



Tuesday, October 2, 2012

9:00 AM - 10:30 AM

1204 – The Growing Trend toward Supply-Chain Transparency: Conflict Minerals, Human Trafficking and More

Shirley R. Edwards

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Burton D. Ford

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Sherry Scott

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Faculty Biographies

Shirley R. Edwards

Shirley R. Edwards is the associate counsel for West Marine Products, Inc, a large retail and wholesale boating supply company with stores throughout the United States, Canada and Puerto Rico. Her responsibilities include providing legal counsel to all business teams relating to product development, marketing, information technology and security, regulatory and environmental compliance, intellectual property protection, imports, and business relationships with suppliers, vendors and service providers.

Burton D. Ford

Burton D. Ford serves as associate general counsel, for the Lockheed Martin Corporation in Bethesda, MD. In this position, Mr. Ford is responsible for advising the corporation on government, commercial and international contracting matters, management of litigation and investigations, and other matters.

Prior to his current position, Mr. Ford was associate general counsel and site lead counsel for the Lockheed Martin Aeronautics Company in Marietta, GA. He also served as program counsel for the Lockheed Martin C-130 Hercules Aircraft production program. Prior to coming to work for Lockheed Martin, Mr. Ford served as a law clerk for the United States District Court for the Northern District of Georgia.

Mr. Ford is a member of the State Bar of Georgia and has served as a vice chairperson of the Georgia State Bar Diversity Steering Committee. He is a Fellow of the Lawyers Foundation of Georgia, and is also active in the public contacts law section of the American Bar Association, and serves as co-chair of the Strategic Alliances, Teaming and Subcontracting Committee.

Mr. Ford received his JD, with honors, from the University of Georgia School of Law. He received his undergraduate degree, AB economics, *summa cum laude*, from the University of Georgia.

Sherry Scott

Sherry L. Scott is an attorney in the environmental and safety law department at Exxon Mobil Corporation in Houston, TX. Her responsibilities include advising clients on a number of Clean Air Act-related legal issues, including compliance with Title V requirements and defense of administrative enforcement actions.

Prior to joining ExxonMobil, Ms. Scott was an associate at Vinson & Elkins LLP in Houston, in the litigation section.

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More

Ms. Scott is a member of the Local Bar Services Committee of the State Bar of Texas. She also coaches cross country and distance track at St. Anne Catholic School in Houston.

Ms. Scott received a BBA in finance from the University of Houston. She obtained her JD from the University of Houston, cum laude, where she was an articles editor on the *Houston Law Review*.



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The Growing Trend Toward Supply-Chain Transparency: Conflict Minerals, Human Trafficking and More

**Session 1204:
Tuesday, October 2, 2012**



Panelists

Shirley R. Edwards

Deputy County Counsel, Santa Clara County

Burton D. Ford

Associate General Counsel, Lockheed Martin Corporation

Sherry L. Scott

Counsel, Exxon Mobil Corporation



It's Less About the Impact on the Environment
and More about the Impact on the Human

--

The Regulation of Social Justice or
Environmental Justice—Sound Familiar?



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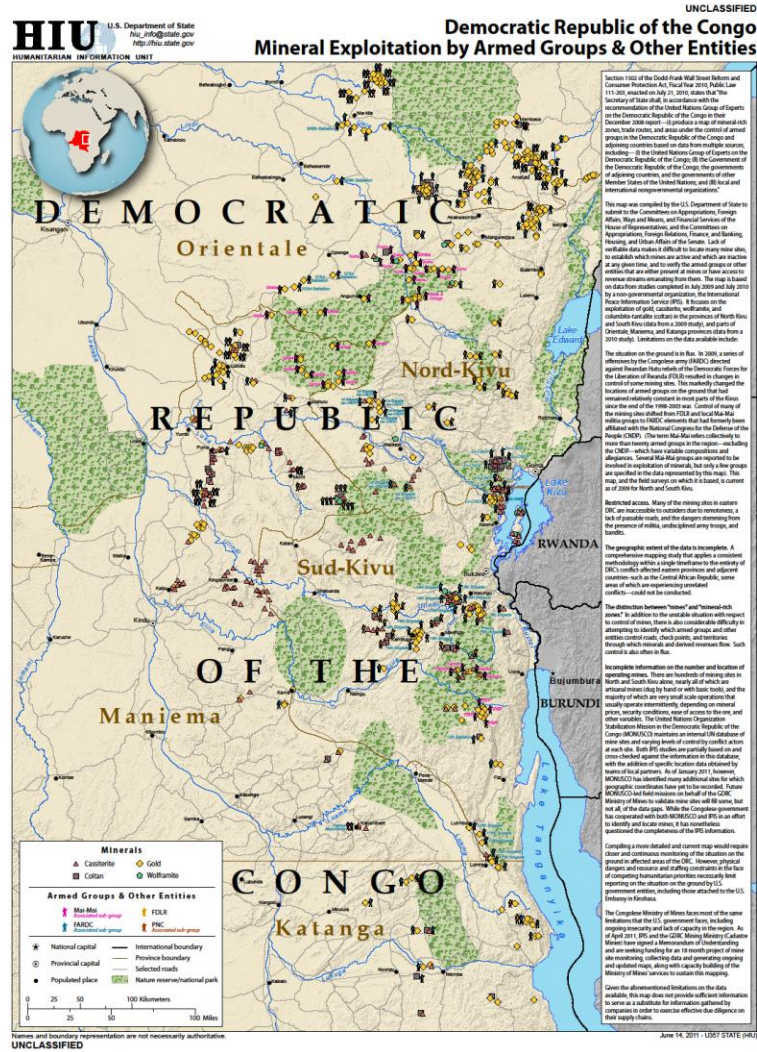
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Something, Someone and Somewhere to Think About Today:

- The Democratic Republic of the Congo and Adjoining Countries (Covered Countries)
- Conflict Minerals
- Human Trafficking and Forced Labor
- Walking the Mining and Manufacturing Trail
- Due Diligence
- California, The Federal Trade Commission, Federal Procurement Standards and other Enforcing Authorities
- Consumer Disclosures and Government Contracting.
- Are There Any Industry Standards Out There That Help?



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Source: U. S. Department of State
<http://documents.nam.org/IS/State%20Department%20>



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Which Adjoining Countries to the DRC are of concern? They share an internationally recognized border with the DRC. The DRC is surrounded by:

- Republic of the Congo to the west
- Central African Republic and South Sudan to the north;
- Uganda, Rwanda, and Burundi in the east;
- Zambia and Angola to the south; the Atlantic Ocean to the west; and
- is separated from Tanzania by Lake Tanganyika in the east.



What Are Conflict Minerals?

- Columbite-tantalite (coltan),
- Cassiterite,
- Gold,
- Wolframite,
- or their derivatives (tantalum, tin and tungsten)
- Any other minerals or their derivatives determined to be financing conflict in the DRC



Why are Conflict Minerals so Important?

Many in the international community believe that exploitation and trade of **conflict minerals** originating in the **Democratic Republic of the Congo (DRC)** helps finance conflict involving extreme levels of violence which have claimed more than 5.4 million lives since at least the 1990's.

Source: Electronic Industry Citizenship Coalition, Incorporated & Global e-Sustainability Initiative (2011)



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Mines controlled by militant groups cause serious social and environmental issues in the region including:

- Serious human rights abuses, theft, extortion
- Violence over control and taxation of mineral resources
- Forced and child labor
- Limited development options -> artisanal and small-scale mining
- Conservation impact, deforestation, etc.

Source: Electronic Industry Citizenship Coalition, Incorporated & Global e-Sustainability Initiative (2011)



Reaction to Violence in the DRC has Brought U.S. Congressional Action:

Section 1502

of

The **Dodd–Frank** Wall Street Reform and Consumer Protection **Act** (Pub. L. 111-203, H.R. 4173)



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Statutory Objectives

- Guidance to commercial entities seeking to exercise **Due Diligence** on and formalize the origin and chain of custody of conflict minerals **used in their products** and on their **suppliers** to ensure that conflict minerals used in the products of such suppliers **do not directly or indirectly finance armed conflict** or result in **labor or human rights violations**.
- Establish **punitive measures** against individuals or entities whose commercial activities are **supporting armed groups and human rights violations** in the **DRC**.



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The Ultimate End Goal:

Promoting peace and security in the DRC by:

- Supporting efforts of the Government of the DRC, adjoining countries, and the international community (e.g. United Nations Group of Experts on the DRC), to—



- **Monitor and stop commercial activities** involving the natural resources of the DRC that contribute to the activities of armed groups and human rights violations in the DRC; and
- **Develop stronger governance and economic institutions** that can facilitate and improve transparency in the cross-border trade involving the natural resources of the DRC to reduce exploitation by armed groups and promote local and regional development.



Even if these minerals are determined to have originated from the DRC region, your products may still be "conflict free" if:

the minerals have not directly or indirectly financed or benefited armed groups in the DRC or an adjoining country.



What is an ARMED GROUP?

- An armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the DRC or an adjoining country.



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What does it mean to be UNDER THE CONTROL OF ARMED GROUPS?

Areas within the DRC or adjoining countries in which armed groups—

- Physically control mines or force labor of civilians to mine, transport, or sell conflict minerals;
- Tax, extort, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export from the DRC or an adjoining country; or
- Tax, extort, or control trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country.



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- SEC Is Required to Develop Regulations to Implement Dodd-Frank – They Did So in August 2012.
- **COST IMPACT:** The initial cost of compliance may be anywhere between \$3 and \$4 billion and the annual cost of ongoing compliance may be anywhere between \$207 and \$609 million.



Something to Think About

- Is your company required to file reports with the SEC (are you a publically traded company)?
- Do you use conflict minerals in your products or do you manufacture products that use conflict minerals?
- Do these conflict minerals originate in the DRC or adjoining countries?
- Are these conflict minerals from scrap or recycled sources?



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Something to Think About

- Did you perform a good faith inquiry to determine the source of the minerals?
- If you reasonably believe the minerals were mined in the DRC or adjoining countries, did you perform a due diligence check tracking the minerals from the source through the supply chain (cradle to grave)?
- Your good faith inquiry and due diligence efforts will influence your SEC filing, reporting, disclosure and recordkeeping requirements.
- Sherry will go over all these details with you.



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Is There Any Chance That These Requirements Might Go Away Some Day?

YES



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Temporary Waiver

At any time for a period of no more than 2 years, these requirements can be temporarily waived or revised if the President determines (with reason provided) that a revision or waiver is in the national security interest of the United States.



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Termination Date For these Disclosure Requirements

One day and five years from its statutory enactment, the President of the United States can determine and certify to the appropriate congressional committees that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.



Summary: Conflict Mineral Disclosure Will Require an Understanding of

The PRODUCT:

- Mining, Sourcing & Manufacturing Process
- Country of Origin
- Materials & Component Parts (break it down)
- Design
- Testing & Certification Methodology & Standards (third party or internal).



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The SEC Rule



SEC Rule

- Per Section 13(p) of the Securities Exchange Act of 1934, SEC was to issue regulations by April 15, 2011
- On December 15, 2010 SEC issued proposed rule <http://www.sec.gov/rules/proposed/2010/34-63547.pdf>
- New target for final rule was Jan. 2012 – June 2012; comment period ended March 2, 2011
- SEC held a public roundtable on Oct. 18, 2011 and requested further comment
- Approximately 420 individual comment letters and 13,400 form letters were received; many in support of the proposed rule but some in opposition
- SEC held an open meeting to discuss the proposed rule on Aug. 22, 2012
- The final rule, with some changes, was adopted on Aug. 22 by a vote of 3-2; published in the Federal Register on Sept. 12, 2012 and will become effective 60 days thereafter.
- Final rule located at <http://www.sec.gov/rules/final/2012/34-67716.pdf>



“Just” 3-Steps



- SEC rule has a 3-step process for determining applicable disclosure requirements
 - Step 1: Determine whether the issuer is subject to the Conflict Minerals Provision of Dodd-Frank
 - Step 2: If the issuer is subject to the Conflict Minerals Provision, the issuer must conduct a reasonable country of origin inquiry (“RCOI”) regarding the origin of its conflict minerals
 - Step 3: If the issuer knows or has reason to believe that its necessary conflict minerals originated in the “Covered Countries” and did not or may not have originated from recycled or scrap sources, then it must provide a Conflict Minerals Report as an exhibit to Form SD.



Step 1: Does the Conflict Minerals rule apply to my company?

The rule will apply to your company if:

- It files reports with the Commission under Section 13(a) or 15(d) of the Exchange Act; and
- The issuer is a *“person described.”*



What is a “Person Described”?

“**Person described**” is one for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person. Can include:

- Issuers that manufacture products containing conflict minerals
- Issuers that contract to manufacture their products or components of a product containing conflict minerals where the issuer has “some actual influence over the manufacturing of their products”
 - Factual determination - an issuer is considered to be contracting to manufacture a product depending on the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product that contains conflict minerals or their derivatives. The degree of influence necessary for an issuer to be considered to be contracting to manufacture a product is based on each issuer’s individual facts and circumstances.
 - “Substantial” influence is not required to be covered by the Rule!



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Step 1: Applicability cont'd

The rule **will not** apply to the following issuers whose actions involve ***no more than*** the following:

- Specifying or negotiating contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution, or other like terms or conditions concerning the product, ***unless*** the issuer specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product.
- Affixing its brand, marks, logo or label to a generic product manufactured by a third party.
- Servicing, maintaining or repairing a product manufactured by a third party.

Anything more than these may bring your company into the rule!



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Step 1: Applicability cont'd

Miners:

- An issuer that mines or contracts to mine conflict minerals will not be considered to be manufacturing or contracting to manufacture those minerals unless the issuer also engages in manufacturing, whether directly or directly through contract, in addition to mining.
- So...
 - Mining Conflict Minerals alone \neq Manufacturing or Contracting to Manufacture
 - Mining Conflict Minerals + Manufacturing those minerals = Manufacturing or Contracting to Manufacture



Step 1: Applicability cont'd

Conflict minerals must be “necessary” to the functionality or production of a product manufactured by the issuer.

- No SEC definition of this phrase.
 - Determining whether a conflict mineral is deemed “necessary to the functionality” of a product or “necessary to the production” of a product depends on the issuer’s particular facts and circumstances. Factors to consider:
 - Whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally-occurring by-product;
 - Whether a conflict mineral is necessary to the product’s generally expected function, use or purpose;
 - If a conflict mineral is incorporated for ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.
 - Any of these factors, either individually or in the aggregate, may determine whether conflict minerals are necessary to the functionality of a product.



Step 1: Applicability cont'd

- Only conflict minerals that are actually contained in the product should be considered “necessary to the functionality or production” of that product. Factors to consider:
 - Contained in the product - Catalysts
 - Catalysts from conflict minerals that are used in the production of a product but do not appear in the final product are not considered “necessary to the functionality or production” of that product
 - BUT—catalysts from conflict minerals that are used and not completely washed away in the production process (e.g., trace amounts) will be considered necessary to the production of the product and are subject to the rule.
 - Intentionally added versus naturally occurring
 - What are the product’s generally expected function(s), use(s) or purpose(s)
 - Ornamentation, decoration or embellishment



Step 2: Did the Conflict Minerals originate in the DRC Countries?

- If the criteria in Step 1 are met (i.e., the issuer files reports and conflict minerals are necessary to the functionality or production of a product manufactured by the issuer), then the issuer must make a RCOI inquiry to determine whether its conflict minerals originated in the Covered Countries.
- The results of the inquiry will dictate whether the issuer must proceed to Step 3.



Step 2: Did the Conflict Minerals originate in the DRC Countries?

- Reasonable country of origin inquiry
 - Final rule does not specify what steps must be taken
 - Such determination depends on each issuer's particular facts and circumstances
 - May differ based on an issuer's size, products, relationships with suppliers and other factors such as available infrastructure at a given time
 - General standards are provided
 - An issuer's reasonable country of origin inquiry must be reasonably designed to determine whether the issuer's conflict minerals did originate in the Covered Countries or came from recycled or scrap sources.
 - Must be performed in good faith
 - May be satisfied if the issuer "seeks and obtains reasonably reliable representations [from the facility or through issuer's immediate suppliers] indicating the facility at which its conflict minerals were processed and demonstrating that those conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources."
 - Representations from all suppliers not necessary; standard focuses on reasonable design and good faith inquiry.
 - Consider any applicable warning signs or other circumstances indicating that an issuer's conflict minerals may have originated in the Covered Countries or did not come from recycled or scrap sources.



Step 2: Did the Conflict Minerals originate in the DRC Countries?

- If the issuer knows that the conflict minerals did not originate in the Covered Countries or are from scrap or recycled sources, or if the issuer has no reason to believe that the minerals may have originated in the covered countries, then:
 - No further inquiry is required (no Step 3)
 - Issuer must disclose its determination, provide a brief description of the inquiry undertaken and results of the inquiry on Form SD and file with the Commission
 - Issuer must also publicly describe its process on its internet website
 - Conflict Minerals Report is not required
- If the issuer knows or has reason to believe conflict minerals may have originated from the Covered Countries, or knows or has reason to believe that the minerals may not be from scrap or recycled sources, then:
 - Due diligence on the source and chain of custody of its conflict minerals is required (Step 3)
 - Due diligence must conform to a nationally or internationally recognized due diligence framework (e.g., OECD)
 - Conflict Minerals Report must be attached as exhibit to Form SD and made available on company's website



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Step 3: Conflict Minerals Report

- Conflict Minerals Report must:
 - Include a description of measures issuer has taken to exercise due diligence on the source and chain of custody of the conflict minerals
 - Be audited by an independent private sector audit
- DRC Conflict Free – issuer whose minerals may have originated from the Covered Countries but did not finance or benefit armed groups must:
 - Obtain independent private sector audit of Conflict Minerals Report
 - Certify that such audit was obtained
 - Include audit report in Conflict Minerals Report
 - Identify the auditor
- Not “DRC Conflict Free – issuer whose products are found not to be “DRC conflict free” must describe in its Conflict Minerals Report:
 - products manufactured or contracted to be manufactured that have not been found to be “DRC conflict free”
 - Facilities used to process the conflict minerals in those products
 - Country of origin of the conflict minerals in those products
 - Efforts to determine the mine or location of origin with the greatest possible specificity
 - Audit and certification requirements as above



Step 3: Conflict Minerals Report

- “DRC Conflict Undeterminable” – available to issuers that proceed to Step 3 but are unable to determine whether the minerals in their products originated in the Covered Countries or financed or benefited armed groups in those countries. Such issuers must describe in their Conflict Minerals Report:
 - Products manufactured or contracted to be manufactured that are “DRC conflict undeterminable”
 - Facilities used to process the conflict minerals in those products, if known
 - Country of origin of the conflict minerals in those products, if known
 - Efforts to determine the mine or location of origin with the greatest possible specificity
 - Steps taken or will be taken, if any, since the end of the period covered in its most recent Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve due diligence
- Available for a temporary two-year period (or four-year period for smaller reporting companies)
- Need not be audited



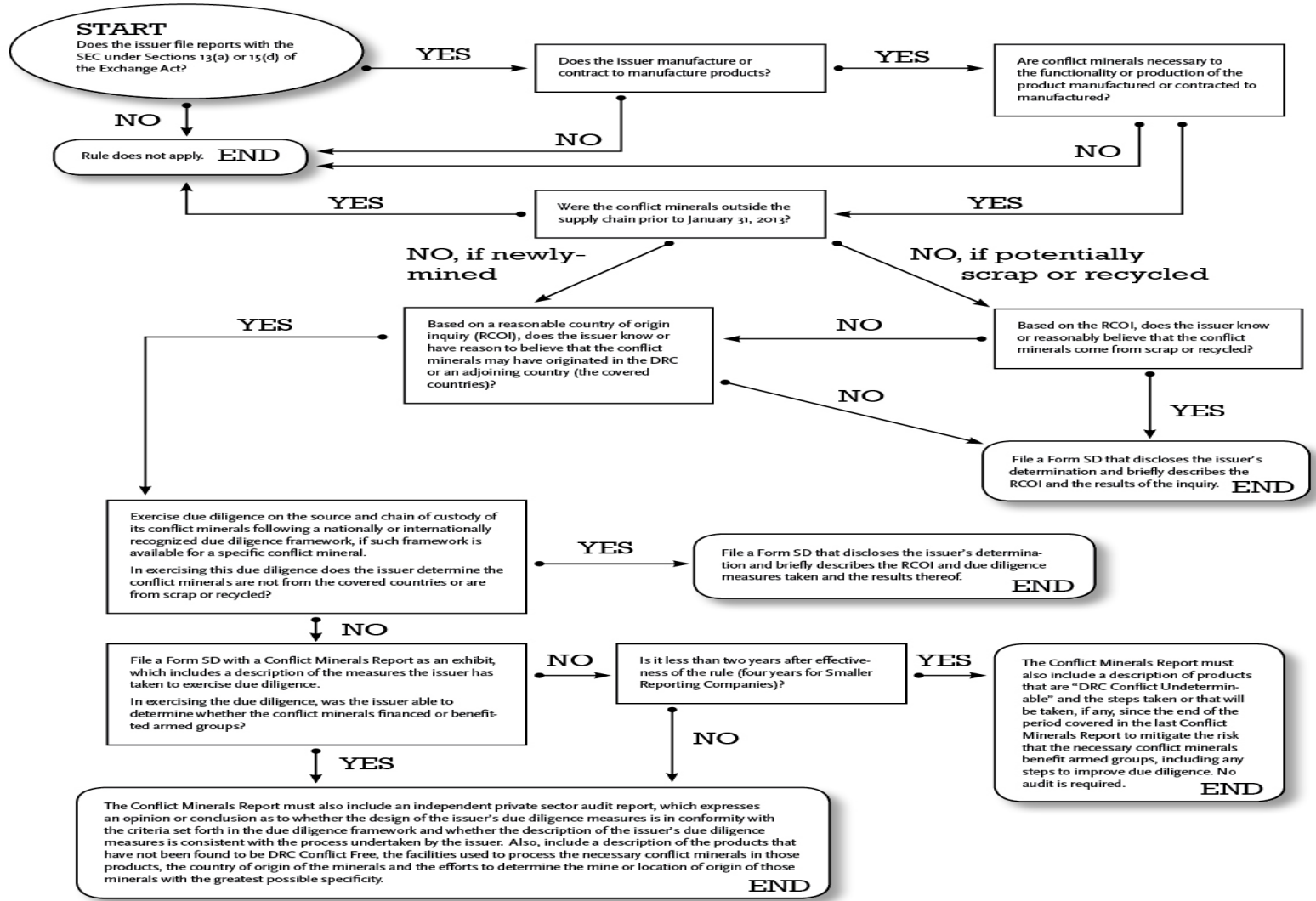
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Recycled and Scrap Conflict Minerals

- Recycled or scrap sources are:
 - Recycled metals, which are reclaimed end-user or post-consumer products
 - Scrap processed metals created during product manufacturing
 - Excess, obsolete, defective, and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold
 - BUT—minerals partially processed, unprocessed, or a byproduct from another ore will not be included in the definition of recycled metal.
- Under the final rule, if an issuer has reason to believe, as a result of its RCOI under Step 2, that its conflict minerals may not have been from recycled or scrap sources, it must exercise due diligence per Step 3. The issuer would then be required to provide a Conflict Minerals Report if it is unable to determine that the conflict minerals came from recycled or scrap sources under the Step 3 due diligence.





