC, expressed the “hope that you may be able to alleviate the unintended economic crisis that has befallen our people as a result of the recent

⁸ Carol Jean Gallo, Digging Deeper Into the Dodd-Frank Congo ‘Blood Minerals’ Controversy, UN Dispatch (Aug. 9, 2011), <http://www.undispatch.com/digging-deeper-into-the-dodd-frank-congo-blood-minerals-controversy/>.

⁹ *See, e.g.*, David Aronson, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision (May 21, 2013).

passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”¹⁰
According to the letter:

The abrupt cessation of this [artisanal mining] trade has had devastating impacts on our people: 1. Millions of our artisanal miners have suddenly had their livelihood cut from under them. (Many of them continue to mine; finding small-scale buyers who are either buying on speculation or smuggling abroad, but at less than a half of what they were making before.) They find it increasingly difficult to pay school, health, or maternity fees. Some even report having difficulty providing food for their families. 2. . . . The world’[s] sudden refusal to buy these minerals means that the planes no longer service these [remote mining] communities [only accessible by plane]; with nothing to trade, they are unable to provide themselves with such basic necessities as salt, sugar, oil, cloths, soap and so on. 3. Because artisanal mining was one of our only engines of economic growth, secondary economic impacts are being felt throughout the province. Even in our large towns, economic activity has diminished; construction slowed; trade in everything fallen. People with very little to begin with are now doing with less.¹¹

At the same time the Congo and many of the bordering countries covered by Section 1502 are experiencing substantial hardship due to decreased demand for minerals, they are bearing significant direct costs to comply with due diligence requirements. For example, in testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, then-Minister of State in charge of Mining with the Ministry of Natural Resources Government of the Republic of Rwanda stated that during the 2014-2015 fiscal year, “the Ministry of Natural Resources – which has several departments beyond mining – had a budget of \$19.8 million . . . [and] approximately \$6.1 million was spent to comply with due diligence requirements . . . And still, because of Section 1502, our minerals are effectively excluded from the world market.”¹²

¹⁰ Open Letter to President Obama and SEC Chairman Schapiro, from 50 religious, civil society and business leaders in South Kivu Province, DRC (July 5, 2011) (“DRC Open Letter”). A list of signatories is provided on pages 4-6.

¹¹ *Id.*

¹² Evode Imena, Minister of State In charge of Mining, Ministry of Natural Resources Government of the Republic of Rwanda, Testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, Dodd-Frank Five Years Later: What Have We Learned from Conflict Minerals Reporting?, at 8 (Nov.

Despite these negative consequences, the nonpartisan U.S. Government Accountability Office (“GAO”) reports that U.S. efforts have “failed to translate into significant improvements in security in 2015 in eastern DRC.”¹³ According to local stakeholders:

Had these unfortunate consequences at least resulted in a significant reduction in the conflicts here, they might have proven worthwhile. But minerals are only one of numerous elements propelling these conflicts, and we have seen no reduction in the toll our people suffer from them. If anything, the law has forced the mineral trade further underground, complicating the various initiatives we and others have undertaken to increase its transparency.¹⁴

Some commenters even maintain that “the law is benefitting some of the very people it was meant to single out.”¹⁵ The GAO notes that “[t]he UN . . . reported that armed groups continue to generate significant revenue from the control, taxation, or looting of all of the ‘conflict minerals’—gold, tin, tantalum, and tungsten—despite the expansion of traceability and due diligence efforts to more mining sites in the DRC.”¹⁶ Other militias have responded by turning to different businesses, such as trading in charcoal, timber, ivory, marijuana, palm oil, soap, or consumer goods to fund their activities.¹⁷ There also have been reports that the downturn in mining due to Section 1502 and the conflict minerals rule has sharpened the conflict in the region and made “miners and their families . . . more susceptible than ever to the predations of armed groups.”¹⁸ According to the Pole Institute, a local research-based institute:

The rise of the M23, but also other groups such as Raia Mutomboki and the large array of new Mai Mai militias, coincides with the downturn in mining in the Kivus—which itself is an unintended, but logical consequence of the new policies on Congolese mining being driven by

17, 2015). Underscoring political instability in the region, former Minister Imena was recently arrested and faces official corruption charges. *See* Ivan R. Mugisha, Rwanda’s Ex-Mining Minister Held for Nepotism, *The East African* (Jan. 30, 2017).

¹³ GAO 2016 Report, *supra* note 2, at 1.

¹⁴ DRC Open Letter, *supra* note 10.

¹⁵ David Aronson, How Congress Devastated Congo, *The New York Times* (Aug. 7, 2011), <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>.

¹⁶ GAO 2016 Report, *supra* note 2, at 1.

¹⁷ *See, e.g.*, September 2014 Open Letter, *supra* note 5.

¹⁸ DRC amicus brief, *supra* note 7, at 20.

international concern about “[c]onflict minerals[.]” Mining is not at the root of these new armed activities. It is the absence of mining that fuels conflict: by depriving the region of foreign earnings, by removing economic opportunities, by driving young people to seek a living through violence instead, by exacerbating competition between local stakeholders over ever scarcer revenues.¹⁹

Indeed, the *Washington Post*, among others, has reported that “[m]any miners are forced to find other ways to survive, including by joining armed groups,”²⁰ which is “a particularly perverse impact, when one considers the intentions of the movement.”²¹ Conveying a story about a fourteen year old boy who joined the militia when his father could no longer make enough money from a tin mine, the *Washington Post* stated that “[h]is path to war involved not just the wrenching poverty and violence of eastern Congo but also an obscure measure passed by American lawmakers.”²²

Impact of the Conflict Minerals Rule on Public Companies and Investors

In addition to the humanitarian impact of the conflict minerals rule, the mandated disclosure is not material information to the vast majority of investors. Even after conducting costly and burdensome due diligence efforts, most companies are still unable to determine the source of the conflict minerals in their products and whether the conflict minerals financed armed groups in the Congo. According to the GAO, “after an estimated 79 percent of the companies that filed a Form SD performed due diligence, an estimated 67 percent of them reported they were unable to confirm the source of the conflict minerals in their products, and about 97 percent of them reported that they could not determine whether the conflict minerals financed or benefited armed groups in the [DRC] and adjoining countries.”²³ In fact, only a “small percentage—an estimated 3 percent—of companies that indicated they performed due diligence reported in 2015 that they were able to determine whether conflict minerals in some of their products financed or benefited armed groups.”²⁴

¹⁹ Dominic Johnson, Senior Analyst, Pole Institute, NO KIVU, NO CONFLICT? The misguided struggle against “conflict minerals” in the DRC, 9 (Apr. 2013).

²⁰ Sudarsan Raghavan, How a well-intentioned U.S. law left Congolese miners jobless, *Washington Post* (Nov. 30, 2014).

²¹ September 2014 Open Letter, *supra* note 5.

²² Raghavan, *supra* note 20.

²³ GAO 2016 Report, *supra* note 2, at summary.

²⁴ *Id.* at 21.

Among other challenges, the GAO reports that some companies reported difficulties in getting sufficient information from suppliers, getting all suppliers to respond to requests for information, and getting complete information from suppliers, all of which limited their ability to determine the source and chain of custody of the conflict minerals in their products.²⁵ In addition, “due diligence efforts at the processing facility level are made more challenging by uncertainties about source and chain of custody of conflict minerals in earlier stages of the supply chain.”²⁶ Because minerals must pass through a number of traders and exporters before arriving at the processing facilities, the documentation of these stages may be incomplete or falsified by smugglers, which may mask the actual source of the minerals being traded.²⁷ Although there are some certification programs in existence to certify the chain of custody of minerals, the GAO reports that “these programs face operational challenges, including lack of infrastructure and government support... [and] challenges [regarding]... the integrity of these programs.”²⁸

According to the GAO:

OECD [Organization for Economic Co-operation and Development] reported in 2013 that as long as there are no traceability or certification schemes in place that cover the whole region, smuggling and contamination of conflict-free materials will continue to pose a threat to due diligence initiatives. There are challenges to the integrity of these programs. For example, a 2015 UN Group of Experts report documented the black-market sale of tin supply chain initiative tags; officials obtained two such illicit tags in the DRC and two in Rwanda. As we have previously reported, some agency officials and officials we

²⁵ See, e.g., GAO 2016 Report, *supra* note 2, at 19.

²⁶ *Id.* at 24.

²⁷ *Id.*

²⁸ *Id.* See also Statement of Kimberly Gianopoulos, Director, International Affairs and Trade, GAO, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, Insights from Companies’ Initial Disclosures and State and USAID Actions in the Democratic Republic of the Congo Region (Nov. 17, 2015) (“Poor infrastructure, including poorly maintained or nonexistent roads, makes it difficult for mining police and other authorities to travel in the region and monitor mines for illegal armed group activity. In our 2010 report, we reported that the minerals trade cannot be effectively monitored, regulated, and controlled unless civilian DRC officials, representatives from international organizations, and others can readily access mining sites to check on the enforcement of laws and regulations and to ensure visibility and transparency at the sites.”).

interviewed from industry, NGOs, and international organizations commented that the DRC government lacks capacity to mitigate corruption and smuggling of conflict minerals. The UN Group of Experts reported in 2015 that, while there has been progress on traceability and due diligence efforts concerning minerals produced in the DRC, smuggling continues, and there is scant evidence of interest in traceability and due diligence by the governments of the DRC and Burundi.²⁹

The Chamber's member companies have observed many of the same challenges in complying with the rule. Many companies' supply chains are complex and fragmented, with the reporting company frequently many tiers removed from the minerals supply chain for smelters or refiners that process metals found in its final products. Typically, there are many intervening third parties between the original sources of conflict minerals and the company. The company, therefore, must rely on its immediate suppliers, with whom it has business relationships, to provide information regarding the sourcing of necessary conflict minerals in the relevant products. The company's immediate suppliers, in turn, typically are downstream in the minerals supply chain and have similar challenges in achieving supply chain transparency.

Because many suppliers are privately held companies with no previous experience with SEC reporting, they often do not have the personnel or expertise to adequately research their supply chains in order to provide the reporting company with useful information. Chamber members have reported that often times the information that flows up through their supply chain is inaccurate, and in some instances have included addresses for smelter locations located in a different continent, far away from the DRC. Though supplier non-responsiveness is frequent, even suppliers that provide diligence information to their customers in good faith often do so in an incomplete manner. In sum, accuracy and reliability of information received through this process are common shortcomings.

In regulated industries suppliers have often gone through lengthy, rigorous, and multi-level regulatory and quality assessments and approvals. In other cases, industry consolidation has led to only a limited universe of suppliers from which certain parts

²⁹ GAO 2016 Report, *supra* note 2, at 24.

can be sourced. Thus, it can be very difficult to switch to another supplier if an existing supplier is not responsive to the company's conflict minerals program.

In order to make a good faith effort to comply with the conflict minerals rule, companies have had to dedicate enormous time and resources for compliance. Chamber members have reported having to dedicate hundreds of working-hours per year to the conflict minerals rule, which translates to enormous costs for shareholders. These are resources that could be dedicated to hiring or training other employees, or making long-term investments that benefit both the company and its investors.

One Chamber member reported that non-recurring implementation costs totaled roughly \$10 million, and that annual compliance costs will fall in the range of \$1-2 million per year. That company reported having to significantly update its supply chain operations, in particular by creating a new sequence of communications with thousands of suppliers in order to secure accurate information to help the company comply with the mandate. One company estimated that their conflict minerals compliance efforts span over 7 months per year, and involve information collection spread across 300 suppliers. Another company shared that their compliance efforts span the entire year and involve contacting 2,200 suppliers. That company reported having up to 100 employees at any given time involved with the compliance efforts. These are costs that are ultimately borne by the shareholders and customers of public companies.

Recommendations

As stated above, the Chamber supports full repeal of Section 1502 as we believe this mandate is fundamentally misguided and was a fundamentally misguided use of the federal securities laws. Even the Commission has conceded that the final rule is "quite different from the economic or investor protection benefits that [its] rules ordinarily strive to achieve."³⁰ And, as the D.C. Circuit held, "The idea . . . that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there . . . is entirely unproven and rests on pure speculation."³¹ Given that the rule remains in place, we therefore renew our call for the SEC and the State Department to establish an interagency working group to provide a more nuanced understanding of the

³⁰ *NAM*, 800 F. 3d at 521 (citing Release No. 34-67716, 77 Fed.Reg. 56,274, 56,350 (Sept. 12, 2012)).

³¹ *Id.* at 525.

complex technical, diplomatic, humanitarian and geopolitical issues inherent to SEC regulation of conflict minerals. In particular, this working group can investigate the issues involved with identification and the feasibility of supply chain authentication and propose refinements to the disclosure regime that will mitigate the lingering negative impact on persons living in the affected region, investors, business operations, the quality of disclosures and consumer choice.

Additionally, Step One of the analysis under the final rule requires a reporting company that manufactures or contracts to manufacture products to determine whether conflict minerals are “necessary to the functionality or production” of any product manufactured or contracted to be manufactured by the reporting company. Many of the Chamber’s members have struggled to determine whether conflict minerals are in fact “necessary to the functionality or production” of a given product in light of the broad construction of these terms and the lack of detailed guidance from the Commission or Staff as to how these terms should be interpreted. This fundamental ambiguity in the final rule has created substantial uncertainty regarding the scope of the rule.

A company should only be subject to the disclosure rules to the extent it exercises a significant level of direct control over the manufacturing of its branded goods, including directly sourcing or procuring raw materials for the manufacture of those goods. Eliminating uncertainty and confusion about which companies will be subject to the rules and ensuring that only companies that directly control input materials and have the capacity to monitor the source of those materials will ensure the disclosure requirements reflect Congress’s intent to create disclosure obligations for companies that are significantly and directly involved with conflict minerals.

The SEC should also consider allowing companies subject to disclosures to “furnish” such information to the SEC as opposed to “filing” it with the Commission and therefore becoming subject to liability under Section 18 of the 1934 Securities Exchange Act (“’34 Act”). The SEC has a long history deeming certain required disclosures to be “not filed” for purposes of liability provisions under the ’34 Act. The current rule exposes public companies and their shareholders to those with litigious instincts, a reality all the more troubling given that parts of the rule have been struck down on Constitutional grounds. The SEC has the opportunity to preclude any such harmful litigation by allowing disclosures to be furnished instead of filed.

Another option for reducing the reporting burden is by including safe harbor and *de minimis* standards in the rule. Safe harbor standards would enable companies distant in the supply chain that have little or no view or control over the acquisition of the conflict minerals to comply by adopting defined contractual procurement practices, without also being subjected to undue and impractical audit or reporting requirements. Separately, without a *de minimis* standard, even trace elements of one of the conflict minerals could trigger disclosure obligations. For example, a catalyst used to manufacture another product should be viewed no differently than a physical tool used for the same purpose, which is generally excluded from coverage of the rule. But the SEC made the subject of catalysts even more confusing than it needed to be with the infamous footnote 236 to the final rule adopting release, which covers products made with a conflict-mineral catalyst if “traces” of the catalyst remain in the final product but not if the catalyst is fully “washed away”. The problem with this position from an engineering standpoint is there is always a likelihood that at least some minute traces of a catalyst will unintentionally remain in a product manufactured with that catalyst, and footnote 236 provides no *de minimis* threshold. Accordingly, for a company taking a conservative approach, any product manufactured using a conflict-mineral catalyst ends up being covered by the rule even though catalyst traces are not intended to be in the product and do not serve the functionality of the product.

Step Two of the final rule requires a reporting company that determines in Step One that a conflict mineral is necessary to the functionality or production of a product manufactured or contracted to be manufactured by the reporting company to conduct in good faith a reasonable country of origin inquiry (the so-called “RCOI”) that is reasonably designed to determine whether the conflict mineral originated in a covered country or is from scrap or recycled sources. If the reporting company determines that its necessary conflict minerals “did not originate” in a covered country or did come from recycled or scrap sources, or if it has no reason to believe that the conflict minerals “may have originated” in a covered country, or if it reasonably believes that its conflict minerals did come from recycled or scrap sources, the company does not move on to Step Three and must disclose on Form SD its determination and briefly describe its RCOI. On the other hand, the reporting company must move on to Step Three if it knows that any of its necessary conflict minerals originated in a covered country and are not from recycled or scrap sources, or has reason to believe that its necessary conflict minerals “may have originated” in a covered country and has reason to believe that they may not be from recycled or scrap sources. Step Three, of course, contemplates an onerous due diligence process.

The distinction between determining whether conflict minerals “did originate” and “may have originated” is an important one. The Chamber believes that in promulgating the final conflict minerals rule, the SEC misinterpreted the statutory language of Section 1502. Section 1502 unambiguously states that a company would only be required to make disclosures if they determine conflict minerals in certain of their products “*did originate*” in the DRC. The SEC went well beyond its authority when it created a new, ambiguous standard by requiring the companies also determine whether or not conflict minerals in their products “*may have originated*” in the DRC. This undoubtedly has led to increased compliance costs and complexities as companies do not wish to run afoul of the regulation, notwithstanding its contrast with the clear statutory language.

Putting aside the complexity of the core inquiry, the Chamber wishes to make two final recommendations. First, in light of significant difficulties our member companies report in tracking scrap and recycled raw materials, we urge the Commission to provide a more definite statement that scrap and recycled sources are out of scope if a reporting company reasonably believes they are included within a product otherwise subject to the rule. Second, and more fundamentally, the Commission should take action to cure the fundamental First Amendment defect inherent in the rule as written, which formed the basis for the D.C. Circuit’s ruling on appeal. The most straightforward way to do so would be to permit a company that is unable to determine the country of origin after conducting an RCOI to provide a general description of those efforts in Form SD along with a statement that it has been unable to determine the country of origin. Under this approach, there would be no need to advance to Step Three of the analysis, nor would there be any need to seek an expensive audit. We are optimistic that these approaches would begin to unwind the de facto embargo on the region that now exists.

Conclusion

Exhibit A to this letter compiles third-party testimony and reporting about the impact of the conflict minerals rule on stakeholders on the ground that have been negatively affected. Given the lack of decision-useful information produced by burdensome and inconclusive SEC reporting on Form SD, the Commission’s conflict minerals rule has failed to achieve Section 1502’s goal of providing material

information to investors to “help American consumers and investors make more informed decisions.”³²

Absent the necessary repeal of Section 1502 by Congress, the Commission has an opportunity to begin correcting some of the fatal flaws embodied under the current rule, and we respectfully urge you to do so without delay. We thank you for your consideration of these comments and are available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long horizontal flourish.

Tom Quadman

cc: The Honorable Michael S. Piwowar
The Honorable Kara M. Stein

³² GAO 2016 Report, *supra* note 2 (quoting 77 Fed. Reg. 56,274).

Exhibit A:

Commentary
on the Unintended Consequences
of the Conflict Minerals Rule

*Open Letter to President Obama and then-SEC Chairman Mary Schapiro, from 50 religious, civil society and business leaders in South Kivu Province, DRC (July 5, 2011)*³³

- “We write to you in our capacity as representatives of the people of South Kivu Province in the Democratic Republic of Congo, in the hope that you may be able to alleviate the unintended economic crisis that has befallen our people as a result of the recent passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”
- “As you know, our country is already among the poorest in the world. . . . In this environment, artisanal mining has emerged as one of our only economic lifelines, and has directly and indirectly provided millions of jobs. The abrupt cessation of this trade has had devastating impacts on our people: 1. Millions of our artisanal miners have suddenly had their livelihood cut from under them. (Many of them continue to mine; finding small-scale buyers who are either buying on speculation or smuggling abroad, but at less than a half of what they were making before.) They find it increasingly difficult to pay school, health, or maternity fees. Some even report having difficulty providing food for their families. 2. . . . The world’[s] sudden refusal to buy these minerals means that the planes no longer service these [remote mining] communities; with nothing to trade, they are unable to provide themselves with such basic necessities as salt, sugar, oil, cloths, soap and so on. 3. Because artisanal mining was one of our only engines of economic growth, secondary economic impacts are being felt throughout the province. Even in our large towns, economic activity has diminished; construction slowed; trade in everything fallen. People with very little to begin with are now doing with less.”
- “Had these unfortunate consequences at least resulted in a significant reduction in the conflicts here, they might have proven worthwhile. But minerals are only one of numerous elements propelling these conflicts, and we have seen no reduction in the toll our people suffer from them. If

³³ Open Letter to President Obama and SEC Chairman Schapiro, from 50 religious, civil society and business leaders in South Kivu Province, DRC (July 5, 2011). A list of signatories is provided on pages 4-6.

anything, the law has forced the mineral trade further underground, complicating the various initiatives we and others have undertaken to increase its transparency.”

- “We know that neither of you wish to cause further needless suffering to our people. And we recognize that the authors of the relevant portions of the Dodd Frank Act intended to help us, not hurt us. Now we ask you to find a way to apply the Act in a way that relieves the unintended burden it has placed on us, and that was never intended by its authors.”
- “Specifically, we ask: . . . 2. That you make a strenuous effort to ensure that our voices, rather than those of Western NGOs who claim to speak on our behalf, be consulted thoroughly as the law is defined and implemented.”
- “We are all in agreement on the need [t]o increase transparency in the mineral trade and to develop traceability programs. There are in fact numerous bilateral and multilateral initiatives underway, working with the Congolese government, which seeks to do just that. Unfortunately, the law as it has been understood here has left these initiatives blocked and frustrated.”

Statements of Mulumba K. Serge, President of the DRC mining cooperative, CDMC, at the SEC Roundtable on Issues Relating to Conflict Minerals, Washington, DC (Oct. 18, 2011)³⁴

- “We believe that Dodd Frank, while being a good law in terms of its humanitarian nature, had a negative impact on the lives of miners (diggers) in our various mines throughout the DRC. Each passing day children die from lack of food and medicines, others do not go to school because parents are unable to pay school fees. The social situation of miners (diggers) has so deteriorated since the advent of Dodd Frank.”
- “We cannot give you exactly the number of lives that are lost each day following the cessation of artisanal mining in the DRC and yet even if a child died or who is hungry or do not go to school because his father digger lacked money, this is a tragedy, it is a sad news that should challenge our humanity. Or the woman who gives birth to her home with all the risks involved for the simple reason that the miner (digger) husband has no money to bring her to the hospital.”