Also covered by the rules...

- No *de minimis* threshold
- Not limited to domestic companies; foreign companies that report to the SEC are also covered by the legislation
- Not limited to large companies; small companies also may be covered
- Private companies within the supply chain will likely need to conduct their own due diligence as part of their customer's due diligence



What Next?

- First reporting period for all issuers will be from January 1, 2013 to December 31, 2013
- First specialized disclosure report must be filed on or before May 31, 2014
 - Conflict mineral information must be provided on a calendar year basis regardless of the issuer's fiscal year end.
- Final rule excludes any conflict minerals that are “outside the supply chain” prior to January 31, 2013
 - After any columbite-tantalite, cassiterite, and wolframite minerals have been smelted;
 - After gold has been fully refined; or
 - After any conflict mineral, or its derivatives, that have not been smelted or fully refined are located outside of the Covered Countries
- Legal challenges?
 - Nov. 12, 2012 is the deadline for filing legal challenges



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Conflict Minerals Due Diligence



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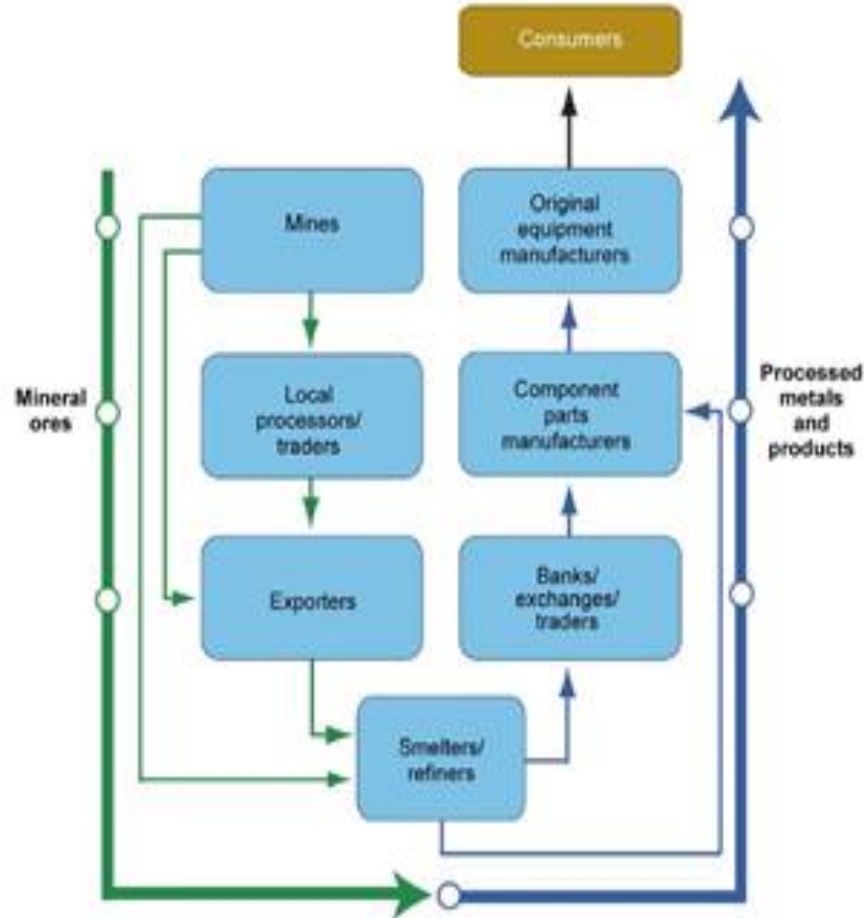
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Complexity of Supply Chain Poses Challenges

- Supply chains are complex and multi-layered.
- Conflict minerals enter the supply chain many tiers removed from the end item manufacturer and ultimate purchaser.
- End item manufacturers have very limited visibility into remote tiers.
- End item manufacturers typically do not have captive supply chains.



Typical Supply Chains for Conflict Minerals



Source: GAO analysis



Due Diligence under SEC Rule

When Conflict Minerals Reports are required –

“The registrant’s due diligence must conform to a nationally or internationally recognized due diligence framework if such a framework is available for the conflict mineral.” (17 CFR 249p)

As for this date, there is only one such recognized framework – the OECD *“Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict Affected and High-Risk Areas”*



OECD

The Organization of Economic Cooperation and Development is an international organization of thirty-four countries organized to promote economic world trade and economic development.

The OECD has taken a leading role in developing policies addressing anti-corruption practices and legislation.

In 2011, the OECD published its guidance on supply chain due diligence.

OECD has worked extensively with various stakeholders in conflict minerals issues including government, non-government organizations, and a broad group of business concerns.



What's in the OECD Framework

- Five step framework
- Model supply chain policy
- Risk identification and mitigation
- Tin, tantalum, and tungsten supplement
- Gold supplement



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OECD 5 Step Framework

- While due diligence will vary depending upon a company's position within the supply chain, and may vary with respect to different minerals, OECD has created a 5-step due diligence framework consisting of the following--
 - 1. Establish strong company management systems.
 - 2. Identify and assess risk in the supply chain
 - 3. Design and implement a strategy to respond to identified risks
 - 4. Carry out independent third party audit of supply chain due diligence at identified points in the supply chain.
 - 5. Report on supply chain due diligence.



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OECD Framework Step 1

Establish strong company management systems

Adopt and communicate clear policy to supply chain and the public.

Ensure management support.

Establish transparency over the mineral supply chains.

Strengthen engagement with suppliers – add requirements in contracts.

Establish grievance mechanism as early warning risk.



OECD Framework Step 2

Identify and assess risk in the supply chain

Identify risks as defined in the OECD guidance supplements.

Assess risks of adverse impacts in light of supply chain policy consistent the OECD due diligence guidance.



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OECD Framework Step 3

Design and implement a strategy to respond to identified risks

- Report findings to senior management.
- Define and adopt risk management plan. Disengage with suppliers who fail risk mitigation efforts. Monitor and track risk mitigation efforts.



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OECD Framework Step 4

Carry out independent third party audit of supply chain due diligence at identified points in the supply chain.

- Companies at identified points in the supply chain should have their due diligence practices audited by third parties.
- Such audits may be verified by an independent institutional mechanism.



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OECD Framework Step 5

Report on supply chain due diligence

- Companies should publically report on their supply chain due diligence policies and practices and may do so by expanding the scope of their sustainability, corporate social responsibility or annual review to cover additional information on mineral supply chain due diligence.



OECD Model Supply Chain Policy

Recognition of commitment to respect human rights and avoid contributing to conflict and human rights abuses.

Discontinue business with suppliers with upstream risk.

Not directly or indirectly support non-state armed groups.

Commit to proper use of armed public or private security forces.

Avoiding bribery and fraudulent misrepresentation of mineral status.

Support of anti-money laundering associated with mineral trade.



OECD Suggested Measures for Risk Mitigation

- Primarily for upstream elements of the supply chain or through collective industry organizations—
- Alert governments of abusive or exploitative practices.
- Disclose illegal taxes or extortion in upstream mineral trade to downstream tiers or to the public.
- Engage with intermediaries and consolidators to build capabilities to document behavior of and payments to security forces.
- Where artisanal or small scale mining is used, support formalization of security arrangements.
- Identifies Red Flags requiring additional attention.



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OECD Tin, Tantalum, and Tungsten Supplement

Supplement tailored to the mining and processing and sell of these metals.
Applies 5-step framework with specific recommendations to upstream and downstream actors in the supply chain.

Upstream refers to the physical extraction of ore through the smelting or refining of metals.

Downstream is the rest of the supply chain through to the retail sale of products containing metals.

Example: Upstream actors are encouraged to establish chain-of-custody for minerals to reliably record where minerals were extracted.



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OECD Gold Supplement

- Gold supply chain is managed differently than other conflict metals.
 - Gold occurs in elemental form and requires refining but not smelting.
 - Gold is extremely valuable by volume, used in smaller quantities.
 - Gold is more commonly recycled.
 - Gold can more easily be transported from conflict areas to avoid conflict minerals rules.
 - Gold market is more tightly controlled by elements of the supply chain.
- Gold supplement published on July 17, 2012.
- Identifies Red Flags requiring additional attention.
- Provides recommendations both with respect to artisanal and large scale mining.



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Upstream Supply Chain Initiatives

- Conflict Free Gold Industry Initiatives
- GECl and EICC Conflict –Free Smelter Program
- Tantalum Closed Pipe Supply Chain
- ITRI Tin Supply Chain Initiative



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Conflict Free Gold Industry Initiatives

- Due to its extremely high value, the supply chain for gold differs from other conflict metals
- There are several initiatives under development to establish conflict free supply chains for gold.
 - World Gold Council (WGC) Conflict Free Gold Standard
 - London Bullion Market Association (LBMA) Responsible Gold Guidance Program
 - Responsible Jewelry Council (RJC) Chain of Custody Certification Program



GeCI and EICC Conflict –Free Smelter Program

- GeCI (Global e-Sustainability Initiative) and EICC (Electronic Industry Citizenship Coalition) have established the “Conflict – Free Smelter Program”
 - Voluntary program
 - Requires an independent third party evaluates a smelter’s procurement activities and determines if the smelter demonstrated that all the materials they processed originated from conflict-free sources.
 - Periodically publishes lists of smelters, by metal, found to be compliant with the conflict free smelter protocol.



Tantalum Closed Pipe Supply Chain

- AVX and KEMET, manufacturers of tantalum capacitors have each established a close pipe supply chain.
- In a closed pipe supply chain only one company has custody of minerals from the mine source onward.
- Closed pipe chains ensure the mine source was not in a conflict area.
- Tantalum is sourced from non-conflict areas of the Democratic Republic of the Congo (Katanga Province)



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ITRI Tin Supply Chain Initiative

- ITRI is a tin industry trade association based in the UK.
- The ITRI Supply Chain Initiative is a physical chain of custody system which tracks the origin and movement of tin ore from its point of extraction.
- The initiative currently operates in non-conflict areas of the DRC.
- Ore is bagged and tagged and monitored to create a verifiable and auditable supply chain.
- Can also be used for tungsten and tantalum sources. (Due to its value, gold is handled differently) .
- Supports the conflict free smelter program by providing conflict free source of ore.



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Federal Procurement Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

- Executive Order 13126 signed by President Clinton in 1999 requires the Department of Labor, in consultation with the Departments of State and Homeland Security, to publish and maintain a list of products, by country of origin, which the three Departments have a reasonable basis to believe, might have been mined, produced or manufactured by forced or indentured child labor.
- Under the Federal acquisition regulations implementing the Executive Order, federal contractors who supply products on the DoL list must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items listed.
- The rule applies to end items, and not components or raw materials unless sold as end items.



U. S. Labor Department List of Products Produced w/Child Labor

- Bamboo /Burma
- Beans (green, soy, yellow) /Burma
- Brazil Nuts, Chestnuts/Bolivia
- Bricks/Afghanistan, Burma, China, India, Nepal, Pakistan
- Carpets/Nepal, Pakistan
- **Cassiterite/Democratic Republic of Congo**
- Coal/Pakistan
- Coca (stimulant plant)/Colombia
- Cocoa/Cote d'Ivoire, Nigeria
- Coffee/Cote d'Ivoire
- **Coltan/Democratic Republic of Congo**
- Cotton/Benin, Burkina Faso, China, Tajikistan, Uzbekistan
- Cottonseed (hybrid)/India
- Diamonds/Sierra Leone
- Electronics/China
- Embroidered Textiles (zari)/India, Nepal
- Garments/Argentina, India, Thailand
- Gold/Burkina Faso
- Granite/Nigeria
- Gravel (crushed stones)/Nigeria
- Pornography/Russia
- Gravel (crushed stones)/Nigeria
- Pornography/Russia
- Gold/Burkina Faso
- Granite/Nigeria
- Gravel (crushed stones)/Nigeria
- Pornography/Russia
- Rice/Burma, India, Mali
- Rubber/Burma/Shrimp
- Thailand/Stones
- India, Nepal
- Sugarcane/Bolivia, Burma
- Teak/Burma
- Textiles (hand-woven)/Ethiopia
- Tilapia (fish)/Ghana
- Tobacco/Malawi/
- Toys/China



Combating Trafficking in Persons in Federal Procurement

- In 2006 the Department of Defense implemented a DFARS rule requiring defense contractors and subcontractors take action to combat trafficking in persons. (71 Fed Reg 62560). Other Federal agencies were subject to a similar FAR rule implemented the same year (71 Fed Reg 20301)
- In 2007 the FAR rule was modified and the DFARS rule cancelled so that all agencies are subject to the same rules.
- In 2009 the rule was amended to provide clarification on what constitutes forced labor.
- All prime contracts issued since 2007 contain Federal Acquisition Regulation 52.222-50 *Combating Trafficking in Persons*



FAR 52.222-50 – Contractor Prohibitions

- Contractors and contractor employees shall not--
 - (1) Engage in severe forms of trafficking in persons during the period of performance of the contract;
 - (2) Procure commercial sex acts during the period of performance of the contract; or
 - (3) Use forced labor in the performance of the contract.



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FAR 52.222-50 – Contractor Requirements

- The Contractor shall--
 - (1) Notify its employees of--
 - (i) The United States Government's zero tolerance policy described in paragraph (b) of this clause; and
 - (ii) The actions that will be taken against employees for violations of this policy. Such actions may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and
 - (2) Take appropriate action, up to and including termination, against employees or subcontractors that violate the policy in paragraph (b) of this clause.



FAR 52.222-50 – Notice and Flowdown

- The Contractor shall inform the Contracting Officer immediately of--
 - (1) Any information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, or subcontractor employee has engaged in conduct that violates this policy; and
 - (2) Any actions taken against Contractor employees, subcontractors, or subcontractor employees pursuant to this clause.
- Subcontracts. The Contractor shall include the substance of this clause in all subcontracts.



FAR 52.222-50 – Remedies

- In addition to any other remedies, the Government may:
 - (1) Require the Contractor to remove a Contractor employee or employees from the performance of the contract;
 - (2) Require the Contractor to terminate a subcontract;
 - (3) Suspend contract payments;
 - (4) Reduce award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;
 - (5) Terminate the contract for default or cause, in accordance with the termination clause of this contract; or
 - (6) Suspend or debar the contractor from Federal contracting.



Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts

- Signed by President Obama on September 25, 2012.
- Strengthens the efficacy of the Government's zero-tolerance policy on trafficking in persons by Federal contractors and subcontractors.
 - Prohibits contractors and subcontractors from engaging in specific trafficking-related activities.
 - Applies new, tailored compliance measures for larger contracts performed abroad.
 - Establishes a process to identify industries and sectors that have a history of human trafficking, to enhance compliance on domestic contracts.
 - Augments training and heightens agencies' ability to detect and address trafficking violations.
 - Will require change to the Federal Acquisition Regulation (FAR).



What Have Some Companies Been Doing to Address Conflict Minerals?



In 2011 and 2012, the Organization for Economic Cooperation and Development (OECD) began a conflict mineral pilot project involving 30 participating companies. Although a few remained anonymous, most self-identified as reflected in one of three Reports to be issued over a 12 month period.

Source: <http://www.oecd.org/dataoecd/34/47/49079906.pdf>



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Of the participating companies, the following industries were represented:

- Aerospace and defense
- Automotive
- Medical Devices
- Information and Communications Technology (ICT), including semiconductors
- Consumer Products
- Extractives
- Chemicals
- Lighting



And are headquartered throughout the

- United States
- Canada
- European Union
- China
- Japan
- Malaysia
- Singapore



Of those participating,

- 30 percent characterized themselves as original equipment manufacturers and
- 30 percent self-identified as component manufacturers (integrators or value-added resellers to OEMs).
- Several of the remaining companies fell under the category of miner, metal exchange, metal trader, assembler, producer, contractor or distributor.

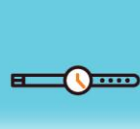


What this pilot project shows is that many of these companies have aggressively moved toward verification of their supply chain as "conflict-free" but many others took a wait and see approach before implementing any significant due diligence. However, now that the SEC Regulations are finalized—the wait and see period is over.



For those who are trying to implement a strategy, there are challenges:

- Identifying smelters and verifying compliance with all mineral streams is labor-intensive, with limited reliability.
- Obtaining chain of custody information for minerals used in the supply chain from the many parts suppliers can also be quite burdensome especially if the manufacturing process uses, contains or involves hundreds or thousands of parts. In some instances, a vendor's desire to protect its trade secrets and proprietary information may prevent them from disclosing information about the configuration of the materials used in these products.
- Many suppliers may not have the resources to implement due diligence even if a buyer were to require them. Beyond contractual requirements (Dodd-Frank may not reach them), there is little reason for suppliers to disclose this information.



California's Equivalent:

- AB 861, and
- California Transparency in the Supply Chain



AB – 861 (Adds Section 10490 to the Public Contracts Code)

Effective the date of the SEC Final Rules:

- A scrutinized company is ineligible to, and shall not, bid on or submit a proposal for a contract with a state agency for goods or services related to products or services that are the reason the company must comply with Section 13(p) of the Securities Exchange Act of 1934.
- A “scrutinized company” is a company that has been found to be in violation of Section 13(p) of the Securities Exchange Act of 1934 by final judgment or settlement entered in a civil or administrative action brought by the Securities and Exchange Commission and the company has not remedied or cured the violation in a manner accepted by the commission on or before final judgment or settlement.



California Supply Chains Transparency Act

- Requires covered a retail seller and manufacturer to disclose efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.
- Covered entities:
 - “Do business” in California (Section 23101 of the Revenue and Taxation Code)
 - Have annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000)
- "Manufacturer“ and “Retail Seller” means a business entity with manufacturing or retail trade respectively as its principal business activity as reported on the entity's California tax return.



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California Supply Chains Transparency Act

- Disclosures must be posted on Internet Web sites with a conspicuous and easily understood link to the required information placed on the business' homepage.
- If a company has no Web site, it must disclose in writing upon request.
- The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief. Nothing in this section shall limit remedies available for a violation of any other state or federal law.



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California Transparency Act Disclosures

- (1) Engages in **verification of product supply chains** to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
- (2) Conducts **audits of suppliers** to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
- (3) Requires **direct suppliers to certify that materials** incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- (4) Maintains **internal accountability standards and procedures** for employees or contractors failing to meet company standards regarding slavery and trafficking.
- (5) Provides company **employees and management**, who have direct responsibility for supply chain management, **training** on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.



Business Transparency on Trafficking and Slavery Act (H.R. 2759)

- Modeled after the California Transparency in Supply Chains Act (NOT YET LAW)
 - Requires ALL companies that submit annual reports to the SEC to disclose measures taken during the year to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within the company's supply chains.
 - "Supply chain" – all supplies of products, component parts of products, and raw materials used by such person in the manufacturing of such person's products or the provision of such person's services, whether or not such person has a direct relationship with the supplier.



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CA Business & Professions Code Section 17200

It is unlawful in the state of California to engage in any unfair competition which means

- Any unlawful or unfair or fraudulent business act or practice; or,
- Any unfair or deceptive or untrue or misleading advertising.



In essence, a California enforcing entity can allege a violation of Section 17200 as a consequence of a violation of some other law or statute (including local, state, federal or international law).



Civil Penalty: up to \$2500 for each violation

Other Relief: An Injunction



Who Can Sue for Civil Penalties?