³⁴ Statements of Mulumba K. Serge, President of the CDMC Mining Cooperative in the Congo, at the SEC Roundtable on Issues Relating to Conflict Minerals, Washington, DC (Oct. 18, 2011), <https://www.sec.gov/comments/s7-40-10/s74010-334.htm>.

*Open Letter from Pastor Raymond Muhombo Shemihiyo, General Mining Cooperatives of North Kivu, SOS From The Small Scale Miners of the Congo Regarding The Dodd Frank Act (Apr. 27, 2011)*³⁵

- “Please listen attentively to our cries of weeping and anguish. Our families and us will be doomed to death if you do not hear these cries of alarm. Do not wait to rescue us when we will be already in the grave. Act in time to avoid the humanitarian catastrophe that would arise from the consequences of your suspension to purchase our minerals.”

*Letter to Dr. Jerry Meyers, Chair of Extractives work group at Intel Corporation, from mining cooperatives corporation of Eastern Congo (Apr. 8, 2011)*³⁶

- “[W]hat is the refuge of all the Congolese jobless, around 85% of the population. Is it to make peace or to trouble the peace, when the life is stopped for a population? No job, no life. Please imagine the consequences . . . when we are assisting and living the criminal situation by a minority handed in the forest; can you imagine what kind of criminality shall be everywhere by this jobless that is imposed to this people. Who shall be responsible of the tragic trouble we are going to live so soon? It is time to stop it please.”

*Letter to the SEC, from Father Pere Didier de Failly, Note On The Need To Let Some Time To Implement A Thorough Control System On Artisanal Mining In Eastern DRC (Mar. 10, 2011)*³⁷

- “Thanks to their commitment and funds, several procedures to assess the artisanal mining products along the supply chain are now in the design process. . . . Now if the Dodd-Frank regulations are applied from April this year it will ruin all these efforts and condemn hundreds of thousands of people in Eastern DRC to keep under the terror of these maffiosi barons,

³⁵ Open Letter, from Pastor Raymond Muhombo Shemihiyo, General Mining Cooperatives of North Kivu, Democratic Republic of the Congo, SOS From The Small Scale Miners of the Congo Regarding The Dodd Frank Act (Apr. 27, 2011), available at <http://www.fairjewelry.org/sos-from-the-small-scale-miners-of-the-congo-regarding-the-dodd-frank-act/>.

³⁶ Letter to Dr. Jerry Meyers, Chair of Extractives work group at Intel Corporation, from Josue W. Mukulumanya, President of the Générale des Coopératives Minières du Sud Kivu (GECOMISKI), and Raymond Muhombo Shemihiyo, President of the COMIMPA, on behalf of the mining cooperatives corporation of the Eastern Congo (Apr. 8, 2011).

³⁷ Letter to the SEC, from Father Didier de Failly, Note on The Need To Let Some Time To Implement A Thorough Control System On Artisanal Mining In Eastern DRC (Mar. 10, 2011), <http://www.sec.gov/comments/s7-40-10/s74010-190.pdf>.

instead of improving the whole situation. Even in Rwanda, Uganda and Burundi, thousands of people will be badly affected.”

*Open Letter, from 70 local stakeholders and DRC experts (Sept. 9, 2014)*³⁸

- “Despite successes of activists in shaping policy, the conflict minerals campaign fundamentally misunderstands the relationship between minerals and conflict in the eastern DRC. First, while the minerals help perpetuate the conflict; they are not its cause. National and regional political struggles over power and influence as well as issues such as access to land and questions of citizenship and identity are just some of the more structural drivers of conflict. . . . Second, armed groups are not dependent on mineral revenue for their existence. The eastern DRC is a fully militarized economy, in which minerals are just one resource among many that armed groups – and the national army FARDC – can levy financing from. The M23, until recently the most powerful non-state armed group in DRC, never sought physical control over mining activity.”
- “Moreover, few local stakeholders have been included in on-going international policy-making, and as a result realities on the ground have not always been taken into account. . . . But in demanding that companies prove the origin of minerals sourced in the eastern DRC or neighbouring countries before systems able to provide such proof have been put in place, conflict minerals activists and resultant legislation – in particular Section 1502 of the Dodd-Frank Act – inadvertently incentivize buyers on the international market to pull out of the region altogether and source their minerals elsewhere.”
- “As a result, the conflict minerals movement has yet to lead to meaningful improvement on the ground, and has had a number of unintended and damaging consequences. Nearly four years after the passing of the Dodd-Frank Act, only a small fraction of the hundreds of mining sites in the eastern DRC have been reached by traceability or certification efforts. The rest remain beyond the pale, forced into either illegality or collapse as certain international buyers have responded to the legislation by going ‘Congo-free.’”

³⁸ Open Letter, from 70 local stakeholders and DRC experts (Sept. 9, 2014), *available at* <http://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf>. A list of signatories is provided on pages 4-5.

- “This in turn has driven many miners into the margins of legality (for instance, feeding into smuggling rackets), where armed actors return through the loopholes of transnational regulation. Others have simply lost their jobs, and in areas where mining has ceased, local economies have suffered. To put this in context, an estimated eight to ten million people across the country are dependent on artisanal mining for their livelihood. Some former miners have returned to subsistence agriculture, but persisting insecurity levels leave them in abject poverty facing dire living conditions, in fear of missing harvests due to displacement. Others have been prompted to join militias as a means to quick cash in the absence of other opportunities; a particularly perverse impact, when one considers the intentions of the movement.”
- “Alongside the impact on mining communities and local economies, several armed groups have responded by turning to different businesses such as trading in charcoal, marijuana, palm oil, soap, or consumer goods. Those remaining in the mining sector have largely traded mineral exploitation on site for mineral taxation a few steps down the supply chain, operating numerous roadblocks that can bring in millions of dollars a year. Others are reported to have sent in family members or civilian allies to run business for them on site, while they remain safely at a distance.”
- “There is broad consensus for the need to clean up the eastern Congo’s minerals sector, yet much disagreement about the international community’s current model for achieving this goal. As such, efforts to improve transparency in the eastern DRC’s mineral supply chains should continue. Yet a more nuanced and holistic approach that takes into account the realities of the eastern DRC’s mining sector and the complexity of the conflict is needed.”
- “Congolesse government and civil society were poorly consulted on Section 1502 of the Dodd-Frank Act prior to its passing, and as a result many were unaware of its implications. . . . More Congolesse voices must be listened to, and the local context and power structures taken into account. This would ensure greater understanding of the local context and better harmonisation with existing national and regional initiatives”
- “Worse, these initiatives will risk contributing to, rather than alleviating, the very conflicts they set out to address.”

*Commentary by Raymond Gilpin and Brett Boor, On the Issues: the Instability in the DRC, U.S. Institute of Peace (Aug. 8, 2012)*³⁹

- “The law is based on the presumption that the violence in northeastern DRC is primarily fueled by violent competition for control of the region’s lucrative gold and tin ore mines. The recent flare up of hostilities suggests that this is not the case. Not only has there been a resurgence of violent conflict following a purported decrease in ‘conflict mining,’ but we have also witnessed a shift in funding modalities by the belligerents. It appears that U.S. Congressman Barney Frank (a co-sponsor of the Dodd-Frank Act) has not achieved his goal of ‘...cut[ting] off funding to people who kill people.’”
- “Though well-intentioned, such sentiments [to cut off the funding to people who kill people] fail to address the root causes of conflict and grossly underestimate the resilience and adaptability of the warring factions. In recent months the armed groups have proven that they can quickly adapt, shifting from conflict mining to smuggling, racketeering (including ‘taxes’ imposed on coal and cattle) and bank robbery. Although strategies to stem the flow of funds to the warring groups are clearly critical in resolving this ongoing crisis, they can only be effective if they are part of a comprehensive solution that seeks to address the underlying drivers of the conflict; particularly security sector reform, socioeconomic inequality and poor governance.”
- “It is estimated that since the April mutiny, some 470,000 people have been displaced, with around 51,000 crossing the borders into Rwanda (19,400) and Uganda (31,600). Media reports suggest that scores have lost their lives and thousands have been deprived of their means of livelihood. Acute shortages of food, fuel and other supplies have also been reported.”

*Kivu Times Interview with Soraya Aziḡ Souleymane, human rights activist, development issues specialist and Deputy Director at the Carter Centre in the DRC, DRC: Mining Resources, A Curse To His Children? – Answers With Soraya Aziḡ Souleymane (Sept. 11, 2015)*⁴⁰

³⁹ Raymond Gilpin and Brett Boor, On the Issues: Instability in the DR Congo, U.S. Institute of Peace (Aug. 2012), <https://www.usip.org/publications/2012/08/instability-drc>.

⁴⁰ Interview with Soraya Aziz Souleymane, DRC: Mining Resources, A Curse To His Children? – Answers With Soraya Aziz Souleymane, Kivu Times (Sept. 11, 2015), <https://kivutimes.wordpress.com/2015/09/11/rdc-les-ressources-minieres-une-malediction-pour-ses-enfants-reponses-avec-soraya-aziz-souleymane/>.

- “Do you think the appearance of theories on minerals in blood and the certification process brought more into local economies in the mining areas? Do you think for example that the Dodd-Frank Act has led to the restoration of the social climate in the mining areas of the DRC? “That is a good question to the extent that many communities depend on natural resources. Some international initiatives have decried the problem of conflict minerals. This led the US government to adopt the Dodd-Frank Act which requires all American companies trace their minerals. The Congolese Government has also made the suspension of activities in certain mining squares. However, this had the effect of further impoverishing the communities that depend mainly on the exploitation of these resources has resulted in creating major clandestine networks that propelled Rwanda to the largest world producer of coltan. For me it must apply the solutions I mentioned earlier, namely the creation of alternative economic activities to enable communities to survive without these mining revenues. Hail to this the recent regulation of the European Union has taken this aspect of the local economy into consideration.”

*MakeITfair Report,*⁴¹ *Voices from the inside: Local views on mining reform in Eastern DR Congo (Oct. 2010)*⁴²

- “Recently, numerous efforts and initiatives ranging from legislation to certification have focused on the link between conflict and the mineral trade from Eastern DRC. Despite the fact that all such initiatives aim to end the mineral trade funding armed groups in Eastern DRC, there is growing concern that there is a boycott in practice on minerals from Eastern DRC, which may lead to worse consequences for the people on ground.”⁴³
- “In the field interviews it was demonstrated that all members of civil society groups in Goma and Bukavu welcome the attempts of policymakers to ‘clean up’ the mining business in Eastern DRC. However, they want to have a stronger voice in the debate and more influence over initiatives that are currently taking shape. Most of the respondents rejected the idea of an embargo on minerals from Eastern DRC, while they expressed their

⁴¹ The report was published as part of the makeITfair campaign, which is “a Europe-wide project on consumer electronics . . . [that] aims to inform young consumers about human rights violations, as well as social and environmental issues along the supply chain. It also addresses consumer electronics companies that can contribute to change.”⁴¹ See the report for additional comments from local stakeholders warning of the unintended consequences of section 1502 of Dodd-Frank and the conflict minerals rule.

⁴² MakeITFair, *Voices from the inside: Local views on mining reform in Eastern DR Congo (Oct. 2010)* (“MakeITfair Report”).

⁴³ MakeITfair Report, at 5.

concerns about the feasibility of traceability mechanisms, the lack of sensitization and organization of stakeholders at the grassroots level, and the lack of attention to social problems associated with the exploitation and trade in mineral resources. These problems include land disputes, forced labour and sexual violence.”⁴⁴

- “There is also a worry that international initiatives uncritically strengthen the Congolese state in a part of the country where trust in the state is very low due to years of corruption and state violence.”⁴⁵
- “When high level institutions and industry are busy drawing up standards, local views and priorities are in danger of remaining unheard.”⁴⁶
- “We see it as crucial that the views and suggestions of those most affected by mining in Eastern DRC are taken into account when corporate decisions on this pressing issue are taken. It is, however, important to note that efforts regulating the mineral trade are not by any means the only initiatives needed to end violent conflict in Eastern DRC. Much research supports the fact that the root cause of insecurity in Eastern DRC is not the conflict mineral nexus, which means many security sector reforms need to be put in place to complement initiatives to break the circle of militarized mines and the mineral trade.”⁴⁷
- “Skeptics of the idea that ending the trade will stop the violence say it will only hurt an already extremely weak economy and make the local population suffer even more. They underline the fact that more than two-thirds of the revenue of a province like North Kivu is from mineral exports. . . . The local research-based Pole Institute is of the opinion that the dilemma becomes even greater when the mining industry is criminalized without offering an economic alternative to a possible boycott of these minerals.”⁴⁸
- “Steve Hege, a program officer of the Center on International Cooperation (CIC) at New York University and Jason Stearns, Phd. candidate at Yale . . . question the viability of asking all individual companies undertaking due diligence work in the field in Eastern DRC. ‘Due diligence is a good idea in

⁴⁴ *Id.* at 6.

⁴⁵ *Id.*

⁴⁶ *Id.* at 8.

⁴⁷ *Id.*

⁴⁸ *Id.* at 23.

theory, but very difficult to implement given the corrupt administrative apparatus it would have to rely on and the security situation in the mining areas, they write.”⁴⁹

- “In addition, many have voiced serious concerns about the consequences of the new US legislation on conflict minerals for the people of the DRC. According to the Pole Institute, the US law risks causing considerable economic damage in Eastern Congo. The end effect can be the opposite of that intended: pushing people towards conflict rather than leading them towards peace.”⁵⁰
- “Pact has been consulting many local stakeholders within the iTSCi-pilot project. Karen Hayes writes: ‘We have found that people are quite angry that there is a risk of an embargo about which they have not been consulted, and a great deal of worry that there is not a reasonable timeframe in which to meet the requirements. They consider that this would lead to a loss of their livelihoods, would force them to migrate to new areas, it could cause some to turn to crime, and they feel they would then have to operate in a more clandestine manner in which they are more vulnerable to exploitation and conflict.’”⁵¹
- “By far most informants questioned the usefulness of an embargo. The most outspoken critic was Désiré Segahungu, the chairman of the business association, Fédération des Entreprises du Congo (FEC), in North Kivu. In Segahungu’s opinion, ‘an embargo would be dramatic for the local economy’. The main reason for this, he said, ‘Is that the mining sector is currently the most important earner of foreign currency in Eastern DRC’. He was convinced that an embargo would inevitably lead to the destruction of the most important source of foreign currency, which, in turn, would have a negative impact on the purchase and import of goods from abroad. In addition to this, he feared that an embargo might have pernicious consequences for the security situation in the region. ‘Considering that mining is currently one of the only sources of income for unemployed youngsters in North and South Kivu,’ he noted, ‘there is a serious risk that some of these youngsters will join armed groups if an embargo prevents them from making money through mining or mining-related activities.’

⁴⁹ *Id.* at 23-24 (quoting Center on International Cooperation (CIC) discussion paper, Mining and Conflict in the Eastern DR Congo).

⁵⁰ *Id.* at 24 (quoting Dominic Johnson, Pole Institute, Killing the economy in the name of peace? The new US [‘conflict minerals’] legislation for the DRC (July 19, 2010)).

⁵¹ *Id.*

Segahungu accused the UN Panel of Experts and NGOs such as Global Witness of showing all participants in the local mining business in a bad light”⁵²

- “Several local stakeholders complained during interviews that policy makers at the national and international level had failed to consult them about their plans to reform the Congolese mining sector. They regretted that only a limited number of civil society groups were able to participate in high-level talks about the aforementioned reform measures.”⁵³

*Pole Institute*⁵⁴ Report by Dominic Johnson, Senior Analyst, NO KIVU, NO CONFLICT? The misguided struggle against “conflict minerals” in the DRC (April 2013)⁵⁵

- “When in 2010 the US Congress passed the Dodd-Frank law on reforming Wall Street, including a section on [“conflict minerals”], and shortly afterwards the DRC government [“suspended”] legal mining in Eastern Congo, the sector was thrown into a crisis from which it has yet to recover. The implementation of existing trac[e]ability and transparency initiatives in Kivu, which had only just begun, was abruptly cut short. The government suspension was lifted in 2011, but without the safeguards in place which had been developed earlier by local stakeholders. Legal trade remained low and was thrown further into chaos by the renewed outbreak of war in North Kivu in 2012.”⁵⁶
- “Thus, a pattern is emerging in which Kivu’s mining sector is being asphyxiated in the name of reform. Before 2010, Kivu’s mineral traders had willingly participated in moves to strengthen formal and legal channels and to safeguard Kivu livelihoods by creating [“conflict-free”] production and trading chains within Eastern Congo. The mining ban killed this off, and today the focus has moved to Katanga and Maniema, increasingly apparently favouring a nexus of mining firms closely linked to the powerholders in Kinshasa. Because they do not finance armed groups,

⁵² *Id.* at 25-26.

⁵³ *Id.* at 29.

⁵⁴ Pole Institute, a local research-based institute located in the eastern North Kivu province of the Congo, was formed by a group of Congolese people to, among other things, provide analysis and research on major local challenges and their national, regional and international implications, such as poverty, social violence, and ethnic divisions. The report is part of a wider Pole Institute research project examining and monitoring the impact of international mining policy and natural resource exploitation on communities in Eastern Congo.

⁵⁵ Dominic Johnson, Senior Analyst, Pole Institute, NO KIVU, NO CONFLICT? The misguided struggle against “conflict minerals” in the DRC (Apr. 2013) (“Pole Institute Report”).

⁵⁶ Pole Institute Report, at 7.

these firms are seen as [‘]conflict-free[‘], but no criteria exists to judge the wider political ramifications of their activities, their benefits for local development and the possible exacerbation of local conflict caused by favouring certain firms in collusion with international partners to the detriment of others. Especially worrying is the fact that these firms themselves finance the schemes which are supposed to validate their activities as [‘]conflict-free[‘].”⁵⁷

- “In a previous paper, it was argued that the [‘]conflict minerals[‘] debate suffered from a series of false assumptions – namely, that conflict in Kivu was primarily about minerals, and also, that the central government of the DRC was a stabilising force and that strengthening it would reduce conflict. Experiences with security sector reform in the DRC have disproved the latter assumption, but in mineral policy it still holds sway.”⁵⁸
- “At the same time, while Kivu’s mining sector has plunged into crisis, more young people in the Kivu provinces than ever before are joining armed groups and illegal militias. The resulting conflicts, which have caused displacement in the DRC to reach levels not seen since the formal end of the Second Congolese war in 2003, are not primarily about mining, despite efforts by international lobbyists to narrow every conflict analysis in the Congo down to conflicts around natural resources. The M23 rebellion, the best known of the new armed groups in the Kivus, does not control any mines, has not attempted to do so and does not conduct mineral exports through the areas it controls.”⁵⁹
- “The rise of the M23, but also other groups such as Raia Mutomboki and the large array of new Mai Mai militias, coincides with the downturn in mining in the Kivus – which itself is an unintended, but logical consequence of the new policies on Congolese mining being driven by international concern about [‘]conflict minerals[‘]. Mining is not at the root of these new armed activities. It is the absence of mining that fuels conflict: by depriving the region of foreign earnings, by removing economic opportunities, by driving young people to seek a living through violence instead, by exacerbating competition between local stakeholders over ever scarcer revenues.”⁶⁰

⁵⁷ *Id.* at 7-8.

⁵⁸ *Id.* at 8.

⁵⁹ *Id.* at 8-9.

⁶⁰ *Id.* at 9.

- “It should be recalled that warring parties, warlords, politicians and other powerholders in Eastern Congo are not interested in minerals as such. They are interested in money. If they can earn it with mining, fine; if not, they will earn it with something else, even if this means destroying the few livelihoods and institutions that exist.”⁶¹
- “Removing mining from [‘]conflict finance[‘] in Kivu and marketing non-Kivu mining as [‘]conflict free[‘] may sharpen conflict around the revenue sources that remain in Kivu while turning mining outside Kivu into a battleground for financial-political interests. Without a fundamental reform of governance in the DRC, the result is unlikely to be positive.”⁶²
- “A range of companies active in the Great Lakes Region, NGOs and government bodies from the region argued in their submissions [‘]that the provision and/or rule could lead to a de facto boycott or embargo on conflict minerals from the Covered Countries[‘] - AngloGold Ashanti, Comimpa, Somima; FEC, Best, ITRI, PACT; the Mining Ministries of Uganda and Tanzania. During this debate, this view was put quite forcefully. [‘]For artisanal miners, the damage has been done[‘], Tony Hilvers, Vice President of Industry Programs (IPC) wrote in May 2011. [‘]No OEM (Original Equipment Manufacturer) in their right mind – or members of their supply chains – will willingly source metals from Africa, let alone the DRC.[‘] . . . [‘]If you oppose the law, then obviously you support rape and murder in the DRC by the rebel miners and criminal network[‘], he continued ironically. Hilvers was not the only one to point out that Dodd-Frank had in practice prevented further implementation of existing [‘]bag and tag[‘] schemes by ITRI on the ground.”⁶³
- “Parallel to declining volumes, prices collapsed from \$5.5/kg in Mubi 2010 to \$2 in May 2012. The numbers of miners in Bisie and other mining sites declined too, as did miners’ incomes: according to a fact-finding mission by Enough and others, dropping from \$8 to \$2.50/kg. Enough appears to regard the drop in prices as an indication of the success of Dodd Frank, claiming that [‘]the passage of the conflict minerals legislation within the Dodd-Fra[]nk Wall Stree[t] Reform law and new tech industry sourcing policies have helped lead to a 65% drop in armed groups’ profits from the trade in tin, tantalum and tungsten – the ‘3 Ts’ – over the past two years[‘].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 21.

The calculations behind this figure are difficult to follow as raw data are not provided, However, the obvious conclusion can also be drawn that since 2010 the proportion of mining revenues going to armed groups has significantly increased to the detriment of official and miners' revenues – surely not an indication of success in curbing the trade in []conflict minerals[].”⁶⁴

- “The GoE estimates official exports as running at around 10% of production, less than for many years. As mining from inaccessible sites such as Bisie decreases and shifts to sites on Lake Kivu, smuggling to Rwanda and official exports from Rwanda increased.”⁶⁵

*Working Paper by Laura Seay, Center for Global Development, What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy (Jan. 2012)*⁶⁶

- “Nicknamed ‘Obama’s Law’ by the Congolese, Section 1502 has created a de facto ban on Congolese mineral exports, put anywhere from tens of thousands up to 2 million Congolese miners out of work in the eastern Congo, and, despite ending most of the trade in Congolese conflict minerals, done little to improve the security situation or the daily lives of most Congolese.”⁶⁷
- “Moreover, Western advocacy efforts on conflict minerals have thus far made life more difficult for many Congolese while failing to stop the violence they purport to address. Instead, these efforts have thus far increased smuggling, led armed groups to seek other sources of revenue, and left up to 2 million Congolese artisanal miners out of work. As is the case with the Kimberley Process, good intentions and the belief that attacking the perceived economic roots of conflict was a path to peace have largely proved ineffective.”⁶⁸
- “Section 1502’s effect on Congolese artisanal miners and their families, however, has been devastating. Congolese artisanal miners normally work

⁶⁴ *Id.* at 53.