- The Attorney General,
- Any District Attorney,
- Any County Counsel authorized by agreement with a DA
- Any City Attorney (if population > 750,000) or any City Attorney with DA consent.



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Who Can Obtain an Injunction: All of the above, plus the public.

Private Right of Action: Any person may pursue representative claims or relief on behalf of others only if the claimant meets standing requirements and complies with Section 382 of the Code of Civil Procedure (Class Action).



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What Happens When One Intentionally Violates an Unfair Competition Injunction?

\$6,000 civil penalty for each violation. Every violation day is a separate and distinct violation.

Statute of Limitation: Must commence within four years after the cause of action accrued.



SEE ALSO:

California Business & Professions Code 17508.

Unlawful to make false or misleading advertising claims, including claims that: purport to be based on factual, objective, or clinical evidence, or purport to be based on any fact.



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Also Consider FTC Enforcement

The **Federal Trade Commission's** Authority Under Section 5 of the Federal Trade Commission Act (**Deceptive & Unfair Acts or Practices**):

- The FTC has determined that a representation, omission or practice is *deceptive* if it is likely to:
 - mislead consumers and
 - affect consumers' behavior or decisions about the product or service.
- And, an act or practice is unfair if the injury it causes, or is likely to cause, is:
 - Substantial
 - not outweighed by other benefits and
 - not reasonably avoidable.
- A claim can be misleading if relevant information is left out or if the claim implies something that's not true.

[Source: http://business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road/](http://business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road/)



IN CONCLUSION...

KNOW:

- Your PRODUCT
- Your MANUFACTURER & Their SOURCING
- Your REPORTING OBLIGATIONS



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Top 3 things you should know when you walk away today...



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Additional Resources



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RESOURCES FOR COMPLYING WITH DODD-FRANK CONFLICT MINERALS PROVISION AND PROPOSED SEC REGULATIONS

- EICC - <http://eicc.info/index.shtml>
- GeCI - <http://www.gesi.org/>
- ITRI - <https://www.itri.co.uk/>
- LBMA - <http://www.lbma.org.uk/pages/index.cfm>
- OECD - <http://www.oecd.org/home/>
- RJC - <http://www.responsiblejewellery.com/>
- World Gold Council - <http://www.gold.org/>
- EICC-GeSI Due Diligence Common Reporting Template & Dashboard - www.conflictreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm



RESOURCES FOR COMPLYING WITH DODD-FRANK CONFLICT MINERALS PROVISION AND PROPOSED SEC REGULATIONS

- IPC Association Connecting Electronics Industries
<http://www.ipc.org/ContentPage.aspx?pageid=Conflict-Minerals-Resources-for-the-Electronics-Industry>, Resource page with form letters for companies to send to suppliers (“Dear Supplier Letter”) and response letters (“Dear Customer Letter”)
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
<http://www.oecd.org/dataoecd/62/30/46740847.pdf>
- OECD Pilot Project in the Mining Sector: Promoting Responsible Investment Through Enhanced Due Diligence
<http://www.oecd.org/dataoecd/4/29/44581414.pdf>
- OECD Work on Conflict-Free Mineral Supply Chains & The U.S. Dodd Frank Act <http://www.oecd.org/dataoecd/56/59/48889405.pdf>



RESOURCES FOR COMPLYING WITH DODD-FRANK CONFLICT MINERALS PROVISION AND PROPOSED SEC REGULATIONS

- Responsible Jewelry Council Chain-of-Custody Certification Standard for precious metals supply chain (gold and platinum, palladium and rhodium)
<http://www.responsiblejewellery.com/chain-of-custody-certification/>
- “The RJC CoC Standard allows for the tracking of gold and platinum group metals from their starting points in the supply chain, thereby reducing risk and avoiding the need to retrospective inquiries. RJC CoC Certification can therefore assist companies to conform with the [OECD Due Diligence Guidance](#), [LBMA Responsible Gold Guidance](#) and the [EICC Smelter/Refiner Validation Program](#), and to comply with the provisions of the US Dodd-Frank Act (Section 1502, Conflict Minerals).”
- Automotive Industry Action Group (AIAG) Conflict Minerals FAQs
http://www.aiag.org/staticcontent/press/releases/general/webinar_faqs_7_14_11_final1.pdf



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RESOURCES FOR COMPLYING WITH DODD-FRANK CONFLICT MINERALS PROVISION AND PROPOSED SEC REGULATIONS

State Department map of the DRC Mineral Exploitation by Armed Groups & Other Entities

<http://documents.nam.org/IS/State%20Department%20DRC%20mines%20map.pdf>

KPMG Conflict Minerals Provision of Dodd-Frank

<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/dodd-frank-conflict-minerals.pdf>

Conflict Minerals Due Diligence (Practical Law Company)

http://www.srz.com/files/upload/Littenberg_Damania_Valane_PLC_Nov_2011_Conflict_Minerals.pdf

Preparing for Conflict Minerals Compliance: Company Action Items Checklist

http://www.srz.com/files/upload/Littenberg_Damania_Valane_PLC_Nov_2011_Preparing_for_Conflict_Minerals_Compliance_Company_Action_Items.pdf



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RESOURCES FOR COMPLYING WITH DODD-FRANK CONFLICT MINERALS PROVISION AND PROPOSED SEC REGULATIONS

- Conflict Minerals Resource Center (comprehensive list of resources and links compiled by Schulte Roth & Zabel LLP)

http://www.srz.com/Conflict_Minerals_Resource_Center/

- Dodd-Frank Section 1502 website lists several links to companies that provide tools for compliance with the Conflict Minerals Provision

<http://section1502.com/category/tools-and-solutions/>

- Public-Private Alliance for Responsible Minerals Trade

<http://www.resolv.org/site-ppa/>

“The Public-Private Alliance for Responsible Minerals Trade (PPA) is a new, joint initiative between governments, companies, and civil society to support supply chain solutions to conflict minerals challenges in the Democratic Republic of Congo (DRC) and the Great Lakes Region (GLR) of Central Africa. Leaders worldwide are calling for action to address conflict minerals concerns while delivering solutions that benefit those involved in responsible minerals trade in the Great Lakes Region. The PPA is being launched as a joint effort with U.S. State Department, the U.S. Agency for International Development, non-governmental organizations, and companies/industry organizations to take on this challenge.”



RESOURCES AND TEMPLATES FOR COMPLYING WITH CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT

Resources and Guidelines:

Effective Supply Chain Accountability: Investor Guidance on Implementation of the California Transparency in Supply Chains Act and Beyond (by Interfaith Center on Corporate Responsibility, Christian Brothers Investment Services, and Calvert Investments)

<http://www.calvert.com/NRC/literature/documents/WP10009.pdf>

Society of Corporate Compliance and Ethics

<http://www.strquality.com/en-us/aboutus/resources/Brochures/California-Transparency-Compliance.pdf>

Sample Vendor Guarantee (from Citi Trends, Inc. website):

<http://www.cititrends.com/docs/Citi%20Trends%20Inc-CA%20Supply%20Chain%20Act%20Vendor%20Policy.pdf>



Federal Agency Internet Sites

- Department of Defense - <http://ctip.defense.gov/>
- State Department - <http://www.state.gov/j/tip/>
- Agency for Int'l Development - <http://www.usaid.gov/trafficking/>
- Department of Labor - <http://www.dol.gov/ilab/programs/ocft/>
- DHS - <http://www.dhs.gov/files/programs/humantrafficking.shtm>

Additional Checklists and Information

Disclosures Checklist—Just the Bones

The Regulation of:

- VOCs—Volatile Organic Compounds
- GHGs—Greenhouse Gas Emissions
- Conflict Minerals—gold, tin, etc.
- Product Safety/Health Information—Ingredients & Use

Disclose To:

- Government—the Big Four:
 - U.S. EPA
 - U.S. Customs
 - U.S. SEC
 - U.S. CPSC
- Shareholders
- Public

Disclosure From:

- Manufacturers
- Importers
- Companies that are subject to the jurisdiction of the SEC

Disclose What:

- Country of Origin
- Hazards & Emissions—health, safety and environmental
- Ingredients/Materials Used in Manufacture
- Testing and Certification Records

Disclose When:

- Upon Import
- Annually
- Prior to Offering for Sell or Distribution
- Upon Shipment to Retail or Industrial Purchaser
- Upon Request by Government or the Public

Disclosure Method:

- With Import Entry Papers--Certificates of Conformity/Compliance
- With Annual SEC Filings
- On Company Website
- On Government Website
- On Material Safety Data Sheet
- On Labels and Packaging
- In Direct Document Submissions to Government Agency for Approval--Applications and Requests for Approval

Product Environment/Safety Compliance Checklist for Imports

- ☑ Know what you are importing--understand the products that you import and the vulnerabilities associated with these products. Know the details such as use, packaging, size, quantity, quality, product composition, specifications, safety concerns, etc.
- ☑ Know whether the product is intended for commercial sale or use in the U.S.
- ☑ Know your supply chain--the foreign firms that produce or source the products you purchase and any other firms with which you do business and through which such products pass (e.g., consolidators, trading companies, distributors)
 - ☞ Name, address, type of business, and who they use for raw material sourcing, processing, packaging, storage and transportation.
 - ☞ Do they have a product safety & compliance program that will meet your U.S. regulatory compliance needs?
 - ☞ What's their proof?
- ☑ Know the risks and compliance history of your products, including those of the manufacturer, distributor or transporter.
- ☑ Understand the hazards that may arise during the product life cycle, including all stages of production
- ☑ Ensure proper control and monitoring of these life cycle and supply chain hazards
- ☑ Establish a Product Environmental and Safety Management Program--develop and maintain clear written policies, specifications, processes and recordkeeping.
- ☑ Know the U.S. Requirements that apply to the product (from cradle to grave)
- ☑ Verify product and supply chain compliance with U.S. requirements throughout the supply chain and product life cycle
- ☑ Regularly check U.S. regulatory agency policy statements, guidance and other available information they publish to assist your industry.
- ☑ Establish a clear management structure for product compliance—defining and documenting functions, responsibilities and reporting relationships for people involved.
- ☑ Assign responsibility for product control and compliance to specific individuals and ensure they understand their role within the organization.
- ☑ People assigned to product compliance should have training, knowledge, expertise, experience, skills and competence to perform their role.
- ☑ Establish a communication and information sharing system to allow for informative decisionmaking within the organization, and where appropriate, with third parties (e.g., federal, state and local authorities).
- ☑ Control, monitor and improve operational continuity to achieve product compliance.
- ☑ Take corrective and preventive action when a product is found not in compliance with U.S. requirements
- ☑ What form of integrity checks will you perform?
 - ☞ Periodic inspections of foreign manufacturers, distributors and suppliers involving verification of preventative controls, records retention, sampling of products and raw materials.
 - ☞ Purchasing from certified sources, where possible.
 - ☞ Purchase from sources in countries where laws are comparable to U.S. requirements
 - ☞ Conduct paper audits--reviewing
 - ⇒ production and processing records
 - ⇒ written controls for monitoring devices
 - ⇒ sampling and testing records
 - ⇒ corrective action plans
 - ⇒ procedures in place established to verify U.S. regulatory compliance
 - ☞ Control, monitor and verify product compliance prior to and during import entry and while in U.S. distribution
 - ☞ Investigate the root cause of non-compliance, take corrective action, as needed to remediate and prevent harm and to correct the discrepancy.

C. Appendix C – Sample Certificate of Conformity

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

200x Model Year Certificate of Conformity

Manufacturer: **ABC Inc.**
Small SI Engine Family **xABCS.0685AA**
Certificate Number: **ABC-NRSI-0x-42**
HC+NOx FEL: g/kW-hr **68**
Date Issued: **6/30/200x**

Karl J. Simon, Director
Compliance and Innovative Strategies Division
Office of Transportation and Air Quality

Pursuant to Section 213 of the Clean Air Act (42 U.S.C. section 7547) and 40 CFR 90, and subject to the terms and conditions prescribed in those provisions, this certificate of conformity is hereby issued for the following small nonroad engine family, more fully described in the documentation required by 40 CFR 90 and produced in the stated model year. This certificate of conformity covers only those new small nonroad engines which conform in all material respects to the design specifications described in the documentation required by 40 CFR 90 and which are produced during the model year stated on this certificate. This certificate of conformity does not cover small nonroad engines imported prior to the effective date of the certificate.

This certificate of conformity is conditional upon compliance of said manufacturer with the averaging, banking and trading provisions of 40 CFR Part 90, Subpart C both during and after model year production. Failure to comply with these provisions may render this certificate void ab initio.

It is a term of this certificate that the manufacturer shall consent to all inspections described in 40 CFR 90.126 and 90.506 and authorized in a warrant or court order. Failure to comply with the requirements of such a warrant or court order may lead to revocation or suspension of this certificate for reasons specified in 40 CFR 90. It is also a term of this certificate that this certificate may be revoked or suspended or rendered void ab initio for other reasons specified in 40 CFR 90.

This certificate does not cover small nonroad engines sold, offered for sale, or introduced, or delivered for introduction, into commerce in the U.S. prior to the effective date of the certificate.

Environmental Compliance in a Nutshell

If your company sells, offers for sale, advertises for sale, distributes, makes, imports or exports any of these items:

- Chemicals (not pesticides)
- Pesticides
- Products subject to safety standards (not chemicals) (e.g, refrigerators, furniture, bicycles, dishes, copper and brass products, plastic products, electronics)
- Children's Products (12 and under)
- Adult clothing and fabrics
- Children's clothing

And Any of these items do or contain the following:

Anything that's harmful or potentially harmful to children (e.g., choking hazard)

Contains any ingredient that is:

- Harmful if touched, swallowed, consumed or gets in eyes
- Corrosive
- Reactive
- Ignitable
- Flammable
- Explosive
- Toxic

Any item that contains

- Lead
- Mercury
- Cadmium
- Chromium
- Heavy Metals like Copper
- Vermiculite
- Phthalates -- DEHP (di(2-ethylhexyl) phthalate), DBP (dibutyl phthalate), BBP (benzyl butyl phthalate), DINP (diisononyl phthalate), DIDP (diisodecyl phthalate), DnOP (di-n-octyl phthalate)
- Conflict Minerals (gold, cassiterite, columbite-tantalite, wolframite and their derivatives)

Anything that when used or opened emits (into the air) or contributes to the formation of:

- ozone,
- volatile organic compounds (VOCs)
- greenhouse gases (GHG)
- carbon monoxide,
- nitrogen dioxide,
- sulfur dioxide,
- particulate matter,
- sulfates,
- lead

Then all or some of the following requirements may be or are triggered:

- Labeling language (what can be said and what must be said)
- Packaging language and container requirements
- Advertising restrictions (what can be said and what must be said)
- Storage limitations
- Handling/clean up procedures
- Disposal requirements (how much, when, where and how)

- Shipping requirements (how much, means of transport, documentation, packaging, labeling)
- Import restrictions
- Export restrictions
- Training
- Store signage
- Product Testing
- Product Certification
- Product Registration
- Reporting
- Fees (quarterly, annual, etc.)
- Recordkeeping
- Written Plan or Program

By any one or all of these Agencies:

- U.S. Securities & Exchange Commission (**SEC**)
- U.S. Consumer Product Safety Commission (**CPSC**)
- U.S. Federal Trade Commission (**FTC**)
- U.S. Environmental Protection Agency (**EPA**)
- U.S. Department of Transportation - Pipeline & Hazardous Materials Safety Administration (**DOT**)
- States (e.g., California)
- U.S. Coast Guard Rules--for products used in marine environment (**Coast Guard**)
- U.S. Customs & Border Protection--for Imports (**Customs**)
- U.S. Dept of Commerce--for Exports (**Commerce**)
- U.S. Food & Drug Administration (**FDA**)
- **Local Gov't** (e.g., State Fire Marshals who enforce EPCRA and California Certified Unified Program Agencies (CUPA) who enforce RCRA)

Subject to one or all of the following laws: EXPAND

SEC:

- Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act—**for conflict minerals**
- Regulation S-K (17 C.F.R. 229.10(a))--**in relation to climate change and other envt'l issues**
 - Item 101 (17 CFR 229.191(c)(xii)),
 - Item 103 (17 CFR 229.103, Instruction 5)
 - Item 303 (17 CFR 229.303)
 - Item 503(c) (17 CFR 229.503)--Risk Factors
- The Securities Act's Rule 408(a) (17 CFR 230.408)—**in re climate change & envt'l issues**
- Form 8-K Disclosures--Rule 12b-20 (17 CFR 240.12b-20)-- **in re climate change & envt'l issues**
- Release Nos. 33-9106, 34-61469 and FR-82, Commission Guidance Regarding Disclosure Related to Climate Change—17 CFR Parts 211, 231 and 241 (75 Fed. Reg. 6290, February 8, 2010)

CPSC:

- Consumer Product Safety Act, amended by Consumer Product Safety Improvement Act (CPSIA)--**if it's recalled, defective, dangerous or can cause substantial injury when used.**
- Poison Prevention Packaging Act (PPPA)--**child-proof containers & skull/cross bones image--to protect children under 5 from ingesting/touching chemicals that can poison them**
- Federal Hazardous Substance Act (FHSA)--**if toxic, corrosive, irritant, strong sensitizer, flammable, combustible, generate pressure through decomposition, heat or other, or can cause substantial personal injury during use.**

FTC:

- FTC Green Guides (Green Guides)--if promote it as "green"
- Federal Trade Commission Act (FTCA)--if promote it in a deceptive, misleading or false way.

U.S. EPA:

- Resource Conservation and Recovery Act (RCRA)--if handle, store or dispose of it AND it's corrosive, reactive, ignitable, flammable, explosive or toxic (hazardous material).
- Emergency Planning and Community Right-To-Know Act (EPCRA)--if stored in distribution centers or stores and it's a hazardous material.
- Federal Water Pollution Control Act (FWPCA) and Safe Drinking Water Act (SDWA)--if dump, spills or leaks into storm drain or rivers, lakes, streams groundwater and it's a hazardous material.
- Clean Air Act (CAA)--if contain ingredients that contribute to emissions of GHG, VOC, ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, sulfates, lead, etc.
- Federal Insecticide, Fungicide & Rodenticide Act (FIFRA)--if promote it as a pesticide, even if its not.

U.S. DOT:

- Hazardous Materials Transportation Act (HMTA) and Hazardous Materials Regulations (HMR)--if transport it and it's a hazardous material.

California:

- Prop 65 (in California)--if sell it and contains one of 400 toxic chemicals (e.g., known to cause cancer or birth defects)

U.S. Coast Guard:

- Coast Guard regulations relating to Recalls of marine products.

U.S. Customs:

- Customs restrictions on Imports--enforcing FIFRA, CPSIA, EPA and DOT import restrictions where products banned or certification required.

U.S. Dept. of Commerce:

- Commerce restrictions on Exports--enforcing FIFRA, CPSIA, EPA and DOT export restrictions.

U.S. FDA:

- FDA regulations--relating to testing, labeling, registration and recalls of chemicals used for first aid or medical treatment

Local Gov't:

- Local city and county regulations--delegated authority to enforce EPA or CPSC standards, misc.

Subject to penalties ranging as follows (depending upon the particular statute)—enforceable by U.S. Dept. of Justice:

- \$2,500 to \$100,000 per violation (civil penalties)
- Up to \$500,000 per violation (criminal penalties)
- Misdemeanor and Felony convictions
- Directors, officer and agents can be found personally liable

With other risks, such as:

- State Attorney Generals can enforce the CPSIA, FHSA, PPPA, RCRA, FTCA, EPCRA, FWPCA, CAA, SDWA, and FIFRA
- Local Cities, Counties, Special Districts can enforce CAA, RCRA, EPCRA, SDWA, FWPCA
- Individuals can enforce Prop 65 in California.
- Potential for forfeiture of Goods
- Injury or illness to customers and others
- Possible property damage
- Risk of class action lawsuits
- Bad press -- damage to reputation and good will
- Loss of customer loyalty or trust
- Potential for SEC obligation to disclose if material.

SAMPLE

A Good Start – Company-Wide Environmental Compliance Program

I. Environmental Compliance Overview:

A. The Environmental Policy: COMPANY and its family of companies engage in environmentally responsible behavior and encourage all employees, suppliers and customers to join in efforts to comply with environmental laws, protect and improve the environment and conserve natural resources. COMPANY follows practices that comply with environmental laws, improves environmental protection, conserves natural resources, and protects employee and customer environmental health and safety. These practices comply with applicable laws and regulations and include additional voluntary initiatives.