⁶⁵ *Id.* at 54.

⁶⁶ Laura Seay, Center for Global Development, What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy, Working Paper 284 (Jan. 2012), available at <https://www.cgdev.org/publication/what%E2%80%99s-wrong-dodd-frank-1502-conflict-minerals-civilian-livelihoods-and-unintended> (“CGD Paper”).

⁶⁷ CGD Paper, at Executive Summary.

⁶⁸ *Id.* at Introduction.

under horrific conditions for little pay, but in most mining communities, it is the only paid employment available. There are no livelihoods alternatives, save subsistence agriculture or joining a militia. Now they are in trouble; as the World Bank PROMINES head Paul Yenga Mabolia told *Bloomberg Businessweek*, ‘Almost everything came to a standstill.’⁶⁹

- “Local civil society activists engaged in the mining sector estimate that 1-2 million Congolese artisanal miners and those who work in other aspects of the mining sector are currently out of work. Multiplied by the 5-6 direct dependents that each miner has, Section 1502 has inadvertently and directly negatively affected up to 5-12 million Congolese civilians. Many miners cannot feed their children, their children are not in school this year because they cannot pay tuition fees, and those who are ill cannot afford medical treatment. Many other miners have shifted to work in the gold sector, where smuggling is easy and sales continue.”⁷⁰
- “That miners are out of work reverberates through the entire eastern Congolese economy. This situation was anticipated by Congolese civil society leaders and has been just as devastating as they feared. When miners lack earnings, not only can they not pay their children’s school fees or afford to visit health care professionals, but they do not have money to pay for other goods and services in the local markets, meaning that shopkeepers, hairdressers, seamstresses, and market sellers are also earning significantly less. . . . In addition, planes that flew into remote mining areas like Shabunda and Walikale are no longer coming to take the minerals out. Those planes carried in basic necessities like petroleum, salt, and candles to places that are not accessible by road. Today, those communities must do without such necessities; even if no one has money to purchase the goods, they are no longer available.”⁷¹
- “The impact on mining sector livelihoods, while unintended, is a disaster for the already fragile economy of the eastern D.R. Congo. Miners cannot provide for their families by returning to subsistence agriculture. Policy makers must consider the real and immediate – albeit unintended – impact their actions have had on artisanal mining communities.”⁷²

⁶⁹ *Id.* at 15.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 15.

- “The real tragedy of this situation is that while 1502 has inadvertently put entire Congolese communities out of work, they still live under the constant threat of violence and intimidation. There has been no reduction in violence in the Kivu provinces as a result of the government-imposed or the international de facto bans. Armed groups continue to terrorize local populations and to prey upon communities for food, money, and other resources. Moreover, as the 2011 Final Report of the UN Group of Experts on Congo notes, the de facto ban has led to an increase in conflict mineral smuggling via Rwanda and pushed Congolese armed groups to seek alternate sources of revenue, including the timber trade, and, in the case of the FDLR, continuing involvement in trading cannabis and palm oil. Section 1502 has – albeit unintentionally – thus far caused more problems than it has solved.”⁷³

GAO Annual Reports to Congress on the effectiveness of the SEC’s conflict minerals rule

Dodd-Frank requires GAO to report annually on, among other things, the effectiveness of the SEC’s conflict minerals rule in promoting peace and security in the DRC and adjoining countries. In 2015, GAO reported the following:⁷⁴

- “In brief, we found that company disclosures filed in 2014 indicate that companies performed country-of-origin inquiry and due diligence but provide limited insights regarding country of origin of conflict minerals used, citing difficulty obtaining information from suppliers.”⁷⁵
- “According to our analysis, an estimated 67 percent reported that they were unable to determine the country of origin, 4 percent reported that conflict minerals came from Covered Countries, 24 percent reported that conflict minerals did not originate in Covered Countries, 2 percent reported that conflict minerals came from scrap or recycled sources, and 3 percent did not provide a clear determination.”⁷⁶
- “Our analysis shows that the exercise of due diligence on the source and chain of custody of conflict minerals yielded little or no additional information, beyond the RCOI, regarding the country of origin of conflict

⁷³ *Id.* at 16.

⁷⁴ Statement of Kimberly Gianopoulos, Director, International Affairs and Trade, GAO, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, Insights from Companies’ Initial Disclosures and State and USAID Actions in the Democratic Republic of the Congo Region (Nov. 17, 2015) (“GAO 2015 Report”).

⁷⁵ GAO 2015 Report, at 2.

⁷⁶ *Id.* at 5.

minerals or whether the conflict minerals that companies used in 2013 in their products benefited or financed armed groups in the Covered Countries. The estimated 4 percent of the companies who determined that the necessary conflict minerals used in their products originated from Covered Countries could not determine whether such conflict minerals financed or benefitted armed groups during the reporting period, even though they disclosed that they conducted due diligence on the source and chain of custody of conflict minerals they used.”⁷⁷

- “As we previously reported, according to UN, U.S., and foreign officials and NGO representatives, some members of the Congolese national military units are consistently and directly involved in human rights abuses against the civilian population in eastern DRC and are involved in the exploitation of conflict minerals and other trades.”⁷⁸
- “We have described some of these challenges in our previous reports but, as we observed during our fall 2014 visit to the region, numerous challenges continue to exist. First, the mining areas in eastern DRC continue to be plagued by insecurity because of the presence and activities of illegal armed groups and some corrupt members of the national military. . . . Although U.S. agency and Congolese officials informed us during our recent fieldwork in the region that a large number of mines had become free of armed groups . . . officials we met with in the DRC also told us that armed groups and some members of the Congolese military were still active in other mining areas. Specifically, . . . officials described two fundamental ways in which armed groups continued to be involved in conflict minerals activities: directly, by threatening and perpetrating violence against miners to confiscate minerals from them; and indirectly, by setting up checkpoints on trade routes to illegally tax miners and traders. As we noted in our 2010 report, U.S. agency and UN officials and others believe that the minerals trade in the DRC cannot be effectively monitored, regulated, or controlled as long as armed groups and some members of the Congolese national military continue to commit human rights violations and exploit the local population at will.”⁷⁹
- “As we reported in 2010, U.S. government officials and others indicated that weak governance and lack of state authority in eastern DRC constitute

⁷⁷ *Id.* at 7-8.

⁷⁸ *Id.* at 8-9.

⁷⁹ *Id.* at 11-12.

a significant challenge. As we noted then, according to UN officials, if Congolese military units are withdrawn from mine sites, civilian DRC officials will need to monitor, regulate, and control the minerals trade. We also noted that effective oversight of the minerals sector would not occur if civilian officials in eastern DRC continued to be underpaid or not paid at all, as such conditions easily lead to corruption and lack of necessary skills to perform their duties. Evidence shows that this situation has not changed much. U.S. agencies and an implementing partner, as well as some Congolese officials, told us that there are not enough trained civilians to effectively monitor and take control of the mining sector. . . . Corruption continues to be a challenge in the mining sector. For example, a member of the UN Group of Experts told us that smuggling remains prolific and that instances of fraud call into question the integrity of traceability mechanisms. This official stated that tags used to certify minerals as conflict-free are easily obtained and sometimes sold illegally in the black market.”⁸⁰

In 2016, GAO reported the following:⁸¹

- “Fragmentation of some of the armed groups and decreases in troop strength failed to translate into significant improvements in security in 2015 in eastern DRC. The UN also reported that armed groups continue to generate significant revenue from the control, taxation, or looting of all of the ‘conflict minerals’—gold, tin, tantalum, and tungsten—despite the expansion of traceability and due diligence efforts to more mining sites in the DRC.”⁸²
- “SEC-filing companies face challenges in their due diligence efforts related to uncertainty about the source and chain of custody of conflict minerals processed by processing facilities because (1) these facilities generally rely on documentary evidence from upstream stakeholders that may be susceptible to fraud, and (2) the complexity of processing operations also introduces fraud risk and may increase the cost associated with disclosure efforts. . . . Sourcing and chain-of-custody complexities, which companies reported to

⁸⁰ *Id.* at 12.

⁸¹ U.S. Government Accountability Office, Report to Congressional Committees, SEC Conflict Minerals Rule: Companies Face Continuing Challenges in Determining Whether Their Conflict Minerals Benefit Armed Groups, GAO-16-805 (Aug. 2016) (“GAO 2016 Report”).

⁸² GAO 2016 Report, at 1.

be a challenge, may increase the cost required for disclosure efforts or result in missing information.”⁸³

- “Some filings and representatives of some companies we interviewed reported difficulties in getting sufficient information from all suppliers to enable them to determine the country of origin of all conflict minerals in their products. Some companies reported in their filings that they could not determine the country of origin of some of their conflict minerals because some suppliers did not respond to requests for information. . . . Additionally, representatives of some companies that we spoke with told us that they received information from suppliers that was incomplete, limiting their ability to determine the source and chain of custody of the conflict minerals in their products. . . . As we have previously reported, a company’s supply chain can involve multiple tiers of suppliers, potentially delaying a company’s request for information about upstream companies.”⁸⁴
- “[A]fter an estimated 79 percent of the companies that filed a Form SD performed due diligence, an estimated 67 percent of them reported they were unable to confirm the source of the conflict minerals in their products, and about 97 percent of them reported that they could not determine whether the conflict minerals financed or benefited armed groups in the Democratic Republic of the Congo (DRC) and adjoining countries.”⁸⁵
- “According to our analysis, an estimated 67 percent of the companies that performed due diligence determined that they could not definitively identify the origin of the conflict minerals in their products based on the due diligence they performed. A small percentage—an estimated 3 percent—of companies that indicated they performed due diligence reported in 2015 that they were able to determine whether conflict minerals in some of their products financed or benefited armed groups.”⁸⁶
- “Due diligence efforts at the processing facility level are made more challenging by uncertainties about source and chain of custody of conflict minerals in earlier stages of the supply chain. Processing facilities rely on paper documentation from miners and exporters for information on source and chain of custody, which, according to some industry officials, could be

⁸³ *Id.* at 23.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.* at summary.

⁸⁶ *Id.* at 21.

susceptible to fraud. Ore may pass through a number of traders and exporters before reaching a processing facility. The documentation of these stages may be falsified by smugglers or be incomplete, which may mask the actual source of the minerals being traded, according to some experts . Some programs exist to certify the chain of custody of minerals in some countries, but, as we have previously reported, these programs face operational challenges, including lack of infrastructure and government support. OECD reported in 2013 that as long as there are no traceability or certification schemes in place that cover the whole region, smuggling and contamination of conflict-free materials will continue to pose a threat to due diligence initiatives. There are challenges to the integrity of these programs. For example, a 2015 UN Group of Experts report documented the black-market sale of tin supply chain initiative tags; officials obtained two such illicit tags in the DRC and two in Rwanda. As we have previously reported, some agency officials and officials we interviewed from industry, NGOs, and international organizations commented that the DRC government lacks capacity to mitigate corruption and smuggling of conflict minerals. The UN Group of Experts reported in 2015 that, while there has been progress on traceability and due diligence efforts concerning minerals produced in the DRC, smuggling continues, and there is scant evidence of interest in traceability and due diligence by the governments of the DRC and Burundi.”⁸⁷

- “Sourcing and chain-of-custody complexities, which companies reported to be a challenge, may increase the cost required for disclosure efforts or result in missing information.”⁸⁸

Testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, on The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision (May 21, 2013)

David Aronson. David Aronson is a freelance writer and editor who has written about the Congo for, among other publications, *The New York Times*, the *Washington Post*, *The New Republic*, *Dissent*, the *Chicago Tribune*, the *Christian Science*

⁸⁷ *Id.* at 24.

⁸⁸ *Id.* at 28.

Monitor, and the *World Policy Journal*. The following statements are excerpts from his testimony.⁸⁹

- “Dodd-Frank 1502, the ‘conflict minerals’ provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (DF-1502) is a case study in how good intentions can go awry, particularly when a compelling activist-sponsored narrative substitutes for considered and timely analysis.”⁹⁰
- “As I will make clear: Advocates for the law disregarded the consensus opinion of Congolese experts who repeatedly warned them of the dangers the campaign posed to their people; The law imposed 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; The case for DF-1502 rested on dubious and misleading assumptions; A dozen or so scholars and NGOs have independently studied this issue; they have all concluded that the law is imposing unacceptable costs on the Congolese while doing little to diminish the violence.”⁹¹
- “Unfortunately, in their quest to fashion a narrative that would resonate with and therefore galvanize their largely Western audience, activists ignored the complexities of the local context and brushed aside Congolese experts who repeatedly warned them of the dangers the conflict minerals campaign posed to their people. In doing so, they developed policy prescriptions that damaged an already tenuous economy, entrenched the position of the warlords, and accomplished little by way of resolving the conflicts.”⁹²
- “In a *New York Times* opinion editorial I wrote about DF-1502, I reported that knowledgeable Congolese felt excluded from the conflict minerals debate. It was, they told me, a dialog in which their voices went unheeded, dominated by Western advocacy groups confronting Western electronics

⁸⁹ David Aronson, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, *The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision* (May 21, 2013) (“Aronson testimony”).

⁹⁰ Aronson testimony, at 1.

⁹¹ *Id.* at 1-2.

⁹² *Id.* at 2.

companies. As a result, immensely important decisions about the lives of millions of Congolese were made without any input from them.”⁹³

- “I would add one more reason for concern: near epidemic-levels of livestock and crop diseases are currently devastating agricultural production. Families who dispersed their risk by sending some members to mine while keeping others at home to farm are being hit on both counts; they have nothing else to fall back on.”⁹⁴
- “Today, the de facto embargo on Congo’s tin, tantalum and tungsten (the three T’s) is still in effect, and DF-1502 continues to depress the economy of eastern Congo. There has been some resumption in the trade, from three sources: Several ‘conflict-free’ initiatives are underway, with mixed results. . . . However, there are allegations that the site, widely viewed as a test case for responsible sourcing, is already being exploited by a military-led smuggling racket. . . . Chinese firms continue to buy some modest amount of undocumented minerals at significantly discounted prices. Finally, there has been a significant expansion in illicit trade through Rwanda, with cassiterite in particular being smuggled across Lake Kivu and repackaged as domestic Rwandan product. The fact that Rwanda is one of the unintended beneficiaries of the legislation is a bitter pill for many Congolese, who point out that Rwanda has been plundering Congolese mineral wealth for years. Overall, however, the trade has by no means reached its pre-embargo level, and miners receive significantly less than they used to for each kilogram of mineral that they produce.”⁹⁵
- “In contrast to the three T’s, the trade in gold continues unabated, with virtually no procedures in place to formalize let alone control it. . . . Last month, the *Wall Street Journal* reported that ‘opportunities for illicit gains only increased after the U.S. in 2010 passed a Wall Street overhaul, known as Dodd-Frank.’”⁹⁶
- “The economic harm caused by DF-1502 might be worthwhile if the embargo were having its intended effect, of reducing the overall level of violence in the region. Advocates used to argue that the legislation was not having its intended effects because the SEC had yet to issue the

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 4-5.

⁹⁶ *Id.* at 5.

implementing regulations. Now that it has, it is important to ask whether we are seeing an improvement on the ground. Roger Meece, the UN special representative in Congo and Monusco chief, drew a dire picture in a briefing before the Security Council. Appealing for an additional military brigade, he told the Council that an ‘ever-growing number of violent, destructive rebel groups is battling for territory while terrorizing local populations. . . . Other groups have echoed Meece’s assessment. Just last week, the International Red Cross reported that violence in eastern Congo had reached ‘unprecedented levels.’ This is not the result we were led to expect.”⁹⁷

- “Over the past eighteen months, a dozen independent scholars and NGOs have published reports on the impact of the conflict minerals campaign. Strikingly, they have all reached similar conclusions: DF-1502 is harming ordinary people, helping militia and warlords, and in no way significantly reducing conflict. . . . To my knowledge, not a single independent analysis has concluded that Dodd-Frank 1502 has had a positive impact on developments in eastern Congo.”⁹⁸

Rick Goss. Rick Goss is the Senior Vice President of Environment and Sustainability for the Information Technology Industry Council (“ITI”), “a global trade association representing 50 of the world’s most innovative companies in the information and communications technology sector.” The following statements are excerpts from his testimony.⁹⁹

- “Section 1502, however, has also created obstacles for companies that want to remain responsibly engaged in Central Africa. Simply put, the mechanism contained in Section 1502 encourages companies to avoid the region, while layering regulatory burdens and costs on those that stay. Even companies that source cleanly from the covered region must submit a full Conflict Minerals Report to the SEC, and must further subject that report to an independent private sector audit. Companies that elect to exit the region altogether can avoid these obligations. This has led to a de facto embargo on minerals from the covered region, with serious consequences for local populations.”¹⁰⁰

⁹⁷ *Id.* at 5-6.

⁹⁸ *Id.* at 7.

⁹⁹ Rick Goss, SVP of Environment and Sustainability, Information Technology Industry Council (ITI), testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision (May 21, 2013) (“Goss testimony”).

¹⁰⁰ Goss testimony, at 4.

- “Likewise, most companies expend the bulk of their time and resources establishing that they are not sourcing from the region, rather than developing programs to build clean-sourcing capacity. As a consequence, countless companies are fulfilling redundant paperwork obligations: developing parallel lists of smelters, reviewing supplier declarations, writing reports and scheduling audits. These efforts yield few if any benefits to the people of the Congo.”¹⁰¹
- “The societal impacts can be measured in reduced family incomes, limited availability and rising prices for food and medicines, and in falling school enrollments. The U.N. also reported significant black market movement of covered minerals from the Congo, and a rush by armed groups and the Congolese military to gold mines where due diligence requirements have not impacted trade. Furthermore, militias and “criminal, mafia-type networks” within the Congolese Army are exploiting other sources of revenue, through products such as timber, charcoal, cannabis, ivory and basic supplies, and through practices such as human trafficking, illegal roadblocks and extortion.”¹⁰²
- “Section 1502, by focusing almost exclusively on the role of the private sector, has diverted critical attention away from the indispensable role of governments in addressing the endemic political, security and humanitarian crises in the region. Private sector initiatives alone cannot succeed in a region beset by rampant conflict and corruption, and destabilized by chronic interference and intrusions from neighboring countries. The underlying causes of this regional war are political, not economic, and are linked to entrenched ethnic enmities and disputes over political power, land rights and citizenship. While control over natural resources is in part responsible for fueling violence in eastern Congo, it is striking to note that adjacent areas that are equally rich in resources are not plagued by conflict.”¹⁰³
- “Ultimately, corporate efforts alone are no substitute for comprehensive international engagement; in the absence of this international will, the status quo will reign in the Congo.”¹⁰⁴

¹⁰¹ *Id.*

¹⁰² *Id.* at 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 6.

- “In closing, ITI and our members urge Congress to consider ways to overcome the deterrent effects of Section 1502 and provide incentives to companies that responsibly source from Central Africa.”¹⁰⁵

Mvemba Phezo Dizolele. Mvemba Phezo Dizolele is a native Congolese writer, foreign policy analyst, independent journalist, and a Visiting Fellow at Stanford University’s Hoover Institution on War, Revolution and Peace. He has also testified on the Congo before the U.S. Senate Committee on Foreign Relations and the U.S. House Committee on Foreign Affairs. The following statements are excerpts from his testimony before the U.S. House Committee on Financial Services.¹⁰⁶

- “Section 1502 seeks to bring peace to eastern Congo by regulating mineral trade through U.S. law, cleaning up the supply chain and reducing militias’ access to financial means. The spirit of this law supposes that such a regulation would de facto curb the violence and human rights abuses. This campaign, however, has a serious weakness. Proponents of 1502 built their case on an erroneous premise that claimed that minerals were either the source or at the center of the conflict. Cutting militias’ access to mines will lead to peace, the argument goes.”¹⁰⁷
- “Mineral trade in eastern Congo is part of a wider war economy, which can only be regulated either by the most powerful armed groups working in collusion, the biggest armed group imposing its way on the smaller ones or by their backers seeking to maximize profits and preserve their own interests. As such, Section 1502 builds on a weak foundation and requires the buy-in of the very negative actors it seeks to tame. This approach perverts basic peacemaking models and rewards criminals and would-be spoilers.”¹⁰⁸
- “This premise led to a law with the following results: 1. The U.S. Congress passed a legislation that ignores the will and agency of the Congolese people and imposes an outside solution to a problem that is best understood by the Congolese. This approach to peacemaking undermines DRC’s strong civil society, which has been working hard over the years to end the looting of natural resources, including the audit of mining contracts, the revision of

¹⁰⁵ *Id.* at 6.

¹⁰⁶ Mvemba Phezo Dizolele, Visiting Fellow, Hoover Institution on War, Revolution and Peace, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, ‘The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision (May 20, 2013) (“Dizolele testimony”).

¹⁰⁷ Dizolele testimony, at 2.

¹⁰⁸ *Id.* at 2-3.

the mining code, the call for security sector reform and the respect of a transparent and credible electoral process. 2. The U.S. Securities and Exchange Commission, which is entrusted with the implementation of this law, is not qualified to carry out such a task. The SEC has neither the expertise nor the money to conduct a cost and benefit analysis of the impact of Section 1502 on the Congolese and U.S. business. Thus, the SEC had to decide on such a complicated matter affecting the livelihood of millions of people without adequate assessment of the situation on the ground in Congo. It was inappropriate to ask the SEC to serve as the primary agency to enforce this law. This work is simply outside this agency's scope and mandate. 3. Section 1502 perpetrates the dominant, but wrong narrative that casts the Congolese people as incapable of solving their problems and in constant need for outside guidance. The truth is that no one understands mining in Congo better than the Congolese. By failing to engage the Congolese in an honest dialogue on the relationship between conflict and mining, proponents of Section 1502 failed to spur a national ownership of the initiative through a true partnership with the Congolese. 4. Section 1502 creates what is known as 'Congo fatigue'. Staffers in both chambers of Congress work hard to help steer U.S. Congo policy in the direction that best benefits the Congolese people. House members and senators invest their political capital to do the same. It is therefore disappointing to hear that the legislation they passed did not yield the anticipated result because they were misled. Such realization makes it difficult to engage members of Congress the next time around. 5. There is no evidence that Section 1502 has reduced violence in the targeted region. In fact, the emergence of the M23 militia last spring, which escalated tensions in the Great Lakes, is proof that this law has little bearing on war entrepreneurs."¹⁰⁹

- “In Congo, businesses are not the enemies; armed groups and their international and local backers are. If we are serious about ending the conflict, we should go after the negative forces and help restore state authority so that the Congolese government can finally meet its obligations toward the people. This means that together we need to work on ending impunity at all levels of the polity. Only then can the Congolese know real peace.”¹¹⁰

¹⁰⁹ *Id.* at 3-4.