B. The Environmental Goal: To achieve a product-driven cradle-to-grave Environmental Compliance Program (“ECP”) reflected in these supply chain drivers:

**Product
Promotion
Place**

Determine Regulatory Compliance at Each Stage

(looking at environmental exposure/risk to air, water, land, humans/other species)

<p>PRODUCT (ingredients, attributes, function) ▼</p>	<p>PROMOTION (product disclosures) ▼</p>	<p>PLACE (product distribution, location) ▼</p>
<p><u>Product Selection & Supplier Sourcing</u> of ___ Chemicals (ingredients) ___ Children’s Products & clothing (lead, phthalates, etc). ___ Electrical devices (e.g., conflict minerals, lead, mercury, chromium, cadmium) ___ Textiles and adult clothing ___ Products with regulated content or emissions (e.g., VOC, GHG, carcinogens, toxics, ozone-depleting chemical content) ▼</p>	<p><u>Packaging</u> ___ Correct warnings, markings ___ No deceptive claims ___ Correct registration and certifications obtained ___ Non-toxic packaging ▼</p>	<p><u>Manufacturer or Distributor Location</u> ___ handling, using, managing hazardous materials and waste streams ___ Records in tact demonstrating full compliance ▼</p>
<p><u>Product Design</u> ___ Meets industry standards and environmental/safety regulations ___ Certification and records</p>	<p><u>Labeling</u> ___ Correct warnings, markings ___ No deceptive claims</p>	<p><u>En route (transport of hazardous materials)</u> ___ From manufacturer/distributor overseas to Distribution Centers (DCs)</p>

- Forfeiture of goods
- Injury or illness to customers or others
- Property damage
- Class action lawsuits
- Enforcement action initiated by U.S. Dept. of Justice or any State Attorney General, including injunction (prohibiting or requiring an action)
- Civil penalties in the hundreds of thousands of dollars per violation
- Criminal penalties
- Imprisonment (felony or misdemeanor)
- Bad press—damage to reputation and good will
- Loss of customer loyalty or trust
- SEC obligations to disclose

III. The Plan:

- A. **IDENTIFY** the responsible (accountable) Executive(s).
- B. **APPOINT** an Environmental Compliance Officer (“ECO”) at the Vice President-level or higher to fulfill all ECO responsibilities, develop a written Environmental Compliance Program (“ECP”), implement a process for environmental management and auditing of program needs.
- C. **ORGANIZE** an Environmental Compliance Task Force (“ECTF”) consisting of managers, directors and executives impacted by environmental issues within their department or division each of which will be appointed as a Deputy Environmental Compliance Officer (“DECO”) to manage environmental programs and compliance within their respective department or division.
- D. **ACCOMPLISH THESE TASKS:**
 1. Establish a budget for the Environmental Compliance Program (“ECP”) covering program:
 - (1) development
 - (2) implementation
 - (3) training
 - (4) oversight/auditing
 - (5) recordkeeping retention, identification & controls
 - (6) annual, quarterly and other reporting
 - (7) annual or quarterly fees (to government)
 - (8) licensing, permits, registration, application processing & maintenance
 - (7) staffing
 - (9) outsourcing of some responsibilities, and
 - (10) equipment acquisition & management (tangible and intangible).
 2. Establish a Compliance Schedule (include all dates and requirements for the above budgeted program items)
 3. Initiate regular and periodic ECTF meetings.
 4. Evaluate/assess the departmental/division environmental needs and risks in relation to product, promotion and place
 5. Determine the effectiveness and completeness of existing environmental processes and controls within each department and division.

6. Develop and distribute a written ECP, Standard Operating Procedures (SOPs) and training modules covering all impacted employees in relation to product, promotion and place. The ECP at a minimum will address the environmental implications associated with the transmittal, processing, maintenance and use/access of COMPANY products, promotions and place, including the who, what, when, where, why and how of each

7. Create supplemental internal controls and incorporate into the ECP, SOPs and training modules.

8. Establish a process for ensuring company-wide coordination with the Legal team for legal representation at all negotiations with federal and state environmental and consumer product agencies concerning non-compliance issues or government investigations/inspections.

9. Develop and implement a data retrieval and storage process for maintaining and updating compliance records.

10. Roll out of company-wide training for employees and suppliers/manufacturers.

11. Issue quarterly reports to executive level management, an annual Environmental Compliance Report and an annual presentation to the COMPANY Board of Directors Audit Committee, if appropriate.

12. Assess, determine whether any regulatory reporting or disclosure requirements have been triggered—implement.

E. IDENTIFY Departmental/Division Teams from:

1. Merchandising
2. Logistics
3. Marketing
4. Facility Operations
5. Direct Sales and Special Orders
6. IT & Information Security
7. Finance
8. Risk Management
9. Legal
10. Internal Audit
- K. Human Resources

F. FULFILL these general DUTIES:

1. Duties of Environmental Compliance Officer (ECO)

- Has the ultimate responsibility for overseeing the enforcement, training and implementation of the ECP in conjunction with the DECOs.
- Manages the overall budget for the ECP.
- Chairs the ECTF, through which COMPANY monitors and coordinates ECP activities across divisions, departments and facilities.
- Ensures that the DECOs and other employees with program responsibilities receive appropriate training, equipment, development, and information for them to carry out their responsibilities.
- Works with the Legal team, executive management and external resources to maintain a current list of external environmental requirements that apply.

- In consultation and coordination with the Legal team, ensures COMPANY is adequately represented during ECP-related external inspections, reviews and enforcement actions.
- In consultation and coordination with the Legal team and coordination with the DECOs, ensures the written ECP, SOPs and training modules are up to date through routine and interim/urgent changes as needed.
- In consultation and coordination with the Legal team, interprets the ECP requirements and the application of alternative methods.

2. Duties of Deputy Environmental Compliance Officers (DECO)

- Has the ultimate responsibility for ensuring the enforcement, training and implementation of this ECP for his/her department/division team, reporting to the ECO.
- Attends all ECTF Meetings.
- Ensures all environmental complaints, incidents and imminent danger situations are investigated to ensure that appropriate corrective actions and lessons learned are developed, implemented, and disseminated and ensures immediate and timely reporting of same to ECO and Legal team.
- Regularly and routinely reports status to ECTF.
- Establishes a rigorous incident and close-call analysis process that enables management to identify root causes, puts in place corrective actions to prevent a recurrence, and informs the ECTF, other employees and management within their department/division team of the corrective action.
- Is accountable to the department/division Vice Presidents and ultimately the ECO for the assigned ECP within their department/division.
- Keep assigned ECP/SOP requirements current and accurate within their department/division
- Attains and maintains relevant ECP certifications, training and awareness of specific technical and administrative aspects of the program
- Manages assigned ECP/SOP within their department and assists their department/division team with implementation
- Supports the project ECP/SOP review process
- Formulates departmental/division program requirements and provides guidance on all ECP/SOP issues within program areas, and interprets requirements and authorizes waivers to requirements as necessary, in consultation and coordination with the Legal team and the ECO.
- Conducts periodic assessments of assigned department/division ECP/SOP compliance responsibilities in accordance with COMPANY's quality assurance requirements provided in the written ECP.

3. Duties of Executive Level Management (Vice President or higher):

- Is ultimately responsible and accountable for all ECP/SOP compliance for themselves and all projects and employees they supervise or oversee, including liability for any ECP noncompliance within their department/division.
- Collaborates and consults with ECO, Legal team and department/division DECO to ensure ECP/SOP performance expectations are communicated and implemented for subcontracted work and all employee activities.
- Documents and implements environmental controls and requirements or delegates responsibly.

- Documents and implements changes to control processes and ensures ECP/SOP considerations are reassessed when work scope changes for employee job tasks, functions, projects or programs. This function may be responsibly delegated.

4. Duties of Managers, Directors:

- Fully implements the ECP
- Provide all employees the necessary tools, equipment, other resources, equipment, training and time to work safely and in compliance with the ECP/SOP.
- Performs ECP/SOP management walkthroughs, addresses deficiencies, supports improvements and communicates ECP/SOP expectations to employees.
- Regularly communicates ECP/SOP performance requirements and solicits and provides feedback from/to employees and contractors over whom he or she has functional or administrative supervisory responsibility
- Holds employees accountable for meeting ECP/SOP performance requirements
- Ensures employees have a supervisor or point of contact who is competent to authorize work in accordance with the ECP/SOP.
- Coordinates with, reports and responds to DECO and ECO.

5. Duties of Facility/Building Managers/Directors. In addition to all of the responsibilities identified above for Managers and Directors:

- Ensures the safety, security, and emergency preparedness of respective facilities, areas, or buildings, as applicable
- Coordinates maintenance activities and operations consistent with the ECP/SOPs and in compliance with all environmental laws, as applicable.
- Acts as the liaison with visitors and environmental regulatory agencies on all ECP/SOP matters.
- Coordinate and oversees the work of contractors and subcontractors to ensure compliance with the ECP/SOPs.
- Coordinates with, reports and responds to DECO and ECO.

6. Duties of all Employees

- Comply with the ECP/SOPs and all applicable environmental laws.
- Integrate ECP/SOPs into one's daily work.
- Communicate actively with each other and with management concerning all environmental issues.
- Successfully complete required ECP/SOPs training.
- Make recommendations about ECP/SOP concerns, especially on the appropriate ways to control hazards
- Report environmental releases, exposure, impact injuries, illnesses, incidents, and hazards to management using reporting protocols in the ECP.

Standard Operating Procedure Template

COMPANY NAME:	DATE CHANGED:	ORIGINAL DATE
LOCATION:	CHANGE APPROVED BY:	ORIG. APPROVED BY:
PROGRAM:	APPROVAL DATE:	APPROVAL DATE:
	SIGNATURE:	SIGNATURE

- I. Policy—the Corporate statement
- II. Legal and Other Requirements—what are the rules of the road
- III. Objectives and Targets—what’s the purpose or end game
- IV. Structure and Responsibility--accountability
- V. Training, Awareness and Competence—keeping current
- VI. Channels of Communication---how does anyone know what anyone else is doing
- VII. Document/Record Controls
- VIII. Operational Controls—who does what, when, how, where
- VIX. Monitoring and Measurement of Success—investigating, inspecting, evaluating
- X. Responding to Emergency Situations (Non-Routine)
- XI. Nonconformance and Corrective/Preventive Action
- XII. Records Retained (Type/Duration)
- XIII. Auditing
- XIV. Public Relations—announcements/disclosures/media & press
- XV. Management Review

Definitions
 Distribution
 Flow Charts, Templates and Forms

**BRIEF SUMMARY OF OTHER ENVIRONMENTAL/PRODUCT SAFETY
LAWS**

**A. CONSUMER PRODUCT SAFETY IMPROVEMENT ACT and OTHER
CONSUMER SAFETY STANDARDS**

1. Notification and Reporting Requirements
Selling and Distributing Unsafe Products

The CPSC requires companies to notify them where a product defect causes or could cause death or serious injury OR where there is a substantial product hazard. Failure to notify the CPSC is a violation of law. A substantial product hazard also exists when a product does not comply with an applicable consumer product safety rule, and the failure to comply creates a substantial risk of injury to consumers. For example, a failure of the product to meet required lead, phthalate or other chemical ingredient or concentration limits could trigger the requirement to notify the CPSC if the noncompliance also creates a substantial risk of injury to consumers. Any one of the following factors could indicate the existence of a substantial product hazard:

- **Pattern of defect.** The defect may stem from the design, composition, content, construction, finish, or packaging of a product, or from warnings and/or instructions accompanying the product. The conditions under which the defect manifests itself must also be considered in determining whether the pattern creates a substantial product hazard.
- **Number of defective products distributed in commerce.** A single defective product could be the basis for a substantial product hazard determination if an injury is likely or could be serious. By contrast, defective products posing no risk of serious injury and having little chance of causing even minor injury ordinarily would not be considered to present a substantial product hazard.
- **Severity of risk.** A risk is considered severe if the injury that might occur is serious, and/or if the injury is likely to occur.
- **Likelihood of injury.** The likelihood is determined by considering the number of injuries that have occurred, **or that could occur**, the intended or reasonably foreseeable use or misuse of the product, and the population group (such as children, the elderly, or the disabled) exposed to the product.

Requirement to Notify CPSC Re. Litigation and Settlement

In addition, CPSC requires a company to report to the CPSC where there have been at least three civil actions that have been settled or fully adjudicated occurring over a two-year period involving (1) the same product, (2) death or grievous bodily injury; and (3) the judgment or settlement required the distributor or manufacturer to actually do something for the injured person(s).

Prohibited Acts

Under the CPSIA, a company can be penalized for failing to recall a defective product, failing to report a defective or unsafe product to the CPSC or for failing to report a violation of a product safety standard, and both the company **and individual employees** can each be **penalized for selling, distributing, importing, offering for sale or manufacturing** recalled products or products that fail to meet safety standards (“Prohibited Acts”). It is also illegal to export recalled products or products that do not meet safety standards. The penalties are as follows:

Civil Penalties for Knowing Violations:

- civil penalties up to \$100,000 for each violation.
- The maximum civil penalty will not exceed \$15,000,000 for any related series of violations.

NOTE: “Knowing” means EITHER (1) having actual knowledge OR (2) having presumed knowledge – possessed by a reasonable man/woman who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

Criminal Sanctions:

- Imprisonment for up to 5 years for a knowing and willful violation; and/or
- Forfeiture of the assets associated with the violation; and/or
- Criminal Fines (misdemeanor or felony) of up to \$250,000 for employees; and/or
- Criminal Fines (misdemeanor or felony) of up to \$500,000 for a company AND may also be fined not more than the greater of twice the gross gain or twice the gross loss.

NOTE: **Any individual director, officer, or agent** of a company **who knowingly and willfully** authorizes, orders, **or performs** any of the acts or practices constituting in whole or in part the Prohibited Act can be subject to criminal penalties in addition to any penalties a company may have to pay.

The CPSC may bring its own action, using the enforcement strength of the United States Department of Justice to litigate for them, or any State’s Attorney General may bring their own civil or criminal action to prevent or stop the selling or offering for sell of defective or unsafe products.

In determining whether a company has a comprehensive product safety program, CPSC will look to see if:

- Reasonable testing procedures are in place to ensure compliance with CPSC regulations
- Procedures are in place to ensure the company complies with all cautionary labeling requirements

- The company has in place guidance manuals for managers and employees regarding product safety compliance
- Procedures are in place for CPSC compliance and reporting
- Procedures are in place to conduct product recalls.
- Corporate records indicate that the company has adequately corrected product violations cited by the CPSC as they are identified
- Systems are in place to investigate all reports of consumer incidents, property damage, injuries, warranty claims, insurance claims, and court complaints regarding products under the CPSC's jurisdiction
- The company conducts periodic product audits to determine testing and certification requirements are being met

2. CPSC Labeling Requirements

CPSC is also responsible for implementing and enforcing the Federal Hazardous Substance Act ("FHSA") and other consumer safety laws. The FHSA addresses responsibilities for product labeling accuracy, product safety and identification of hazards, among others. FHSA will apply if the product is

- Toxic,
- Corrosive
- An irritant
- A strong sensitizer
- Flammable or combustible, or
- Generates pressure through decomposition, heat or other means,
- AND may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including ingestion by children.

In determining whether a product is regulated under the FHSA, one would consider the following:

- Is the product already regulated under FIFRA (if so, FHSA may not apply)?
- Is the product a hazardous substance as defined under FHSA?
- Determine the hazards presented for each product (e.g., specific formulation, use of product, exposure to the product, foreseeable misuse of product).

If any of the products are regulated under FHSA, then they must meet the labeling requirements of the statute and its implementing regulations.

In addition, one must also determine if the packaging conforms to the requirements of the Poison Prevention Packaging Act ("PPPA"), where applicable. *See* 16 CFR 1500 *et seq*; 15 U.S.C. 1471 *et seq* and 16 CFR Part 1700 *et seq*.

3. Federal Trade Commission ("FTC") Disclosure Compliance

The FTC regulates false, misleading or deceptive labeling, packaging and advertising practices. Per the FTC, anyone making an express or implied claim that presents an

objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. Per the FTC, a reasonable basis consists of

competent and reliable evidence (i.e., tests, analyses, research, studies or other evidence based on the expertise of professionals in their field, conducted and evaluated in an objective manner by qualified persons using procedures generally accepted in the profession to yield accurate and reliable results).

See 16 C.F.R. Part 26; 16 CFR Section 260.5; the FTC Act; the FTC's Policy Statement on Deception and the FTC's 1983 Policy Statement on the Advertising Substantiation Doctrine (49 Fed. Reg. 30999 1984).

Product labeling and all associated packaging of the products should meet and comply with FTC regulations and should not be false, misleading or deceptive.

B. FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (FIFRA)

West Marine sells and markets thousands of products that are regulated as pesticides under FIFRA. FIFRA regulates the use of certain pesticides, fungicides and rodenticides. All such products must be approved by the U.S. Environmental Protection Agency ("EPA"), and certain of these products can only be used by certified workers. FIFRA also sets standards for the import and export of pesticides.

Internal controls will be needed to routinely verify whether FIFRA and State Pesticide Laws apply to the products because:

- The ingredients are pesticides or
- Determine if West Marine is selling or offering for sale a product where West Marine or the vendor is making pesticidal claim (e.g., kills, repels, destroys growth, fungus, other living organisms)

If a product is regulated under FIFRA, the product will need to be **registered** with the States requiring registration (e.g., California, Michigan, New York, Massachusetts) and with U.S. EPA.

If a product is regulated under FIFRA, the product must meet FIFRA and each state-required **labeling requirement**? The label must be approved by FIFRA and the applicable State Agency. Per the requirements of FIFRA, it is unlawful to distribute or sell to any person any pesticide which is adulterated or misbranded. It is also unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under FIFRA. Labeling includes all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time; or to which reference is made on the label or in literature accompanying the pesticide or device.

Under FIFRA, the label a regulated product should contain:

- Directions for use, storage, disposal, first-aid
- EPA Registration Number
- EPA Establishment Number
- Name, address of producer, distributor, marketer or registrant
- Unique brand name (not false or misleading)
- Active and inert ingredient list
- A child hazard statement (e.g., “keep out of reach of children”)
- Warning words (e.g., Warning, Danger, Caution)
- Precautionary statements in relation to human and animal hazards
- The identity of physical or chemical hazards (e.g., flammable) and
- This statement: “It is a violation of Federal law to use this product in a manner inconsistent with its labeling.” If regulated under FIFRA, please verify that the attached labels meet FIFRA and State-specific criteria.

C. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)

This EPCRA (or SARA Title III) requires parties to report, to various government and community hazardous emergency planning organizations, the presence of defined quantities of hazardous materials at a worksite. The law also requires a company to report the release of certain hazardous materials to the environment, regardless of whether the release is to land, water or air. Most States and cities/counties have similar requirements that are enforced through a local or state fire marshal or fire department. The reporting quantity thresholds at the federal level are usually very high (over 10,000 pounds, etc.), but the reporting quantity thresholds for most cities and states are significantly lower (usually 1 to 10 pounds) and thus are frequently triggered. This is an annual reporting. In addition to the reporting requirement, each facility is also required to have a written plan for addressing emergency situations, chemical spills and handling (often called a business plan)—this is in addition to the OSHA-required hazard communication plan, but these plans can be integrated into one document or incorporate each other by reference. Although consumer commodities are typically considered exempt from the EPCRA reporting requirement, this is not a universal rule for all state and local hazardous materials reporting requirements. Below are the top 15 states, in relative order of severity, with specific hazardous materials reporting requirements or an increase in regulatory enforcement:

California - Require any facility that stores in excess of 55 gallons, 500 pounds or 200 cubic feet of hazardous materials or wastes submit a Hazardous Materials Business Plan (HMBP) to their local Certified Unified Program Agency (CUPA) within each city or county. The HMBP is submitted in lieu of a Tier II report and must be recertified annually and resubmitted every three years. Many cities and counties with CUPAs have unique requirements for businesses to provide additional information above and beyond the HMBP. Many jurisdictions, particularly in metro areas such as San Francisco, Los Angeles and San Diego, have additional reporting and permitting

requirements that require submittal of information for all hazardous materials on site.

Massachusetts - Massachusetts maintains its own Fire Protection Code and many local fire departments will require facilities to maintain permits for specific (e.g. flammable/combustible liquids, liquefied petroleum gas, oxidizers, etc) categories of hazardous materials that they store, including consumer products for retail sale. Some jurisdictions require submittal of a Hazardous Materials Inventory Statement and/or Hazardous Materials Management Plan. Enforcement of these permits is handled by the initial municipalities at the local level. These tend to be more strict than what is found in other states.

New Jersey – The New Jersey Department of Environmental Protection requires all facilities to submit a Community Right-to-Know Survey and maintain a Life Hazard Use Certificate of Registration. Some local jurisdictions (municipalities) require permitting for consumer commodity storage and sale of Liquefied Petroleum Gas.

New York - The New York City Department of Environmental Protection requires businesses in New York City Burroughs to submit a Facility Inventory Form, also known as a 209u Hazardous Materials Report Form, for hazardous substances that they store over the reportable thresholds. Any facility that stores hazardous materials would be affected, including retail facilities. New York City Fire Departments will also have specific permit requirements for storage or sale of hazardous materials, such as combustible liquids or compressed gasses. New York State has also been progressive in hazardous waste management enforcement including requiring Conditionally Exempt Small Quantity Generators to provide Aid Notification Letters to local hospitals, police and fire departments.

Oregon - The Oregon State Fire Marshal requires the submission of a Hazardous Substance Information Survey (HSIS) for all Oregon facilities that store in excess of 55 gallons, 500 pounds or 200 cubic feet of hazardous materials or hazardous wastes. The HSIS must be resubmitted annually with any changes listed on the original forms mailed by the State Fire Marshal. Consumer products are only exempt from HSIS reporting requirements when they are in a retail sales area that is freely accessible to the public. Items stored in a backroom or storage area must be considered for the HSIS report.

Arizona – Local jurisdictions (municipalities) often require submittal of Hazardous Materials Inventory Statements for all hazardous materials stored in retail facilities. Four jurisdictions (Chandler, Peoria, Tempe and Gilbert) require entry of hazmat data and MSDSs into 3rd party software. The City of Phoenix requires permits for storage of consumer commodity hazardous materials.