¹¹⁰ *Id.* at 4.

- “Above all, we have to resist the urge to impose Western activists’ vision of the world on the Congolese.”¹¹¹

Testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, on Dodd-Frank Five Years Later: What Have We Learned from Conflict Minerals Reporting? (Nov. 17, 2015)

Evode Imena. Evode Imena is the then-Minister of State in charge of Mining, Ministry of Natural Resources Government of the Republic of Rwanda. The following statements are excerpts from his testimony.¹¹²

- “As you can see, Rwanda has taken extensive steps and made great strides in improving accountability and transparency in the mineral supply chain. . . . Despite all that has been accomplished, our efforts to improve are hampered by the fact that Rwanda was lumped together with nine other countries in Section 1502 of Dodd-Frank.”¹¹³
- “The ten countries covered by this law certainly have some things in common, but they are dissimilar in many significant ways. From economic development to border control, these countries are at all different levels of achievement. Putting them in one group and applying a ‘one size fits all’ regulation is not only an impediment to efficient implementation of the regulations, but further, such an approach fails to recognize efforts made and challenges faced by individual countries.”¹¹⁴
- “Today, the Rwandan mining sector bears the direct costs resulting from the conflict mineral due diligence framework. . . . Due diligence fees are directly paid either by large-scale mining companies or by Rwandan mineral exporters, and they in turn pass on the levies to small-scale and artisanal miners who supply the minerals.”¹¹⁵
- “Currently, more money is spent complying with the conflict mineral requirements than money paid for Government taxes. In October 2015, Rwanda tungsten miners paid \$12,000 for each container in due diligence

¹¹¹ *Id.* at 4-5.

¹¹² Evode Imena, Minister of State In charge of Mining, Ministry of Natural Resources Government of the Republic of Rwanda, testimony before the U.S. House Committee on Financial Services, Subcommittee on Monetary Policy and Trade, *Dodd-Frank Five Years Later: What Have We Learned from Conflict Minerals Reporting?* (Nov. 17, 2015) (“Imena testimony”).

¹¹³ Imena testimony, at 6.

¹¹⁴ *Id.* at 6-7.

¹¹⁵ *Id.* at 7.

costs in comparison to \$8,330 paid for royalty tax. Between January and August 2015, \$3.2 million was spent on due diligence – four percent of the value of minerals produced.”¹¹⁶

- “Despite all these efforts and the costly investments in due diligence, we have noted since 2013 a negative international market bias against Rwandan minerals, and in particular against tungsten, as Dodd-Frank has been fully implemented. This situation worsened in 2014, when companies that process tungsten ore stopped buying from all Central African countries – despite the fact that Rwanda was fully implementing both OECD due diligence recommendations related to conflict minerals and the ITRI minerals traceability mechanism.”¹¹⁷
- “The region is now suffering from an ‘Africa-free’ and not a ‘conflict-free’ minerals situation. Section 1502 has caused a de-facto boycott by companies in the US and much of Europe on our most valuable resources. The result is a very limited customer base, which further drives down mineral prices because these customers know they have no competition for our resources.”¹¹⁸
- “The situation has largely impacted the livelihood of thousands of miners and their families, as the costs for due diligence are passed down from mineral exporters to mining companies, and then on to mine workers. Based on our calculation, the revenues for mining companies and wages for mine workers have decreased by 3 to 6 percent in the last year. Coupled with price fluctuation, the situation has become very difficult to miners and to an industry with tight profit margins.”¹¹⁹
- “During the fiscal year 2014/2015, the Ministry of Natural Resources – which has several departments beyond mining – had a budget of \$19.8 million. Approximately \$3.7 million was dedicated to mining sector development, including mineral exploration. Approximately \$6.1 million was spent to comply with due diligence requirements, 46 percent more than was used to discover more mineral resources for the people of Rwanda and

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 7-8.

¹¹⁹ *Id.* at 8.

for modernization of existing mines. And still, because of Section 1502, our minerals are effectively excluded from the world market.”¹²⁰

- “In 2010, when Dodd-Frank was introduced, Rwandan 3T’s mineral production was estimated at \$68 million. It grew by 208 percent to reach \$210 million in 2014. While this growth is very impressive, it is dwarfed by the 1,260 percent growth registered between 1998 and 2010, before the enactment of Dodd-Frank. While the difference between growth rates cannot be explained solely by the negative impact of the conflict mineral regulations, these regulations have clearly had a significant negative impact.”¹²¹
- “As illustrated above, many of the main challenges to our industry revolve around the limitations the de facto Dodd-Frank boycott has put on our potential for growth and increased revenue.”¹²²
- “We are currently missing out on investment from a whole host of socially responsible private US companies. We are not asking for any US government handout, but we would like to create an environment that encourages public-private partnerships with US companies to help us with extraction, surveying and mapping, refining and processing, logistics and transportation, and worker training and professional development.”¹²³

*Opinion Editorial by David Aronson, How Congress Devastated Congo, The New York Times (Aug. 7, 2011)*¹²⁴

- “Unfortunately, the Dodd-Frank law has had unintended and devastating consequences, as I saw firsthand on a trip to eastern Congo this summer.”
- “It’s easier to sidestep Congo than to sort out the complexities of Congolese politics — especially when minerals are readily available from other, safer countries.”
- “For locals, however, the law has been a catastrophe. In South Kivu Province, I heard from scores of artisanal miners and small-scale purchasers, who used to make a few dollars a day digging ore out of

¹²⁰ *Id.* at 8.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 9.

¹²⁴ David Aronson, How Congress Devastated Congo, The New York Times (Aug. 7, 2011), <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>.

mountainsides with hand tools. Paltry as it may seem, this income was a lifeline for people in a region . . . that is now just beginning to emerge from over a decade of brutal war and internal strife.”

- “The pastor at one church told me that women were giving birth at home because they couldn’t afford the \$20 or so for the maternity clinic. Children are dropping out of school because parents can’t pay the fees. Remote mining towns are virtually cut off from the outside world because the planes that once provisioned them no longer land. Most worrying, a crop disease periodically decimates the region’s staple, cassava. Villagers who relied on their mining income to buy food when harvests failed are beginning to go hungry.”
- “Meanwhile, the law is benefiting some of the very people it was meant to single out. The chief beneficiary is Gen. Bosco Ntaganda, who is nicknamed The Terminator and is sought by the International Criminal Court. Ostensibly a member of the Congolese Army, he is in fact a freelance killer with his own ethnic Tutsi militia, which provides ‘security’ to traders smuggling minerals across the border to neighboring Rwanda.”
- “All this might be a price worth paying if the law were having its intended effect of economically asphyxiating the warlords who turned eastern Congo into the deadliest conflict zone since World War II. . . . But by the time President Obama signed the law last summer, the conflict had moved into a different phase. Most of the militias that wreaked havoc between 2003 and 2008 have since been incorporated into the Congolese Army. The two or three of any significance that remain get their money from kidnapping and extortion, not from controlling mining sites or transport routes. The law has not stopped their depredations.”
- “The people of eastern Congo agree that it would be beneficial to bring greater clarity and transparency to the mineral trade. A variety of local and international initiatives to do so were under way when the embargo hit. Those efforts may now become a casualty of the Dodd-Frank law.”
- “Rarely do local miners, high-level traders, mining companies and civil society leaders agree on an issue. But in eastern Congo, they were unanimous in condemning Dodd-Frank. The Rev. Didier de Failly, a Belgian priest who has lived in Congo for 45 years, insistently warned Western advocacy groups of the dangers posed by their campaign. . . . But once the advocacy groups succeeded in framing the debate as a contest

between themselves and greedy corporate interests, no one bothered to solicit the opinion of local Congolese. As the leader of a civil-society group, Eric Kajemba, asked me, more in confusion than in anger, ‘If the advocacy groups aren’t speaking for the people of eastern Congo, whom are they speaking for?’”

*Article by Carol Jean Gallo, Digging Deeper Into The Dodd-Frank Congo “Blood Minerals” Controversy, UN Dispatch (Aug. 9, 2011)*¹²⁵

- “A great deal of debate has surfaced recently on blogs such as *Texas in Africa* and *Congo Siasa* on the effects of the implementation of this Act without adequate assistance for, or progress in, security sector and institutional reform. A lot of criticism has been levied at advocacy groups such as the Enough Project and Global Witness for failing to take into account the effects this legislation would have on the Congolese economy in the absence of the security and institutional frameworks needed to enforce the law, and in the absence of a coordinated effort to address the political, social, and economic root causes of the conflict.”
- “The lopsided implementation of the Act has essentially led to a de facto embargo on the entire mining industry in the DRC. Because the institutional framework needed to sufficiently carry out due diligence is not there, many companies have chosen to play it safe and simply get their minerals elsewhere. . . . many Congolese have voiced frustration with the effects of the bill. Legitimate mining ventures that provided livelihoods for people have screeched to a halt, and the country’s mining exports are down 90% from where they were prior to the law; in most cases where it hasn’t been halted altogether, it has been driven underground, according to observers.”
- “Many have answered criticism of the Act’s implementation by saying that the Congolese government bears the brunt of responsibility for providing an environment in which companies can practice due diligence and legitimately purchase the minerals they need. While it’s true that the Congolese government has a responsibility to provide mechanisms for transparency, the fact on the ground is that those mechanisms are not there. So the implementation of 1502— or, I should say, part of it— doesn’t make much sense without the necessary regulatory framework in place.”

¹²⁵ Carol Jean Gallo, Digging Deeper Into the Dodd-Frank Congo ‘Blood Minerals’ Controversy, UN Dispatch (Aug. 9, 2011), <http://www.undispatch.com/digging-deeper-into-the-dodd-frank-congo-blood-minerals-controversy/>.

- “And as many observers have pointed out on numerous occasions, the root cause of the conflict— and attendant violence— is not competition over resources; while it’s true they may use income from the exploitation of resources to fund their political and/or military objectives, absent the option of doing so they will certainly find other sources of income. Aronson notes that the remaining non-state militias, those not integrated into the national army, ‘get their money from kidnapping and extortion, not from controlling mining sites or transport routes.’”¹²⁶
- “I can’t help but feel that it’s a bit telling that this legislation is part of an act meant to protect American consumers. You can buy your cell phone without feeling guilty, but Congo’s problems have not been solved and may have even been exacerbated. The disconnect seems to be that the simple narrative needed to create a groundswell of public support is not the same narrative that should be used to formulate policy.”