Colorado - Arapahoe County and Colorado Springs require submission of Hazardous Materials Inventory Statements for all hazardous materials stored at each location through a Web based interface. Facilities in the Denver metro area also have additional hazardous material permitting requirements.

Florida - While not traditionally more strict than the Federal guidelines, Florida is a state where there tends to be more aggressive enforcement, particularly with hazardous waste management. Municipalities in areas like Broward and Dade Counties require submittal of a Hazardous Materials Inventory Statement or Hazardous Materials Management Plans. The Department of Agriculture and Consumer Services require specific permitting for consumer commodity storage and sale of Liquefied Petroleum Gas.

Nevada - The Nevada State Fire Marshal's Office requires the submission of a Combined Agency Hazmat Facility Report that requires full disclosure of all hazmat inventory items on site, including consumer products. The Combined Agency Report is an annual submission requirement and through which the State issues a hazmat permit for the facility.

Texas - Several municipalities in Texas require submittal of disclosures such as Hazardous Materials Inventory Statements. For example, the City of Houston Fire Department requires submittal of a Hazardous Materials Inventory Statement that is specific to each retail location within their jurisdiction. The House Fire Department also requires multiple permits, depending on the types and amounts of hazardous materials found on-site. The Texas State Department of Environmental Health will also require that retail facilities maintain a permit to sell any Abusable or Volatile Chemicals. The Texas Railroad Commission requires permits for storage of Liquefied Petroleum Gas, including consumer commodities.

Maine - Some businesses in Maine have been affected by recent increases in enforcement of hazardous waste regulations. The hazardous waste generator facility classifications used by the Maine Department of Environmental Protection are stricter than the federal EPA requirements. This may subject facilities, which are normally conditionally exempt, to additional notification and contingency plan reporting requirements.

Michigan - Each year, local fire departments are required by the state of Michigan to collect a Hazardous Chemical Inventory Survey from businesses listing the categories and quantities of hazardous materials stored on-site, including retail products.

Minnesota - Local fire departments in Minnesota may require a Hazardous Materials Inventory Statement and/or Hazardous Materials Management Plan to be submitted, along with related hazardous materials and fire prevention

permits. Enforcement has increase recently related to state and county waste reporting requirements. In Minnesota, these requirements are stricter than the EPA and may require the submittal of a Hazardous Waste Contingency Plan as well as agreements with local emergency responders if facilities meet state generator classification.

North Carolina - Several municipalities in North Carolina, particularly in the Charlotte and Raleigh areas, require submittal of a Hazardous Materials Inventory Statement and/or Hazardous Materials Management Plan. North Carolina Tier II reportable quantities are 55 gallons or 500 pounds or more of any OSHA Hazardous Substance.

Washington – The State of Washington is proactive in enforcing EPCRA regulations. The Washington State Department of Ecology has stricter requirements than the EPA and proactive enforcement in sectors, such as retail, that have not been traditionally focused on for hazardous waste management.

D. PROPOSITION 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as “Prop 65”) is a California voter initiative passed in 1986 requiring the Governor of California to publish an annual list of chemicals known to the State of California to cause cancer, birth defects or other reproductive harm (“Prop 65 Chemical”).

The Prop 65 Chemical list is broken out into four possible types of toxicity:

- Carcinogen,
- Male Reproductive Toxin (MRT)
- Female Reproductive Toxin (FRT) and
- Developmental Toxin

Statutory civil penalties (for actual or threatened violations) include:

- Issuance of an Injunction – stopping the sale of the offending product in California (through retail stores, mail order catalog or internet sales) and
- monetary penalties of \$2,500 per day per violation.

In California, any private person can file a lawsuit against a company who violates Prop 65. The “violator” is also liable to pay the plaintiff’s attorneys’ fees.

The following steps should be taken to evaluate whether Prop 65 has been triggered:

- Determine if the product contains a Prop 65 listed chemical of concern
- Determine if the chemical in the product falls below the Prop 65 triggering threshold through appropriate testing by a California Prop 65 certified laboratory. If it does, then good;

- If testing shows the product meets or exceeds the Prop 65 criteria, then either
 - reformulate the product so as to eliminate or reduce below the regulated threshold the amount of the identified chemical or
 - place a Prop 65 Warning on the product packaging “with such conspicuousness, as compared with other words, statements, designs or devices in the label or display, as to make it likely to be read and understood by the ordinary consumer.”

The law further states that “to the extent practicable, warning materials such as sign notices, menu stickers, or labels **shall be provided by the manufacturer, producer or packager of the product rather than by the retail seller.**”

E. CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCE CONTROL ACT (“DTSC”)

The DTSC is required to create and implement regulations to enforce AB 1879, the 2008 Green Chemistry Initiative law intended to “accelerate the quest for safer products.” A draft was released in 2010. It will apply to all consumer products made available for use in California and will create a systematic science-based process to evaluate chemicals of concern in these products. Under any new regulations, retailers may be required to (1) carry warning labels on products containing chemicals of concern; (2) have products recalled; or (3) be asked by DTSC to replace a chemical of concern with a safer alternative.

F. RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Federal law regulate the generation, management and disposition of hazardous materials and wastes. Under federal law, the states have been delegated certain RCRA enforcement authority. In California, the Department of Toxic Substances Control (“DTSC”), and at the city and county level the Certified Unified Program Agencies (“CUPA”), have been delegated this authority. RCRA also applies to the import and export of hazardous materials and wastes.

Under RCRA, waste *generators* must evaluate all waste products to determine if they are hazardous (as defined by RCRA). If any wastes are hazardous, the generator must properly handle, label and dispose of the wastes. In addition, the generator may have to notify the U.S. EPA about the waste and complete a manifest that must accompany the waste until it reaches its final disposal destination. The completed manifest must be returned to and retained by the generator and generally kept forever. All of the states in which West Marine operates have similar requirements.

G. HAZARDOUS MATERIALS TRANSPORTATION ACT

This law regulates the transportation of certain hazardous materials by airplane, marine vessel and ground transport (trucks, cars, vans, trains). The law requires that vehicles be properly equipped and placarded for hazardous material transportation. The law also sets

forth stringent requirements and training standards for drivers of the vehicles.

H. TOXIC SUBSTANCES CONTROL ACT (TSCA)

This law includes a prohibition on the importation of certain chemicals. In general TSCA requires that all chemicals used in or imported into the United States are listed on a TSCA registry. **INSERT MORE**

I. CLEAN AIR ACT (CAA)

The Clean Air Act (CAA) regulates air emissions and air quality. Most of the requirements in this law regulate emissions from stationary sources or from motor vehicles, but other requirements prohibit the use, distribution or sale of certain products (such as paints, solvents, engines, vessels and vehicles) and chemicals of concern found in products sold by manufacturers and retailers (e.g., ozone-depleting chemicals).

J. FEDERAL WATER POLLUTION CONTROL ACT (FWPCA)

The FWPCA requires any party responsible for the discharge of a pollutant into any waters of the United States to apply for and obtain a permit. This law covers sources coming from a particular point (such as a fixed pipe) or from certain non-point sources (e.g., run-off or dumping into the storm drains). Most States have programs similar to the Federal program. Any dumping or pouring of paints or other chemicals onto a floor, ground or other surface where the paint or chemical could drain into a nearby storm drain, creek, river, lake or stream would trigger the FWPCA.

K. SAFE DRINKING WATER ACT (SDWA)

This act primarily governs the quality of drinking water. The law also covers certain discharges into the ground.

L. SOLID WASTE DISPOSAL ACT (SWDA)

The SWDA contains requirements for the disposal of "Non-Hazardous" materials. Most states and localities have similar laws. Many of the state and local laws include recycling requirements. For instance, many facilities must separate recyclable office materials from trash.

**The U.S. Department of Justice
Office of Consumer Litigation (OCL)**

Source: www.justice.gov

The Office of Consumer Litigation of the U.S. Department of Justice ("OCL") is responsible for civil and criminal affirmative litigation, and defensive civil litigation, under statutes administered by the United States Consumer Product Safety Commission (the "CPSC"). Affirmatively, OCL may assist the CPSC in its enforcement work by invoking a variety of statutory remedies for violations. OCL may also support the CPSC's enforcement work by seeking court intervention when necessary to overcome resistance to administrative proceedings. Defensively, OCL represents CPSC in federal court challenges to its actions.

A. Statutes Administered by the CPSC

The Consumer Product Safety Act, 15 U.S.C. §§ 2051 et seq. (the "CPSA") [and Consumer Product Safety Improvement Act (CPSIA)], confers on the CPSC broad authority to protect the public against unreasonable risks of injury from consumer products. However, Congress has directed that the CPSC should, absent an express finding of need, rely on alternative, more targeted authority to address risks presented by defined categories of consumer products. 15 U.S.C. § 2079(d).

The alternative authority is conferred by the Flammable Fabrics Act, 15 U.S.C. §§ 1191 et seq. (the "FFA"), the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 et seq. (the "FHSA"), and the Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471 et seq. (the "PPPA"). In addition, the CPSC administers the Refrigerator Safety Act, 15 U.S.C. § 1211 et seq. ("RSA").

The scope of each of these statutes is outlined below. These outlines, however, are not an exhaustive treatment of enforcement remedies and tools available to the CPSC.

1. The Consumer Product Safety Act

Regulatory jurisdiction under the CPSA extends fairly broadly across the range of consumer products.⁽²⁾ The CPSC has authority under the CPSA to promulgate binding labeling or performance standards, or rely expressly on non-governmental standards, to protect the public from unreasonable risks of injury from consumer products. 15 U.S.C. § 2056. In addition, the CPSA provides for mandatory reporting (by manufacturers, distributors, and retailers) of known failures of consumer products to meet applicable standards, of information suggesting a product defect that could create a substantial risk of injury, and of information suggesting an inherent unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b).⁽³⁾

On the basis of information reported in compliance with § 2064(b) or obtained through other means,⁽⁴⁾ the CPSC is broadly empowered, through administrative processes, to order appropriate corrective action as to hazardous consumer products. The CPSC can, for instance, require product recalls or a halt to distribution. 15 U.S.C. § 2064(c) and (d). The CPSA authorizes the CPSC to conduct on-site inspections of regulated firms for purposes of enforcement. 15 U.S.C. § 2065.

2. The Flammable Fabrics Act

The FFA authorizes the CPSC to issue binding flammability and related labeling standards to protect the public against unreasonable risks of fire that could lead to death, personal injury, or significant property damage. 15 U.S.C. § 1193. Jurisdiction under the FFA extends essentially to clothing and to interior furnishings composed of fabric and related materials. 15 U.S.C. § 1191. One distinctive feature of the FFA is that it deems any violation to be unlawful conduct under the Federal Trade Commission Act and equips the CPSC with authority to take enforcement action according to the remedies and procedures provided for by that Act. 15 U.S.C. §§ 1192, 1194(a) - (c).

3. The Federal Hazardous Substances Act

The FHSA confers jurisdiction over defined categories of potentially injurious consumer goods presenting hazards such as toxicity, combustion, radioactivity, or unreasonable risks to children of electric shock, choking, burns to the skin, or other physical harm. See generally 15 U.S.C. § 1261 (definitions).⁽⁵⁾ To address unreasonable risks of injury within the scope of the FHSA, the CPSC may by rule impose binding labeling requirements, performance standards, or, if need be, outright product bans. In addition, the FHSA generally subjects all hazardous substances to certain baseline labeling requirements. 15 U.S.C. §§ 1261(p), 1262.

As does the CPSA, the FHSA broadly empowers the CPSC, through administrative processes, to order appropriate corrective action to guard against unreasonable risks, including product recalls and a halt to distribution. 15 U.S.C. § 1274(a), (b), and (c). Like the CPSA, the FHSA authorizes the CPSC to conduct on-site inspections of regulated firms for purposes of enforcement. 15 U.S.C. § 1270.

4. The Poison Prevention Packaging Act of 1970

The PPPA applies to household substances within both CPSC and FDA jurisdiction. It authorizes the CPSC, by rule, to set standards for labeling and packaging so as to protect children from potential serious harm. If it is within the CPSC's jurisdiction, a household product that is subject to a PPPA standard, and that fails to meet it, is deemed to be improperly labeled under the FHSA. 15 U.S.C. § 1261(p). By dint of that cross-reference, any CPSC enforcement action founded upon a PPPA standard would proceed under authority conferred by the FHSA.

5. The Refrigerator Safety Act

The RSA requires that household refrigerators be equipped with a mechanism allowing the door to be opened from the inside, in accordance with standards prescribed by the CPSC. 15 U.S.C. §§ 1211, 1213.

B. OCL Litigation in Conjunction with the CPSC

The enforcement remedies and tools available under statutes that the CPSC administers are largely parallel, as are the types of litigation that OCL conducts under those statutes. Each major type is discussed below, with reference to illustrative cases and underlying statutory authority.

These statutes share a design feature in how they prohibit specified behavior and provide remedies. Each statute enumerates in one section the "unlawful" or "prohibited" acts. See 15 U.S.C. § 2068 (CPSA), 15 U.S.C. § 1192 (FFA), 15 U.S.C. § 1263 (FHSA), 15 U.S.C. § 1211 (RSA). Sanctions (either civil or criminal) and injunctive relief are available upon an adequate showing of "unlawful" or "prohibited" conduct.

Most commonly, OCL's enforcement litigation focuses upon conduct such as the unlawful interstate distribution of goods that fail to comply with pertinent performance or labeling requirements, the failure to make required product hazard reports, or the failure to permit a statutorily-authorized facility inspection.

1. Criminal Prosecution

The CPSC-administered statutes all provide for the remedy of criminal prosecution. 15 U.S.C. § 2070 (CPSA), 15 U.S.C. § 1196 (FFA), 15 U.S.C. § 1264 (FHSA), 15 U.S.C. § 1212 (RSA). Although the mens rea required for conviction differs from statute to statute (as do some other particulars), the maximum term of incarceration for a conviction under any of the pertinent provisions does not exceed one year. Thus, these are misdemeanor provisions. Nevertheless, where appropriate, OCL can utilize other criminal statutes, including felony provisions, to prosecute conspiracy, fraud, obstruction of justice, false statements, and other related federal offenses that may emerge in the context of CPSC regulation.

In one Colorado prosecution, the defendant pled guilty to 15 misdemeanor violations of the FHSA and PPPA. The defendant sold poisonous chemicals used in solar power systems. He distributed them in recycled food containers lacking child-resistant closures and required warning labels. This led to one death, and thereafter the defendant continued shipping products in unlawful packaging. He was sentenced in 1998 to over 23 months' incarceration for these misdemeanor violations. In another case, OCL prosecuted a manufacturer of unsafe baby pacifiers and rattles. The case led to a plea agreement providing for the maximum possible criminal fines under the FHSA. *See United States of America v. Luv N' Care International, Inc. et al.*, 897 F. Supp. 941 (W.D. La. 1995) (relating to the disposition of pretrial motions).

2. Suit for Civil Penalties

Knowing violations of CPSC-administered statutes may also be sanctioned through the assessment of civil penalties. 15 U.S.C. § 2069 (CPSA), 15 U.S.C. § 1194(e) (FFA), 15 U.S.C. § 1264(c) (FHSA). Determination of appropriate penalty amounts is guided by criteria specified in the statutes. The statutes also impose limits on the amounts that may be recovered for individual violations and for related series of violations. The ceilings allow for assessment of penalties for a related series of violations in excess of \$1 million, depending on the number of violative products involved.

In 1996, after extensive civil discovery, OCL settled companion suits against a major manufacturer of juvenile products by accepting a civil penalty of \$725,000. *United States v. Cosco, Inc.*, Nos. IP-95-1648 and IP-95-1649 (S.D. Ind., filed December 11, 1995). In the suits, OCL contended that Cosco, Inc., the manufacturer, had knowingly failed to comply with product hazard reporting requirements by withholding from the agency dozens of consumer complaints about entrapment of the head or neck of children in toddler beds and accessory guardrails.

3. Suit for Injunction

Federal district courts are expressly authorized under the leading CPSC-administered statutes to restrain violations of the statute or of CPSC orders. 15 U.S.C. § 2071(a) (CPSA), 15 U.S.C. § 1267 (FHSA). Courts also have authority to grant interim injunctive relief pending the completion of administrative proceedings. 15 U.S.C. § 2064(g) (CPSA), 15 U.S.C. § 1195(a) (FFA). OCL may seek orders of injunction either as part of a civil suit also seeking civil penalties, or independently. *United States v. Focht*, 882 F.2d 55 (3d Cir. 1989), is an example of

the type of involved litigation that may ensue if the CPSC encounters resistance in trying to obtain injunctive relief.

4. In rem Seizure Actions

CPSC-administered statutes also provide for the removal of violative goods from the market through in rem seizure actions. 15 U.S.C. § 2071(b) (CPSA), 15 U.S.C. § 1195(b) (FFA), 15 U.S.C. § 1265 (FHSA).

5. Enforcement Assistance

Resort to the courts may occasionally be necessary to vindicate the CPSC's statutory authority to conduct inspections, issue administrative subpoenas, and the like. In re Establishment Inspection of Skil Corporation, 846 F.2d 1127 (7th Cir. 1988), illustrates the kind of court intervention that OCL may pursue on the CPSC's behalf.

6. Defensive Litigation

OCL represents the CPSC in federal court when aggrieved parties seek to invalidate its actions, or to compel action contrary to the CPSC's intended course. Most commonly, challenges are raised to labeling or performance requirements that the CPSC may promulgate under the statutes it administers. *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm'n.*, 92 F.3d 940 (9th Cir. 1996), is representative of OCL's defense of the CPSC in such a context.

Footnotes:

(2): Certain categories of products -- including tobacco, pesticides, motor vehicles, and products subject to FDA jurisdiction -- are expressly exempt from regulation under the CPSA. See 15 U.S.C. § 2052(a)(1).

(3): By regulation, the CPSC has made the finding necessary to confirm that the reporting requirements of 15 U.S.C. § 2064(b) apply to products within the ambit of the FFA, the FHSA, and the PPPA. 16 C.F.R. § 1115.2(d).

(4): The CPSC might otherwise gather such information through independent investigation, or pursuant to 15 U.S.C. § 2084, which requires the manufacturer of a consumer product to report information about products liability litigation in defined circumstances.

(5): As does the CPSA, the FHSA expressly exempts certain categories of goods from regulation. 15 U.S.C. § 1261(f)(2) and (f)(3).

[OCL HOME PAGE](#)

Consumer Product Safety Improvement Act

16 CFR § 1115.22 Prohibited acts and sanctions.

- (a) *Statements generally.* Whoever knowingly and willfully falsifies, or conceals a material fact in a report under the CPSA and rules thereunder, is subject to criminal penalties under 18 U.S.C. 1001.
- (b) *Timeliness and adequacy of reporting.* A failure to inform the Commission immediately and adequately, as required by section 15 (b) of the CPSA, is a prohibited act within section 19(a)(4) of the CPSA (15 U.S.C. 2068(a)(4)).
- (c) *Failure to make reports.* The failure or refusal to make reports or provide information as required under the CPSA is a prohibited act within the meaning of section 19(a)(3) of the CPSA (15 U.S.C. 2068(a)(3)).
- (d) *Noncomplying products.* The manufacture for sale, offering for sale, distribution in commerce, and/or importation into the United States of a consumer product which is not in conformity with an applicable consumer product safety rule under CPSA is a prohibited act within the meaning of sections 19 (a)(1) and (a)(2) of the CPSA (15 U.S.C. 2068 (a)(1) and (a)(2)).
- (e) *Orders issued under section 15 (c) and/or (d).* The failure to comply with an order issued under section 15 (c) and/or (d) of the CPSA is a prohibited act within the meaning of section 19(a)(5) of the CPSA (15 U.S.C. 2068(a)(5)).
- (f) *Consequences of engaging in prohibited acts.* A knowing violation of section 19(a) of the CPSA subjects the violator to a civil penalty in accordance with section 20 of the CPSA (15 U.S.C. 2069). "Knowing," as defined in section 20(c) of the CPSA (15 U.S.C. 2069(c)), means the having of actual knowledge or the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. A knowing and willful violation of section 19(a), after the violator has received notice of noncompliance, subjects the violator to criminal penalties in accordance with section 21 of the CPSA (15 U.S.C. 2070).

Criminal Penalties

15 U.S.C. 2070. Criminal penalties

- (a) Violation of section 2068 of this title is punishable by—
- (1) imprisonment for not more than 5 years for a knowing and willful violation of that section;
 - (2) a fine determined under section 3571 of title 18; or
 - (3) both.
- (b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole

or in part a violation of section 2068 of this title shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

(c)

(1) In addition to the penalties provided by subsection (a), the penalty for a criminal violation of this chapter or any other Act enforced by the Commission may include the forfeiture of assets associated with the violation.

(2) In this subsection, the term "criminal violation" means a violation of this chapter or any other Act enforced by the Commission for which the violator is sentenced to pay a fine, be imprisoned, or both.



**Downstream Pilot
Implementation of the OECD
Due Diligence Guidance for
Responsible Supply Chains of
Minerals from Conflict-Affected
and High-Risk Areas**

**Baseline Report on the
Supplement on Tin,
Tantalum, and Tungsten**



ABOUT THIS REPORT

This is the first of three reports that will be issued over the next 10 months as part of the pilot implementation of the *Organisation for Economic Cooperation and Development's (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and the Supplement on Tin, Tantalum, and Tungsten*. The objective of this report is to establish a baseline of current due-diligence practices of downstream companies. This report includes baseline information from 28 of the 30 participating companies, and three industry associations. A number of the data points outlined in the analysis do not cover all 28 of the respondents, as comprehensive data was not provided consistently in response to the questionnaire.

Section I provides general information on the OECD Guidance and downstream pilot implementation project, and describes its objectives. (p. 5 to 7)

Section II lists the downstream pilot participants that have chosen to disclose their participation, and provides participating company demographics. (p. 8 to 10)

Section III provides baseline data and analysis about due diligence practices that participants shared, as well as data that was gleaned from each of the five steps outlined in the OECD Guidance. The section also explores the challenges that companies face in the implementation of each step. (p. 11 to 32)

Section IV provides clarifications by the OECD Secretariat on high-level issues or specific steps. (p. 33 to 35)

Section V identifies the tools and emerging practices to implement supply-chain due diligence. (p. 36 to 38)

Section VI provides conclusions, recommendations, and next steps for the pilot. (p. 39 to 41)

DISCLAIMER

All data that was provided by participating organisations to develop this report will be kept confidential by the OECD Secretariat and BSR. Data will not be attributed to any of the respondents, and is provided in aggregate form. Only companies that have decided to disclose their participation are listed on page 8.

ABOUT BSR

BSR is a global business network and consultancy leader focused on sustainability since 1992. Visit www.bsr.org for more information. BSR is providing assistance to OECD throughout this process of pilot downstream implementation of the OECD Due Diligence Guidance.

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SECTION I: OECD DOWNSTREAM IMPLEMENTATION PILOT PHASE

OECD DUE DILIGENCE GUIDANCE

The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* provides due diligence recommendations for global responsible supply chains of minerals to help companies respect human rights and avoid contributing to conflict through their activities. The Guidance is for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas. It should be used as a tool to cultivate transparent mineral supply chains and sustainable corporate engagement in the minerals sector, while enabling countries to benefit from their natural mineral resources.

The OECD Guidance presents a five-step, risk-based due diligence process for upstream and downstream companies.

The five-step framework is relevant for any extracted mineral, and a *Supplement on Tin, Tantalum, and Tungsten* provides detailed recommendations tailored to upstream and downstream companies (with specific recommendations for companies in the supply chain) on concrete measures they can implement. The five-step framework includes the following steps:

- Step 1: Establish Strong Company Management Systems
- Step 2: Identify and Assess Risk in the Supply Chain
- Step 3: Design and Implement a Strategy to Respond to Identified Risks
- Step 4: Third-Party Audit of Smelters/Refiners' Due Diligence Practices
- Step 5: Report Annually on Supply Chain Due Diligence

Distinguishing downstream from upstream

“Downstream” refers to the mineral supply chain from smelters/refiners to retailers, and includes metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers (OEMs), and retailers.

“Upstream” refers to the mineral supply chain from the mine to smelters/refiners and includes miners (artisanal and small-scale or large-scale producers), local traders or exporters from the country of mineral origin, international concentrated traders, mineral re-processors, and smelters/refiners.

The OECD Guidance was developed through a multi-stakeholder process over the past two years with in-depth engagement from OECD and African countries, industry, civil society, as well as the United Nations and the World Bank. The Guidance builds on and is consistent with the relevant supply chains provisions contained in the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles for Business and Human Rights. With specific regard to supply chain due diligence for responsible mineral sourcing, risk-based due diligence refers to the steps companies should take to identify, prevent, and address actual or potential adverse impacts, as well as the efforts these companies should make to ensure they respect human rights and do not contribute to conflict through their activities in the supply chain.

The OECD 3Ts Supplement outlines the necessary steps companies should take to identify and respond to risks in the supply chain. If a company identifies a risk of causing an adverse impact, it should take the necessary steps to cease or prevent that impact, and mitigate any remaining impacts to the greatest extent possible.

Companies in the supply chain should seek to prevent or mitigate any adverse impacts that are directly linked to their operations, products, or services by a business relationship—even if they have not contributed to that impact directly.

The OECD Guidance is also intended to help companies meet any supply chain due diligence obligations under national laws. For example, Section 1502 of the U.S. Dodd-Frank Act requires U.S. listed companies to disclose whether they use “conflict minerals” (tin, tungsten, tantalum and gold), and whether these minerals originate in the Democratic Republic of the Congo (DRC) or in an adjoining country. In such a case, issuers must submit a “Conflict Minerals Report” describing:

- The measures taken to exercise due diligence on the source and chain of custody of the minerals.
- The description of products that are not “DRC conflict-free”.
- The facilities used to process the conflict minerals.
- The country of origin of the conflict minerals.
- The efforts to determine the mine or location of origin with the greatest possible specificity.

The OECD Guidance clarifies how issuers and other companies in the supply chain operating beyond U.S. borders should put in place a due diligence process that enables them to generate the information issuers must disclose under section 1502 of U.S. Dodd-Frank Act.

The OECD Guidance allows issuers to communicate a set of clear inter-governmentally backed expectations throughout the entire supply chain, avoiding the risk of exposing suppliers operating in different jurisdictions to multiple—and potentially conflicting—requirements. This enables downstream companies to save costs and to engage constructively with minerals suppliers outside U.S. borders to meet disclosure obligations under Section 1502 of U.S. Dodd-Frank Act. Implementation of the OECD Guidance will therefore help information to flow from upstream suppliers in the mineral supply chain to end users subject to Dodd-Frank disclosure requirements.

OECD DOWNSTREAM IMPLEMENTATION PILOT PHASE

Objective and scope

The pilot implementation of the OECD Guidance focuses on how companies implement due diligence in the supply chains of tin, tantalum, and tungsten, especially as the due diligence relates to minerals potentially sourced from Africa’s Great Lakes Region. The pilot is intended to test and assist with the implementation of the Guidance’s 3T Supplement, share information, and discern best practices, tools, and methodologies for implementing the Guidance.

The pilot is not a monitoring exercise for accountability or enforcement purposes. By participating in the pilot, companies will be in a position to “know and show” that they are performing due diligence. They will also “learn by doing” in a peer-learning process which will help them meet relevant reporting obligations and the expectations of customers, regulators, and the public.

The specific objectives of the pilot are to:

- Assess how companies use the OECD Guidance to conduct their due diligence for responsible sourcing of minerals.
- Identify gaps, challenges, and areas for improvement.

- Share any emerging best practices aligned with the recommendations contained in the OECD Guidance.
- Create the opportunity to develop tools as may be needed, drawing on the expertise of the members of the OECD-hosted multi-stakeholder forum on implementation of the OECD Guidance.

Project approach

The downstream portion of the pilot began in August 2011 and will run for 12 months. BSR is assisting the OECD to collect data for the three reporting cycles with downstream companies that have volunteered to participate. In each of these three cycles, the participating companies will report to the OECD through standardized questionnaires, and will engage in follow-up discussions with BSR on the progress achieved and challenges faced while carrying out the five due diligence steps of the 3Ts Supplement. The questionnaire -- reproduced in the Appendix -- includes approximately 100 questions and follows the five-step framework of the Guidance. The questionnaire also serves as a tool for participating companies to build due diligence capacities and learn how to report effectively on due diligence in the future.

BSR will compile the experiences of all the participating downstream companies into three *aggregate* reports on implementation (a baseline report, a progress report, and a final report). Confidentiality of individual company data has been guaranteed and all reports will only show aggregate results unless participating companies ask to be singled out. The three reports will be submitted for discussion to the OECD multi-stakeholder forum on implementation of the OECD Guidance. This forum is composed of OECD and partner countries, industry, international organisations, and civil society organisations that are participating in the implementation phase so they may provide input to overcome challenges and build capacity to conduct due diligence.

The information in the questionnaire informs this Baseline report and will serve as the basis for analysing the progress of pilot participants over the next six to eight months. This report includes analysis and recommendations that emerged from questionnaire responses and follow-up discussions. This baseline report will be presented and discussed at the meeting of the OECD-hosted multi-stakeholder forum on implementation of due diligence on 29-30 November 2011.

SECTION II: DOWNSTREAM PARTICIPANTS

LIST OF PARTICIPANTS

Thirty companies and three industry associations agreed to participate in the downstream pilot. Of this group, 28 companies submitted their responses in time for analysis, and 21 companies have agreed to disclose their participation. The list below includes only those participants that have agreed to disclose their participation:

Companies	Industry Associations
» Alcatel Lucent	» AIAG (Automotive Industry Action Group)
» Alpha (Cookson)	» EICC-GeSI (Electronics Industry Citizenship Coalition and Global e-Sustainability Initiative)
» Boeing Company	» IPC (Association Connecting Electronics Industries)
» Circuit Connect	
» Epic Technologies	
» Flextronics	
» Ford Motor Company	
» Foxconn	
» Freescale	
» General Electric Company, Lighting Division	
» Hewlett Packard	
» KEMET	
» Lockheed Martin Corporation	
» Nokia	
» Oracle	
» Panasonic Corporation	
» Royal Philips Electronics	
» Siemens	
» Texas Instruments	
» TriQuint	
» UNISEM	

DESCRIPTION OF PARTICIPANTS

Companies spanned industries from aerospace and defense, automotive, medical devices, ICT (including semiconductors) and consumer products, to extractives, chemicals, and lighting. The majority of participants fall within the ICT sector, while many companies fall into multiple categories due to diversified business structures, or because their products are used across multiple industries. Some of the industries that are not represented among participants include jewelry, construction, pharmaceuticals, and packaging.

Companies also range in size based on annual revenues earned in 2010. The majority earned more than US\$30 billion during the 2010 fiscal year.

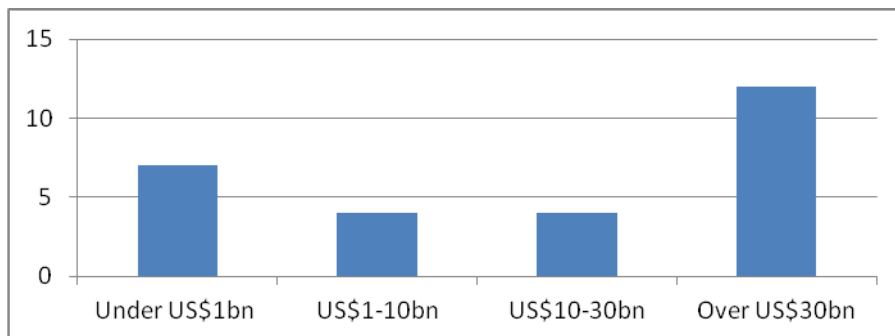


Figure 1: Breakdown of pilot companies by revenue earned (2010).

Participating companies are headquartered throughout the United States, Canada, the European Union, China, Japan, Malaysia, and Singapore. While the majority of the companies are based in OECD countries, approximately 15 percent are headquartered in non-OECD countries. Pilot participation is intended to be diverse in order to understand the implementation challenges and applicability of the Guidance across regions and countries, and what comparable lessons may be derived regardless of location.

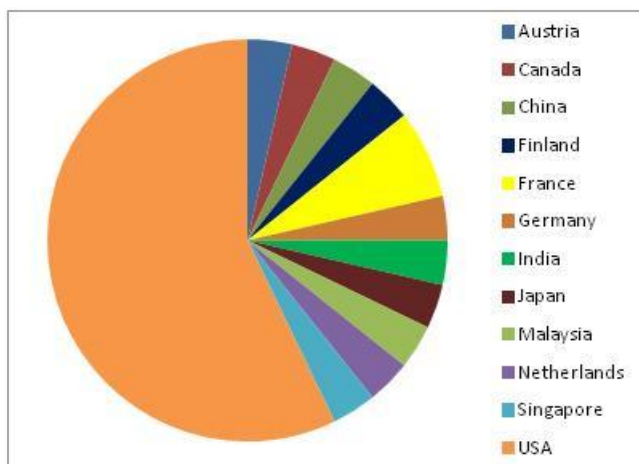


Figure 2: Spread of countries of pilot companies (headquarters location).

Companies represented along the downstream supply chain

Downstream companies include metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers (OEMs), and retailers.

In this report, the term “OEM” refers to the company that acquires a product or component and reuses or incorporates it into a new product with its own brand name. “Component manufacturer” refers to the company that manufactures a product or component and sells it to the OEM (or integrator or value-added reseller). A “Metal Exchange” is a market for trading metals futures, with agreements to buy or sell metals at a future date and options, which are rights to buy metals at a future date.

Approximately 30 percent of the respondents categorise their companies as OEMs, and another 30 percent categorize their companies as component manufacturers. Nine companies fall into multiple categories along the downstream supply chain, from metal exchanges through OEMs. These companies employ highly integrated or vertical supply chains, meaning that they have business operations along various points of their supply chains, and may even be involved in upstream operations.

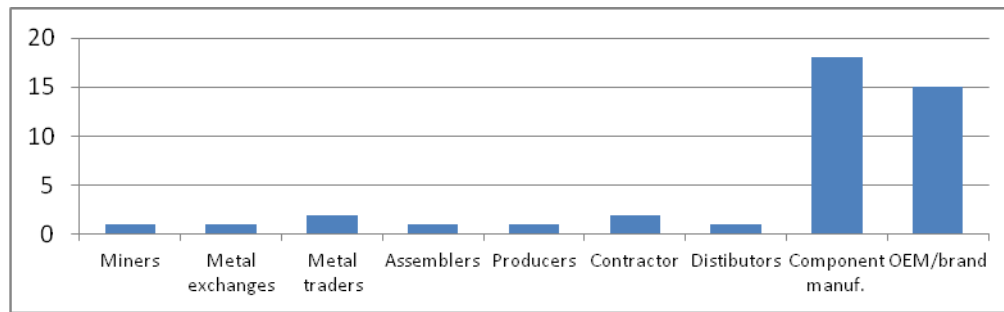


Figure 3: Participants in the downstream pilot fall within various categories along the supply chain.

SECTION III: OECD DOWNSTREAM IMPLEMENTATION PILOT PROJECT

This section provides detailed analysis of the responses provided by companies to the downstream questionnaire.

HIGH-LEVEL FINDINGS

- The step-by-step analysis of pilot participant responses indicates that a majority are using the OECD Guidance at some level to inform the development of their due diligence systems and policies with the mineral supply chain.
- Most companies have developed or are in the process of developing policies on minerals from conflict-affected areas. While policies are broadly consistent with the model supply chain policy featured in the Guidance as Annex II, most companies do not include all elements of Annex II. Companies cited the need for their policies to be actionable and accountable. Downstream companies are also requesting a better understanding of the roles they should play with regard to risk of direct or indirect support to non-state armed groups, and public or private security forces.
- While not all companies have finalised policies, almost all respondents are communicating with their suppliers on the issue of mineral sourcing. This happens at supplier meetings, and through supplier letters, supplier surveys, and direct communications with suppliers.
- The complexity of some downstream company mineral supply chains (in some instances up to nine layers deep from the company to the smelter) makes obtaining information a challenge. Most companies only have visibility into their immediate (Tier 1) supply base, with some having visibility into Tier 2.
- Five pilot participants have used the Electronic Industry Citizenship Coalition and Global e-Sustainability (EICC-GeSI) Common Reporting Template to identify risks and ascertain which smelters are parts of their supply chains. Most others are using their own supplier surveys, supplier site visits, and contractual obligations.
- About half of pilot participants (15 companies), especially OEM/brand companies within the ICT industry, are also relying on the EICC-GeSI Conflict-Free Smelter (CFS) program to validate and audit their smelters. This is in line with the OECD Guidance Step 2, which recommends that companies without a direct business relationship with smelters “*may engage and actively cooperate with other industry members to identify the smelters/refiners in their supply chain and assess their due diligence practices or identify through industry validation schemes the refiners/smelters that meet the requirements of this Guidance in order to source therefrom.*”
- Since the Securities and Exchange Commission’s (SEC) rules on Section 1502 of the U.S. Dodd-Frank are still pending, many downstream companies participating in the pilot who are subject to Dodd-Frank requirements are taking risk-averse approaches that fall roughly into two categories:
 - a. One set of companies are moving aggressively to verify their supply chain as “conflict-free” as soon as possible. “Conflict-free” verification efforts are still being developed. Until the systems are in place to verify “conflict-free” sourcing, the region faces a de facto ban. It is critical to note that there are several in-region sourcing initiatives that are underway and some downstream companies are working both independently and collaboratively to support the development and scaling of these efforts.

b. The other approach is to wait before making any significant investments in due diligence until U.S. Dodd-Frank legal requirements are clarified in the SEC rules. Companies will then finalise policies, communicate to suppliers, and invest in systems that will serve to comply fully with the law. This approach is mainly to reduce the risk of investing in anything that will not fully meet the legal requirements under U.S. law.

DETAILED FINDINGS AND CHALLENGES PER STEP

STEP 1: ESTABLISH STRONG COMPANY MANAGEMENT SYSTEMS

The OECD Guidance encourages companies to incorporate the model policy under Annex II into their existing policies on corporate social responsibility, sustainability, or the equivalent. Currently, one-third of the companies participating in the pilot (nine out of 28 companies) have a policy in place which addresses minerals from conflict-affected areas, often referring directly to “conflict minerals” as the Dodd-Frank Act defines them.

At least 20 percent of participating companies have used the OECD Guidance and Annex II to help them develop policies and internal management systems. Other strategies that have been instrumental in helping companies in Step 1 have included interfacing with industry association working groups dedicated to responsible sourcing of minerals from conflict-affected areas (such as the EICC-GeSI joint work group), and the process of engaging with stakeholders and NGOs to inform the development of individual company policies.

Adopt and commit to a supply chain policy for minerals from conflict-affected and high-risk areas, and communicate it to suppliers

Box 1: OECD Guidance, Supplement on Tin, Tantalum, and Tungsten

Step 1: Establish Strong Company Management Systems

Section A: Adopt and commit to a supply chain policy for minerals originating from conflict-affected and high risk areas

1. A policy commitment setting forth principles for common reference on mineral extraction, transport, handling, trading, processing, smelting, refining and alloying, and export, against which the company will assess itself and the activities and relationships of suppliers. This policy should be consistent with the standards set forth in the model supply chain policy in Annex II.

Section D: Strengthen company engagement with suppliers

2. Communicate to suppliers their expectations on responsible supply chains of minerals from conflict-affected and high-risk areas, and incorporate the supply chain policy and due diligence processes set out in this Guidance into commercial contracts and/or written agreements with suppliers which can be applied and monitored, including, if deemed necessary, the right to conduct unannounced spot-checks on suppliers and have access to their documentation.

Among the companies that do not currently have a policy on minerals from conflict-affected areas (19 companies), it is positive to note that about half (nine companies) are at the advanced development stage of developing and reviewing a policy, and a further four companies have statements or position papers in place and are evaluating their abilities to move forward. Five companies still need a better understanding of the issue or are waiting for the SEC to clarify U.S. Dodd-Frank requirements.

Six out of the nine companies with policies in place described their policies as consistent with the OECD Guidance. However, only three of these companies responded that their policies contain all of the elements outlined in the model policy provided in Annex II of the Guidance.

“Company X’s policy directly references the OECD guidance document and sets the expectation that our suppliers are to follow the guidance.”

“Company Y’s policy is under development. We expect that this policy will be broadly consistent with Annex II of the Guidance, with the understanding that the policy may vary in detail, as appropriate, to take into account our particular circumstances.”

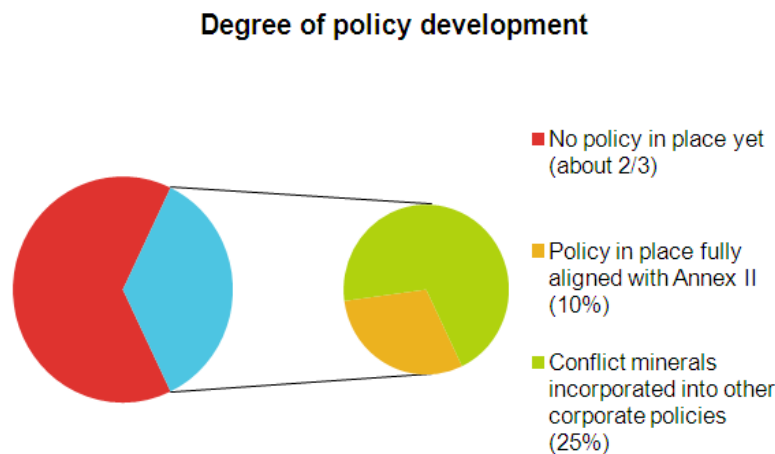


Figure 4: Companies that have adopted a conflict minerals policy.

Box 2: Illustrative Example – Stand-alone minerals policy

... Furthermore, [company] intends to adopt the EICC Due Diligence reporting process and obtain chain of custody declarations from all [Company] sourced and managed suppliers ensuring transparency in our supply chain.

- *[Company] expects our suppliers to source materials from socially responsible suppliers.*
- *[Company] expects all its suppliers to comply with the Dodd-Frank regulation and provide all necessary declarations.*
- *Suppliers must pass this requirement up the supply chain and determine the source of specified minerals.*
- *Suppliers who are non-compliant to these requirements shall be reviewed by Global Commodity Management for future business.*

This Conflict Minerals policy is in line with the Global Business Initiatives on Human Rights, of which [company] is a member, and the framework of the United Nations Principles of Human Rights encouraging governments and businesses to respect, protect, and remedy human rights.