*Article by Sudarsan Raghavan, How a well-intentioned U.S. law left Congolese miners jobless, Washington Post (Nov. 30, 2014)*¹²⁷

- “When his father could no longer make enough money from the tin mine, when he could no longer pay for school, Bienfait Kabesha ran off and joined a militia. It offered the promise of loot and food, and soon he was firing an old rifle on the front lines of Africa’s deadliest conflict. He was 14. But what makes Kabesha different from countless other child soldiers is this: His path to war involved not just the wrenching poverty and violence of eastern Congo but also an obscure measure passed by American lawmakers.”
- “But the legislation, signed by President Obama four years ago, set off a chain of events that has propelled millions of miners and their families deeper into poverty, according to interviews with miners, community leaders, activists, and Congolese and Western officials, as well as recent visits to four large mining areas.”
- “‘The intention of the law was good, but in practice, it was not well thought-out,’ said Eric Kajemba, director of the Observatory for Governance and Peace, a regional nonprofit group. ‘This is a country where

¹²⁶ *Id.* (citing David Aronson, How Congress Devastated Congo, The New York Times (Aug. 7, 2011)).

¹²⁷ Sudarsan Raghavan, How a well-intentioned U.S. law left Congolese miners jobless, Washington Post (Nov. 30, 2014).

the government is absent in many areas, plagued by years of war and bad governance, where the economic tissue has been destroyed. The American lawmakers didn't appear to take this into consideration.”

- “Activists pressured lawmakers to pass the measure in the Dodd-Frank Act. It quickly had an effect. In the fall of 2010, two months after the law’s signing, Congo’s government halted mining for six months — even at facilities not controlled by armed groups. The move had tremendous repercussions in a country where, by some estimates, a sixth of the 70 million inhabitants depend on artisanal mining.”
- “In Luntukulu, a mineral-rich region nestled in rocky hills near the border of Shabunda territory, more than a dozen out-of-work miners joined the Raia Mutomboki militia after the government imposed the ban, village elders and mining cooperative leaders said. ‘If we were earning more money from mining, I would not have entered the militia,’ said Kabesha, now 16, as he sat in a grass hut. When he joined, he was handed a rifle and taught to shoot. Within months, he was looting villages and fighting government forces and other militias.”
- “‘If Obama’s Law wasn’t signed, the ban would not have existed,’ said Waso Mutiki, 41, president of the miners cooperative in Luntukulu. ‘It destroyed everything.’”
- “‘The law of Obama is like a weight on us,’ said Michel Mushagalusa, 30, vice president of the mining cooperative in Nzibira.”
- “Some activists and researchers say that minerals aren’t the core cause of Congo’s war — that there are other, more powerful factors, such as political and ethnic struggles and conflicts over land. And regulating the minerals, they say, does little to thwart the militias.”
- “‘Almost all our mines are controlled by Raia Mutomboki,’ [lords] said Mozart Manigua, 42, president of a cooperative that oversees 20 mines in Kimbli, a vast area within Shabunda. Local people ‘have no choice but to work for the militia.’”
- “In other areas, militias have switched to selling palm oil, charcoal, marijuana, cattle and soap, said community leaders, activists and U.N. monitors. Their income is hardly as much as they earned from minerals, but it’s enough to continue destabilizing eastern Congo.”

- “Increasingly, Congo’s army is becoming a major player in the conflict-minerals trade. Soldiers help smuggle untagged minerals out through Rwanda, Uganda and Burundi, according to U.N. experts and Congolese government and law enforcement officials.”

*Opinion Editorial by Enrico Carisch and Dr. Claude Kabemba, Open Society Initiative for Southern Africa, Conflict minerals not fuelling M23 rebellion (Nov. 27, 2012)*¹²⁸

- “And yet almost nothing has been done to actively tackle the real governance issues. In particular, the international community and the government of President Kabila have consistently neglected serious security sector reform in eastern Congo, partly due to the prevailing ‘conflict minerals’ narrative. But the reality on the ground could not be more different from the concept that every conflict in eastern Congo is – at its heart – a fight for control over the country’s vast natural resources. This certainly does not appear to be the case with the current conflict.”
- “In fact . . . the hundreds of thousands of artisanal gold miners in four provinces (North Kivu, South Kivu, Oriental and Maniema) are no longer afraid of warlords or militias. Instead, they fear the hordes of corrupt civil servants, bureaucrats and members of the government’s security forces, who are far more interested in exploiting the miners rather than supporting and protecting them.”
- “The current conflict is not about minerals. It is about Congo’s dreadful governance - and the bloody role of neighbouring governments.”

*Article by Tom Burgis, Dodd-Frank’s Misadventures in the Democratic Republic of Congo: So the law didn’t end conflicts minerals. But was there any way it could have?, Politico Magazine (May 10, 2015)*¹²⁹

- “Despite Dodd-Frank and the spate of efforts to curb conflict mineral violence in the early 2000s, it appears unlikely that the certification schemes will ever reliably cover the whole of eastern Congo’s mining trade. Clean miners have been squeezed, as the retreat of Western buyers has let Chinese

¹²⁸ Enrico Carisch and Dr. Claude Kabemba, Conflict Minerals Not Fueling M23 Rebellion, Open Society Initiative for Southern Africa (Nov. 27, 2012), <http://www.osisa.org/economic-justice/blog/conflict-minerals-not-fuelling-m23-rebellion>.

¹²⁹ Tom Burgis, Dodd-Frank’s Misadventures in the Democratic Republic of Congo: So the law didn’t end conflicts minerals. But was there any way it could have?, Politico Magazine (May 10, 2015), http://www.politico.com/magazine/story/2015/05/dodd-frank-democratic-republic-of-congo-117583_Page3.html#.WLh5400zWTM.

comptoirs gain a near-monopoly on Congolese coltan, allowing them to dictate prices.”

- “And, finally, there’s the question of whether Dodd-Frank and similar efforts have been worth it. The efforts to impose some control on the mineral trade might trim the income of the armed groups, but it does so at the cost of weakening the already precarious livelihoods of eastern Congo’s diggers and porters and their dependents. In a land ruled by the law of the roadblock, such initiatives can look quixotic. As Aloys Tegera of Goma’s Pole Institute, one of eastern Congo’s most astute commentators, writes, ‘Without a Congolese state capable of playing its role in controlling and running affairs, how can the minerals of Kivu be de-criminalised?’”
- “If there is a lesson of 1502, it may be this. It’s relatively easy to source minerals in a warzone and pour them into an international market that demands ever niftier gadgets. But regulating the supply chains of our global economy—without inflicting harm on whole communities by choking off livelihoods in far off lands—is an altogether harder task.”

*Article by Séverine Autesserre, Dangerous Tales: Dominant Narratives and their Unintended Consequences, African Affairs, Oxford University Press (Feb. 2012)*¹³⁰

- “The well-meaning international efforts have also had unintended ramifications that have prevented the intervention from achieving its stated goals, and that have even, at times, contributed to the deterioration of the situation in eastern Congo. ... Because of these exclusive focuses, the international efforts have exacerbated the problems that they aimed to combat.”

*Brief of Amicus Curiae Experts on the Democratic Republic of the Congo in support of Petitioners in National Association of Manufacturers v. SEC (D.C. Circuit) (Jan. 23, 2013)*¹³¹

- “In sum, since 2010, the legal market for tin, tantalum, tungsten, and gold from the DRC has shriveled, and the eastern provinces hardest-hit by conflict have been disproportionately harmed. Miners and their families are more susceptible than ever to the predations of armed groups. There is

¹³⁰ Séverine Autesserre, *Dangerous Tales: Dominant Narratives and their Unintended Consequences*, African Affairs, Oxford University Press (Feb. 2012), available at <https://academic.oup.com/afraf/article-abstract/111/443/202/16975/Dangerous-tales-Dominant-narratives-on-the-Congo?redirectedFrom=fulltext>.

¹³¹ Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in support of Petitioners in *National Association of Manufacturers v. SEC* (D.C. Circuit) (Jan. 23, 2013) (“DRC amicus brief”).

little market for minerals whose origins cannot be verified, and companies have voiced wariness about the investments and effort required to make verification processes work. The conflict rages on, and armed groups have taken advantage of opportunities to smuggle or launder minerals at the expense of independent mines and exporters. And infighting among armed groups, offensives by the Congolese army, and deals to consolidate armed groups into the Congolese army have produced bewildering changes in control over individual mining sites and surrounding trade routes.”¹³²

- “The SEC, however, failed to minimize the inordinate compliance costs of its rule for issuers, who must undertake burdensome yet possibly inconclusive investigations into whether even trace amounts of tin, tantalum, tungsten, and gold in their products came from mines controlled by armed groups . . . thereby all but guarantee[ing] that the de facto embargo will become permanent.”¹³³
- “Not only did the SEC fail to analyze the rule’s benefits; the SEC made discretionary choices that many comments established will cause further economic harm to the Congolese, aggravate instability, and increase the influence of armed groups in the DRC. The SEC’s due diligence requirements make it prohibitively expensive for issuers to make even a preliminary determination that their minerals may have originated in the DRC or its neighbors. That initial determination triggers due diligence obligations to discern where the minerals ultimately originated and whether they indirectly or directly benefited armed groups, to obtain a private sector audit, and to file an additional and exhaustive disclosure report to the SEC.”¹³⁴
- “Rather than minimizing these burdens, the SEC extended those costs to a far wider range of issuers than Section 1502 required. The SEC justified those costs by saying that they were warranted to advance Section 1502’s humanitarian objectives. But the SEC acknowledged that the higher these compliance costs are, the greater the incentive for issuers to avoid triggering these due diligence obligations altogether—by abandoning sourcing from the DRC and its neighbors entirely. Avoiding a permanent de facto embargo should have been among the SEC’s highest priorities, given the

¹³² DRC amicus brief, at 20.

¹³³ *Id.* at 21.

¹³⁴ *Id.* at 23.

numerous comments stressing that the consequences of such an embargo would render the rule disastrously counterproductive.”¹³⁵

- “This shortcoming is all the worse because, as numerous commenters have highlighted, a permanent de facto embargo will only devastate Congolese miners and the Congolese economy further, while allowing armed groups to readily smuggle minerals. As the Fédération des Entreprises du Congo, a group of minerals exporters from the North Kivu region, explained, such an embargo ‘causes very big problems to the whole economy and stability of the area,’ results in ‘more smuggling activities,’ and ‘does not give chance for the improvements that had already begun to work.’”¹³⁶
- “Crushing the open market for minerals achieves the opposite of Section 1502’s stated aims. Creating a permanent de facto embargo would permanently deprive many miners of their livelihoods, make them more likely to join armed groups, and harm communities that have thus far resisted being taken over by armed groups. Creating a permanent de facto embargo would also entrench the smuggling of minerals out of the DRC, where they will either be falsely labeled as originating elsewhere, or will be sold to buyers indifferent to provenance. Creating a permanent a de facto embargo would similarly disrupt existing transparency measures.”¹³⁷

¹³⁵ *Id.* at 23.

¹³⁶ *Id.* at 31 (quoting Fédération des Entreprises du Congo, Comment 1 Letter (Oct. 28, 2011)). *See also* DRC amicus brief, at note 17, for other commenters that raised the same point.

¹³⁷ DRC amicus brief, at 32.