Eight companies responded that policies in the company’s sourcing, supplier, and environmental codes of conduct incorporate language on minerals from conflict-affected areas (“conflict minerals”). Rather than disseminating multiple policies, companies prefer to aggregate supplier requirements into one policy, and

integrate requirements for various legislation, such as the 2010 California Transparency Act, into one code of conduct that covers all relevant standards and requirements.

The level of detail on sourcing minerals from conflict-affected areas included in non-specific codes of conduct varies by company. On the simplest level, one company included a sentence requiring that its suppliers “refrain from purchasing or using” any “conflict minerals” in its supplier policy. Other companies outline their sourcing frameworks and explicitly refer to the OECD Guidance.

Box 3: Illustrative Example – Policy embedded in supply chain code of conduct

“Conflict Minerals: Suppliers are expected to ensure that parts and products supplied to [company] are DRC conflict-free (do not contain metals derived from ‘conflict minerals;’; columbite-tantalite (tantalum), cassiterite (tin), gold, wolframite (tungsten), or their derivatives such that they do not directly or indirectly finance or benefit armed groups through mining or mineral trading in the Democratic Republic of the Congo or an adjoining country). Suppliers are to establish policies, due diligence frameworks, and management systems, consistent with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, that are designed to accomplish this goal.”

Companies that do not have a policy on minerals from conflict-affected areas cite three reasons for not having a policy today:

- Awaiting internal approval and/or legal review.
- Awaiting the final ruling on the U.S. Dodd-Frank Act and/or other legislation such as the California Transparency Act of 2010 before implementing a policy and communicating to suppliers.
- Waiting to have due diligence systems in place first.

“We find it problematic to make commitments outside our sphere of control. We want our policy to be actionable. If topics are not covered by our direct activities or industry tools and schemes, we don't have control over them. It has also been a challenge to give clear directions to suppliers because while we want to avoid conflict minerals, we do not want to place an embargo on Central Africa.”

In Figure 5, we asked companies to describe their approach to mineral sourcing. Of the total responses received (seventeen companies), more than half (eight companies) have an approach to “not source minerals from conflict areas in any region.” The remainder are divided equally between those that do not source minerals from conflict areas in the DRC, those who aim to source from the DRC (among other countries) but from conflict-free mines, and those who have given other reasons such as consulting with their legal team as an approach to sourcing minerals. No company has selected the option to “Not source any minerals from the DRC.”

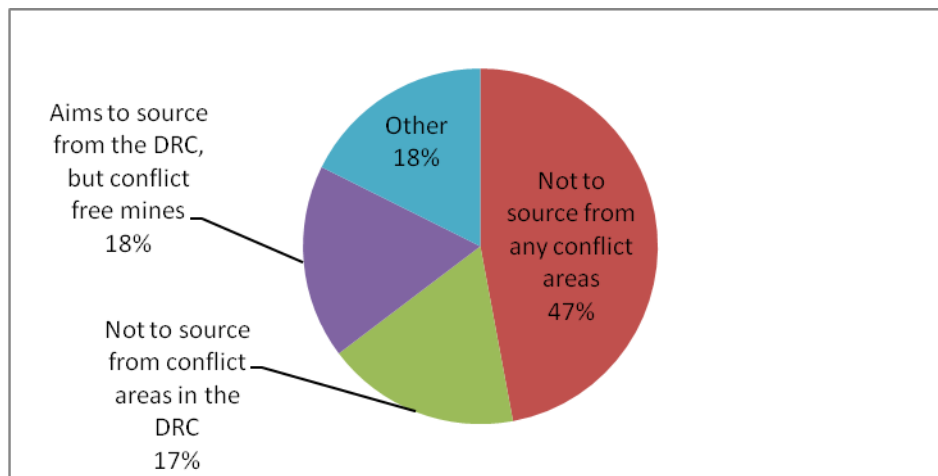


Figure 5: Companies' approach to minerals sourcing.

Of the nine companies with a policy in place, four have publicly-available stand-alone policies, four integrate conflict minerals as part of publicly-available broader compliance or supply chain policies such as the company's "Supplier Guide for Human Rights and Working Conditions" policy, and one company does not make its policy publicly available.

Sixteen of the respondents have engaged with their suppliers on some level of communications, whether by communicating their policy, company expectations, or general information on minerals from conflict-affected areas. Companies have also relied on joint communications, company position papers, or industry position papers on minerals from conflict-affected areas.

Box 4: Illustrative Example – The joint position of automakers through the Automotive Industry Association Group (AIAG)

"The Automotive industry will not support human rights abuses and conflict anywhere in the world. It is our intention to do what we can to ensure that the parts and assemblies in our vehicles and products, regardless of where they are assembled or sold, do not contain Conflict Minerals that have contributed to the armed conflict in the DRC."

Twenty-five of the companies reported they communicate with their Tier 1 suppliers, while six reported that they communicate with their Tier 2 suppliers. Aside from communicating company policies and expectations, companies (both those with and without finalised policies) have communicated Dodd-Frank requirements or provided general information on the topic to their suppliers.

Box 5: Illustrative Example – Communicating requirements to suppliers

" [Company] Statement of Principles on Conflict Minerals will be supplemented with a set of 'Implementing Procedures' that will contain more detailed procedures consistent with the OECD Guidance, as supplemented by existing policies concerning security, bribery, money laundering, and tax compliance."

As recommended in the Guidance, four companies have incorporated a policy on minerals from conflict-affected areas into their contractual relationships. One company requires its suppliers to confirm that they accept and adhere to its policy on mineral sourcing.

Twenty-one out of the 28 companies responded that they plan to track any corrections made by suppliers, although most are still evaluating how to do this. Several companies plan to follow-up with suppliers based on any red flags identified by using the EICC-GeSI Due Diligence Common Reporting Template & Dashboard. Others who have direct relationships to smelters are able to track red flags more directly. Other companies responded that they are focused on establishing an accurate list of relevant smelters before identifying the need for putting corrective action policies or procedures in place.

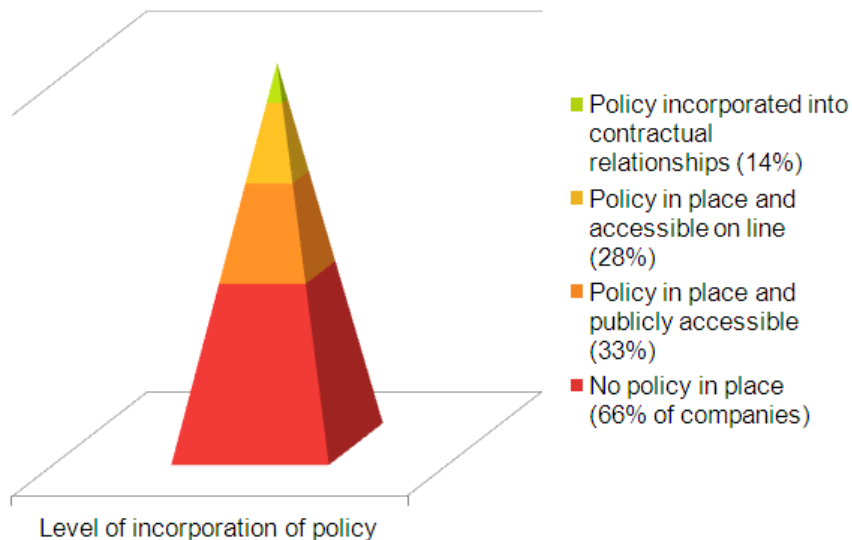


Figure 6: Level of incorporation of policy.

Respondents are further communicating expectations with suppliers at supplier meetings, through supplier letters, supplier surveys, and direct communication. One company has contracted a third party with content knowledge on conflict minerals to present an overview of the issue at supplier symposia. Forty-two percent of respondents have communicated to their management on the issue of minerals from conflict areas.

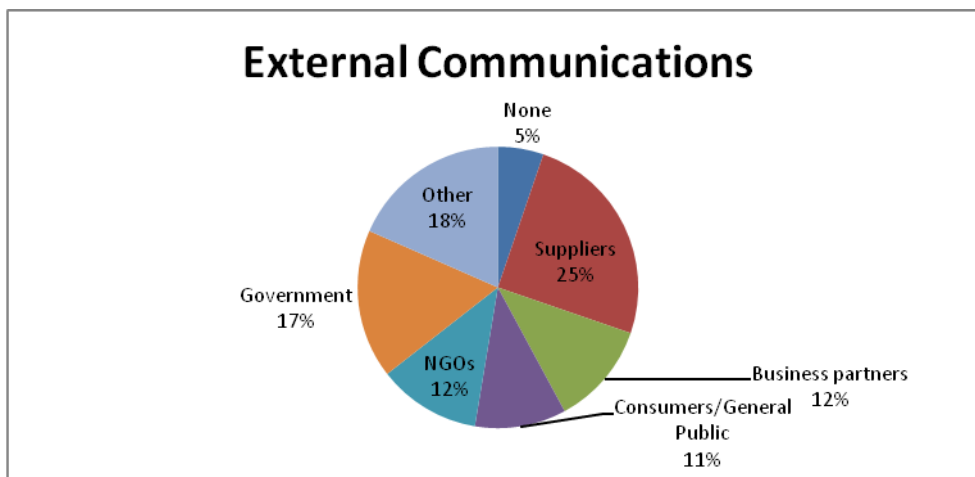


Figure 7: Communication to external audiences on minerals from conflict areas.

Box 6: Illustrative Example – Communicating requirements to suppliers

“We have provided our suppliers with very explanatory documents to help them understand what we are trying to accomplish. We have also tried to create letters that could easily be modified by our suppliers for use with their suppliers. These letters were provided in MS Word form to make it very easy for the suppliers to adapt the letters for their own use. We have also provided copies of all information we have received from our customers.”

Internal management systems

Box 7: OECD Guidance, Supplement on Tin, Tantalum, and Tungsten

Step 1: Establish Strong Company Management Systems

B: Structure internal management systems to support supply chain due diligence.

Companies in the supply chain should:

1. Assign authority and responsibility to senior staff with the necessary competence, knowledge, and experience to oversee the supply chain due diligence process.
2. Ensure availability of resources necessary to support the operation and monitoring of these processes.
3. Put in place an organisational structure and communication processes that will ensure critical information, including the company policy, reaches relevant employees and suppliers.
4. Ensure internal accountability with respect to the implementation of the supply chain due diligence process.

Nineteen companies have dedicated internal resources to address the issue of minerals from conflict areas. All 19 companies have delegated responsibility to a senior-level manager, with at least five at the level of vice president.

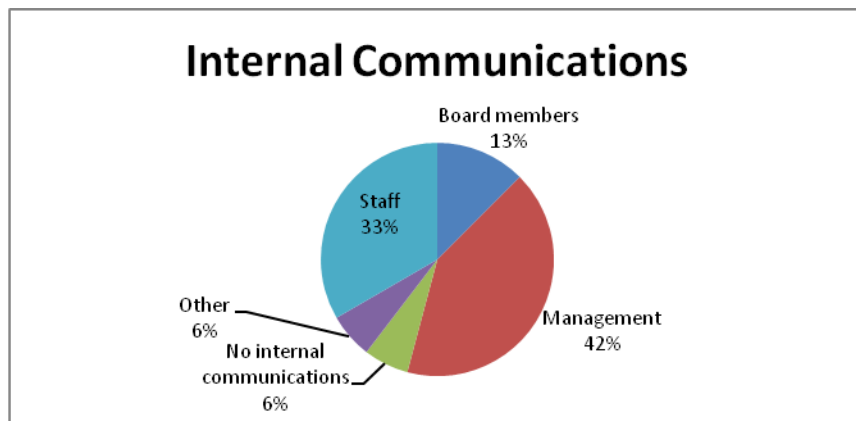


Figure 8: Communication to internal audiences on minerals from conflict areas.

Box 8: Illustrative Example – Communicating Internally

An initial briefing was given to the executive management participating in the [company sustainability committee] in July 2010. Executive briefings (VP and Director-level) have occurred on an ongoing and as-needed basis since that point in time including inclusion to the weekly [business reviews] with [CEO]. Within Purchasing, briefings have been focused with Commodity Directors.”

Generally, employees with responsibilities associated with minerals from conflict areas, spend between 5 to 20 percent of their overall time on the issue, and represent various departments within a company. However, there are also companies who have devoted at least one Full-Time Equivalent (FTE) to the role. These employees typically come from the purchasing, finance, legal, engineering, sustainability, compliance, quality, and auditing departments. This cross-functional structure is a necessary and effective method of developing a roadmap for process development, documentation, and implementation of a due diligence system.

Dedicated Internal Resources

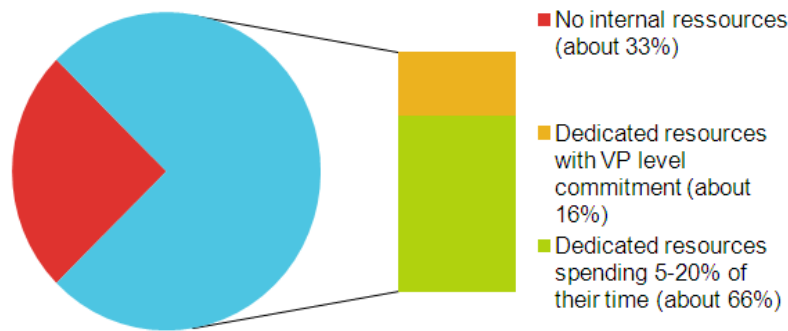


Figure 9: Dedicated internal resources.

Box 9: Illustrative Example – Ensuring Internal Accountability

“The program manager reports program performance and metrics on a quarterly basis to three Senior VPs in product manufacturing and VP of Compliance in the legal division.”

“[Company name] maintains a rigorous employee commitment and accountability system, where key staff responsible for relevant supplier relationships will have their performance evaluation linked to the ability to advance a conflict free supply chain.”

Establishing a system of controls and transparency over the mineral supply chain

Box 10: OECD Guidance, Supplement on Tin, Tantalum, and Tungsten

Step 1: Establish Strong Company Management Systems

C.5. Specific Recommendations – for all downstream companies

1. Introduce a supply chain transparency system that allows the identification of the smelters/refiners in the company's mineral supply chain through which the following information on the supply chain of minerals from "red flag locations of mineral origin and transit" should be obtained: the identification of all countries of origin, transport and transit for the minerals in the supply chains of each smelter/refiner. Companies which, due to their size or other factors, may find it difficult to identify actors upstream from their direct suppliers may engage and actively cooperate with industry members with whom they share suppliers or downstream companies with whom they have a business relationship to identify which smelters are in the supply chain.

[...]

3. Support extending digital information-sharing systems on suppliers to include smelters/refiners, and adapt systems to assess supplier due diligence in the supply chain of minerals from conflict-affected and high-risk areas, utilizing the criteria and process recommended in this Guidance, with due regard to business confidentiality and other competitive concerns.

About half of the respondents answered that they have established methods for identifying minerals from "red flag locations of mineral origin and transit" in their supply chains, with 29 percent of companies having established a method for identifying minerals from "red flag suppliers." The most commonly cited method to conduct this level of identification is in the EICC-GeSI CFS Common Reporting Template.

However, companies acknowledge that this method has its limitations as data is based on what suppliers say, and is difficult to verify. In some cases companies believe that the data cannot be fully trusted.

"Suppliers indicate to us that they estimate the quality of the data received from their (sub-tier) suppliers as limited, and that they have no means to validate that the provided information is correct and complete. We do receive reporting templates filled out by suppliers for which we have our doubts whether the data is correct. Sometimes there are obvious contradictions in their statements (e.g. declaring that they use a tin smelter from the CFS list), while there are currently no tin smelters on the CFS list. An unexpectedly large part of the suppliers are declaring that they are not using any of the 3Ts in their products/components. Suppliers might want to give (us) as the customer the 'right/correct' reply, and they might not always be willing to share all the information and feel the risk of losing business when their answers are not in line with what they think (we) want to hear."

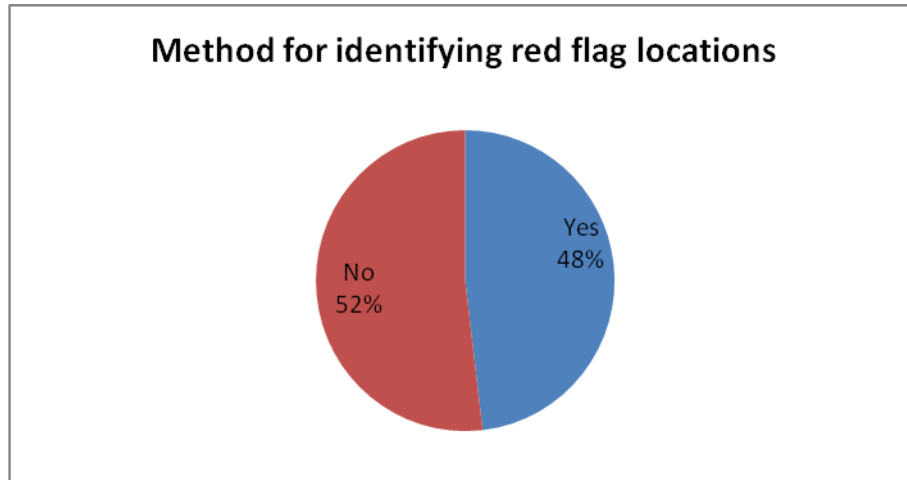


Figure 10: Companies that have a method for identifying minerals from red flag locations.

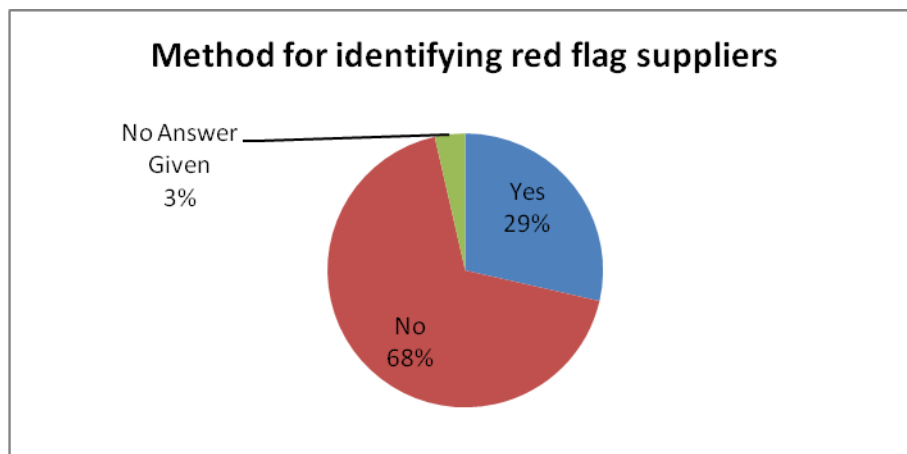


Figure 11: Companies that have a method for identifying minerals from red flag suppliers.

Box 11: Illustrative Example – Identifying Red Flags

“While taking into consideration the suggested ‘flags’ noted [by the OECD], we have created additional flags as appropriate for the level of information that we currently have. We performed a preliminary analysis that gives us directional guidance on commodities and parts that are likely to have [conflict minerals] content. Additionally, we have asked ALL suppliers to report content for [conflict minerals] starting in 2011. With this information obtained from these steps taken, we categorize or ‘flag’ suppliers as follows for YELLOW and RED status:

- *Supplier has reported [conflict mineral] content in parts provided – YELLOW, Follow-up required to ID smelter.*
- *Supplier has not reported [conflict mineral] content for parts provided but provide parts likely to contain [conflict minerals] – RED, Follow-up required to id material content and potentially smelter.*

It is likely that further categorizations will be created as smelter information is collected from suppliers.”

The majority of pilot respondents have visibility into Tier 1 suppliers, with four companies having visibility into Tier 2. One OEM company reported visibility into its Tier 3 suppliers. All companies reported that gaining visibility into sub-tier suppliers is done through supplier surveys. However, companies cited that documentation and visibility into the sub-tier structure is very limited, with up to nine tiers between the end-user and the smelter. There is no process at this stage to verify supplier responses through the EICC-GeSI Common Reporting Template and Tool.

Box 12: Illustrative Example – Supplier visibility

“We depend on our Tier 1 suppliers to provide information on the origin of the metals they use and their suppliers use and on their due diligence process. We will have visibility into Tier 3 suppliers via the CFS program. We aim to create visibility in the sourcing practices of the smelters that we identified to be in our supply chains.”

Fifty-four percent of respondents have started collecting supply chain data on minerals from conflict affected areas and are relying on existing tools for monitoring and reviewing downstream supply systems. Data points that are being collected include, but are not limited to: supplier’s suppliers, smelter name and contact information, mine of origin, product supplied, all points of import and export along the supply chain, export license, signed supplier declaration, and supplier policy. Respondents cited the software tools that aggregate the data from suppliers such as the EICC-GeSI MRPRO dashboard, International Material Data System (IMDS), and SAP software to collect material content data.

The Automotive Industry Action Group (AIAG) is working to put in place a common data collection system for origin/smelter identification. Another respondent is developing its own system internally because the EICC-GeSI data collection format does not satisfy its needs for reporting on continuous improvement in the supply chain monitoring/transparency process.

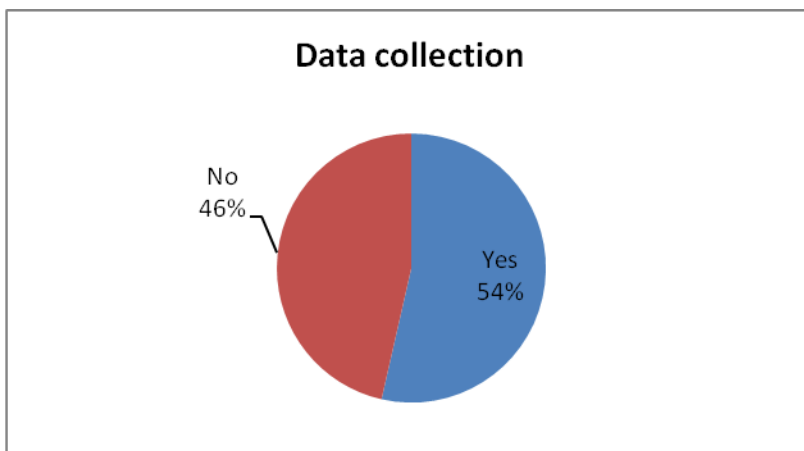


Figure 12: Companies that have established a data collection system.

Box 13: Illustrative Example – Data collection

“We have been collecting RoHS (European Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment 2002/95/EC commonly referred to as the Restriction of Hazardous Substances Directive or RoHS) and Halogens lab data for a few years. This data is collected at the homogeneous material level, which is also the level at which we determine if the material contains any conflict minerals. This system has also worked to collect the information from our supply chain on the origins of the conflict minerals in our product [on a part-specific basis].”

Grievance mechanism

Eleven respondents have a grievance mechanism in place for managing alerts on minerals from conflict affected areas. Most companies are utilizing existing systems already in place for all components of code of conduct. Industries need to work together and collaborate on this effort to reach compliance most effectively. It is not clear yet how this will be achieved.

Box 14: Illustrative Example – Grievance mechanism

“[Company] has an ombuds process for all policies and procedures, which also is available for use by suppliers and other outside entities. Once the Statement of Principles on Conflict Minerals and Implementing Procedures are in place, the ombuds process will apply to them.”

CHALLENGES

While some pilot participants have highlighted the above actions to implement Step 1 of the Guidance, other participants identified challenges to implementation of Step 1. These challenges include:

- More dialogue is required for downstream companies to discuss how Annex II can be relevant to them. Some pilot companies reported that Annex II is more applicable to upstream companies, and that they are not in the position to monitor or have a reliable knowledge of on-the-ground events such as armed group activity.

“We relied on the model policy in part. We need the model to be actionable. For us, it is problematic to commit to certain things far from our sphere of control (e.g. payments made to governments, and eliminating support to armed groups on the ground). It is unclear to us if this is covered via [the Industrial Technology Research Institute (ITRI) Tin Supply Chain Initiative (iTSCi)] and CFS. Also, we believe our position on human rights and bribery is already covered by our company Code of Conduct and Human Rights approach. It would be helpful if the model policy would be clearer on how the sphere of influence or direct control matters.” – Pilot participant.

- Visibility beyond Tier 2 is very challenging. Companies that do not purchase minerals directly must use an industry process, such as the EICC-GeSI processes/tools or others that may be formed, to gain leverage for visibility further into the supply chain.
- It is difficult for some downstream companies to obtain internal buy-in—particularly for smaller companies that have limited knowledge and experience of the supply chain.

STEP 2: IDENTIFY AND ASSESS RISK IN THE SUPPLY CHAIN**Box 15: OECD Guidance, Supplement on Tin, Tantalum, and Tungsten****Step 2: Identify and Assess Risk in the Supply Chain****Section II. Downstream Companies**

Downstream companies should identify the risks in their supply chain by assessing the due diligence practices of their smelters/refiners against this Guidance. Downstream companies who may find it difficult to identify actors upstream from their direct suppliers (due to their size or other factors), may engage and actively cooperate with other industry members with whom they share suppliers or downstream companies with whom they have a business relationship to carry out recommendation in this section in order to identify the smelters/refiners in their supply chain and assess their due diligence practices or identify through industry validation schemes the refiners/smelters that meet the requirements of this Guidance in order to source there from. Downstream companies retain individual responsibility for their due diligence, and should ensure that all joint work duly takes into consideration circumstances specific to the individual company.

A. Identify, to the best of their efforts, the smelters/refiners in their supply chain.

Downstream companies should aim to identify the mineral smelters/refiners that produce the refined metals used in their supply chain. This may be carried out through confidential discussions with the companies' immediate suppliers, through the incorporation of confidential supplier disclosure requirements into supplier contracts, by specifying to direct suppliers the smelters/refiners that meet the requirements of this Guidance, by using confidential information-sharing systems on suppliers and/or through industry wide schemes to disclose upstream actors in the supply chain.

B. Identify the scope of the risk assessment of the mineral supply chain

After identifying the smelters/refiners that produce the refined metal used in their supply chain, downstream companies should engage with those smelters/refiners in their supply chains and obtain from them initial information on country of mineral origin, transit and transportation routes used between mine and smelters/refiners. Downstream companies should review this information and any information generated in Step 1 in order to target risk assessments on those minerals and suppliers triggered by the "red flag locations of mineral origin and transit" and "supplier red flags", as listed in the introduction.

Most companies that are participating in this pilot cite the lack of direct business relationships with smelters as a major challenge to fully identifying and assessing risk in the supply chain, as accounted for in Step 2 of the Guidance (see Box 15). As an illustration, the number of Tier 1 suppliers to pilot participants who use some level of the 3Ts in their products typically ranges in the tens of thousands (i.e. 10,000 Tier 1 bill of materials suppliers for one OEM in the ITC industry; 30,000 Tier 1 tungsten suppliers for another OEM company).

Despite these challenges, companies are taking seriously the requirement to assess risks in the supply chain and are making efforts to understand how to implement appropriate processes for assessing and managing risk, utilising collaborative opportunities, and finding out who their smelters are.

Efforts to identify smelters/refiners in the supply chain

Approximately two-thirds of respondents (17 companies) have started efforts to identify smelters and/or refiners in their supply chains. The majority of these respondents do not have a direct relationship with smelters, and the list of smelters is partial and focused on smelters of one of the minerals (for example, Tantalum).

To identify smelters, companies without a direct relationship are dependent on sub-suppliers to report on smelters in their respective supply chains. Companies found that with persistence and focus, information on smelters could be obtained even when confidentiality and concerns on disclosure were cited for withholding smelter names. However, most companies have just started this process of smelter identification.

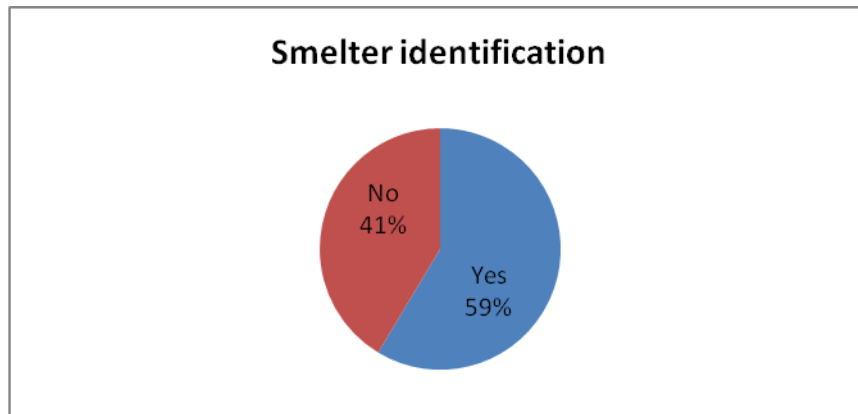


Figure 13: Companies that have started to identify some smelters/refiners in their supply chains.

Box 16: Illustrative Example – Identifying smelters

“We have sent letters to all 3TG suppliers asking for them to conduct supply chain due diligence, establishing a conflict-free policy, reporting smelters you source from directly, and requesting your suppliers do the same, and report to us on the [CFS] Reporting Template.”

More than half of the companies that are making efforts to identify smelters have done so through direct communications with their Tier 1 suppliers. Direct communications include face-to-face meetings, conference calls, letters, emails, surveys, and self-certification requests. Five companies cited the use of the EICC-GeSI reporting template.

Seven companies have used contractual obligations as a means to obtain smelter information from their suppliers. This has been done by incorporating confidential sub-supplier disclosure requirements into direct supplier contracts, which is consistent with the Guidance. Although this contractual route is labor intensive, it is noteworthy that seven companies have used this approach.

Box 17: Illustrative Example – OEM relationship to suppliers

“The relationship with tungsten suppliers has been longstanding, in most cases more than 5 years. They have been qualified. Any new source must go through a rigorous qualification process. We have toured three smelters with a team from the EICC-GeSI. We have facilitated many meetings with the smelters and actually engaged their participation and review and the supplier audit process.”

“For targeted commodities we have mapped our supply chains to smelters and in some cases to mines. However, this information has not been validated and in the future we will rely on the CFS and in-region sourcing activities.”

Identifying the scope of risk assessment of the mineral supply chain

Eleven companies (41 percent of respondents) answered that they had obtained initial information to target risk at the smelter level, identify country of mineral origin, and understand transit and transportation routes used between the mine and smelters/refiners. Companies have gleaned this information through supplier surveys, site visits, membership at commodity associations, and their own market knowledge. One company cited the use of mock audits which helped them obtain useful documentation. Many companies also are relying on collaborative/industry programs such as the EICC CFS program, the ITRI Supply Chain Initiative, and other programs like the Solutions for Hope program, to help assess the scope of risk in their supply chains.

Box 18: Illustrative Example – Obtaining information from smelters

“We have conducted mock audits that simulate actual audits with three tungsten smelters. They were forthcoming with transportation documents, mineral assay reports, governmental duty statements, and invoices. These documents identified loads-on-a-lot basis, mine origin certificates, and mineral quantity.”

Assessing whether smelters have carried out all elements of due diligence

Box 19: OECD Guidance, Supplement on Tin, Tantalum and Tungsten

Step 2: Identify and Assess Risks in the Supply Chain

Section II. Downstream Companies

C. Assess whether the smelters/refiners have carried out all elements of due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.

1. Gain evidence on due diligence practices of the smelter/refiner.
2. Review the information generated by the assessment team.
3. Cross-check evidence of due diligence practices of the smelter/refiner against the supply chain policy and due diligence processes contained in this Guidance.
4. Work with the smelter/refiner and contribute to finding ways to build capacity, mitigate risk and improve due diligence performance, including through industry-wide initiatives.

D. Where necessary, carry out, including through participation in industry-driven programs, joint spot-checks at the mineral smelter/refiner's own facilities.

Fifteen companies (56 percent of respondents) have found that identified smelters have carried out due diligence for their mineral supply chains. The majority of these companies (12 companies), have obtained information on assessments via the EICC-GeSI CFS program. They are thus dependent on the information to the extent that the smelter has “passed” a CFS audit. In three cases however, smelter assessment has been obtained directly from smelters where the company has a direct business relationship and knows from where smelters are procuring their minerals (such as from captive mines).

“We have traced a few uses of conflict minerals to the mines of origin. In some cases, these are situations where the same company owns the mine, the transportation company that ships the ore to the smelter, and the smelter that processes the ore which is used to manufacture the components and materials we purchase). These are usually large, vertically integrated companies from (the region). In other cases, companies have just identified the location of the mines that they source from.” – Component/intermediary manufacturer, pilot participant

A number of companies that are not currently participating in the EICC-GeSI CFS program are evaluating participation in the program.

Box 20: Illustrative Example – Assessing smelters' due diligence

“Our approach is to establish long-term relationships with suppliers, seek sustainable solutions, and work with suppliers to drive improvements. If we identify a reasonable risk that a supplier is violating, we require them to commit to and implement a corrective action plan within a reasonable timeline. We then follow-up effectiveness of corrective actions and conduct on-site assessments as necessary. Continued non-conformance and refusal to address issues of concern will lead to termination of the business relationship.”

Box 21: Illustrative Example – Overcoming confidentiality

“Many suppliers regard their supply chain as confidential business information or intellectual property. There is a great deal of concern (well merited in some cases) that customers will try to reverse-engineer the product supply chain.

We have tried several tactics:

- *Writing letters assuring suppliers that we are not interested in the identity of their suppliers, just the smelters and mines. They can label all levels of the supply chain between themselves and the smelter as Supplier A, Supplier B, etc.*
- *Signing Non-Disclosure Agreements (NDAs). This is difficult, as the purpose of learning the identity of the smelters and mines is to disclose it to our customers. We have only had success with this tactic in one case, but it took about 10 rounds of drafts of the NDA.*
- *Supplying the suppliers with the EICC list of smelters. If their smelters were not on the EICC list, we have asked them to identify the smelters.”*

Conducting spot-checks at smelters/refiners

Forty percent of respondents (11 companies) reported that they had determined spot-checks at the smelter/refiner level were necessary. However, most companies are relying on the EICC-GeSI CFS program and their third-party audits to carry out spot checks.

CHALLENGES

Despite the progress evidenced in implementing Step 2 among many pilot participants, some participants highlighted significant challenges to implementing Step 2 for downstream companies. These challenges include:

- Navigating the process for identifying smelters, which can be labor-intensive, and can be of limited reliability. The pace of progress to have smelters verified across all three mineral streams remains a concern.
- Identifying all of the vendors that supply products containing tin, tantalum, or tungsten. Especially among companies that use tens of thousands of parts in their manufacturing processes, it is challenging to obtain from them information on the chain of custody of minerals in their supply chains. Furthermore, many of the components are designed by suppliers who own the intellectual property of the configuration of materials; in some cases, pre-existing policies prevent materials disclosure of these components.
- Resolving confidentiality issues, trade secret concerns and non-disclosure assurances. These concerns require significant persistence in order to identify smelters and establish that smelters are carrying out full due diligence on their mineral supply chain.
- Overcoming a general lack of resources among suppliers to implement due diligence requirements. This situation often prevents suppliers from providing information, and particularly if they are not subject to Dodd-Frank requirements.

STEP 3: DESIGN AND IMPLEMENT A STRATEGY TO RESPOND TO IDENTIFIED RISKS

Communicating the Risks

Almost half of respondents (13 out of 27 companies) have communication processes to ensure that actual and potential risks are reported to senior management. These include:

- Report to senior responsible sourcing and supply chain management steering groups
- Report to corporate responsible leadership committees
- Regular meetings between Procurement, Legal and other specific business units
- Weekly briefings with the executive office, business process reviews, group vice president Operating Committee meetings
- Quarterly reports

We asked companies to list the actual and potential risk categories that have been raised at the Board of Directors or senior executive levels in the last three years (2009-2011); the most frequently cited abuses were associated with the “extraction, transport or trade of minerals, and risk management of serious abuses.” The specific abuses identified are illustrated in Figure 14.

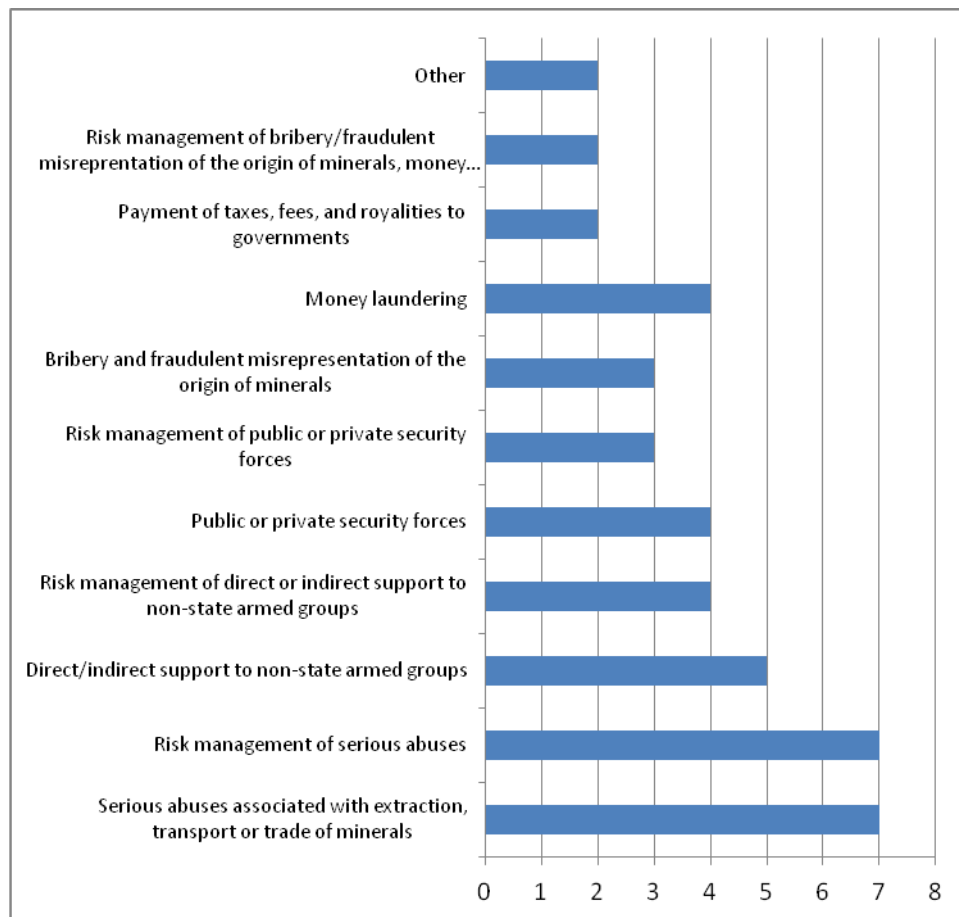


Figure 14: Risks that companies raised at the Board level.

Managing the Risks

Box 22: OECD Guidance, Supplement on Tin, Tantalum and Tungsten

Step 3: Design and Implement a Strategy to Respond to Identified Risks

Section B

Companies may manage risk by either (i) continuing trade throughout the course of measurable risk mitigation efforts; (ii) temporarily suspending trade while pursuing ongoing measurable risk mitigation; or (iii) disengaging with a supplier in cases where mitigation appears not feasible or unacceptable. To adopt the risk management plan and determine the correct risk management strategy, companies should:

1. Review the model supply chain policy on minerals from conflict-affected and high-risk areas in Annex II (or their own internal policies if consistent with Annex II) to determine whether the identified risks can be mitigated by continuing, suspending, or terminating the relationship with suppliers.
2. Manage risks that do not require termination of the relationship with a supplier through measurable risk mitigation. Measureable risk mitigation should aim to promote progressive performance improvement within reasonable timescales.

In practice, only two companies responded that they use the model supply chain policy from Annex II of the OECD Guidance (see Box 22) to determine whether identified risks can be mitigated by continuing, suspending or terminating the relationship with suppliers. Eighteen companies have yet to define an approach to managing risk of sourcing from minerals from conflict areas. Six companies use their own, company-developed approaches.

Another approach includes restricting minerals sourcing from suppliers that are on the EICC-GeSI Conflict-Free Smelter list (which incorporates compliance with the OECD Guidance as an eligibility requirement). Companies also are using stakeholder networks to help identify risks and appropriate responses to these risks. For example, some companies are communicating with the Responsible Sourcing Network, run by As You Sow, which encourages coordinated action from a diverse group of stakeholders for mineral value chains that are more transparent, traceable, and accountable.

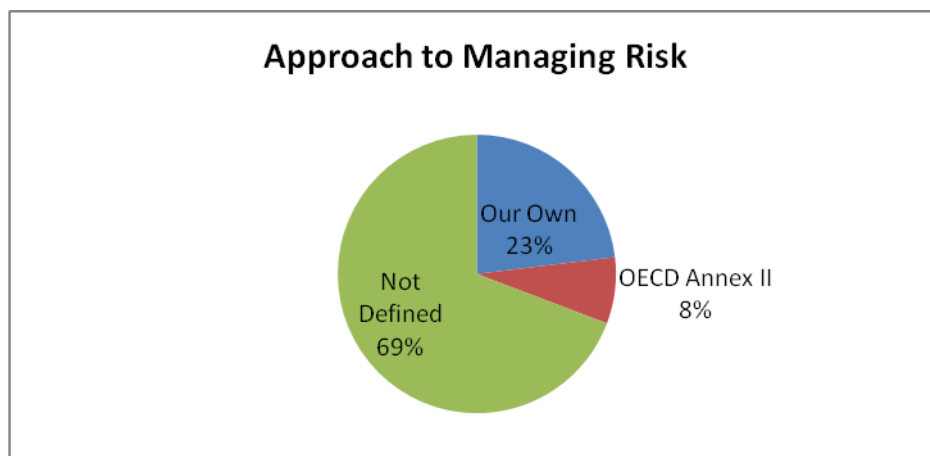


Figure 15: Companies' approach to managing risk.

Box 23: Illustrative Example – Managing Risks

“As part of our supplier performance management process, we use these KPIs: percentage of supplier sites that have identified their smelters, and the percentage of identified smelters on the CFS list.”

CHALLENGES

While the communications aspects of Step 3 are on track, designing appropriate risk strategies remains a challenge; many downstream companies are still unclear on their roles and responsibilities with regard to Annex II.

Companies seek further clarification on:

- Aspects within the Guidance and Annex II that identify specific roles and responsibilities for downstream companies based on their place in the supply chain
- Which parts of the Guidance and Annex II will be covered via in-region schemes
- Which parts of the Guidance and Annex II could be covered by industry collaborations like the EICC-GeSI CFS program

STEP 4: THIRD-PARTY AUDIT OF SMELTERS/REFINERS' DUE DILIGENCE PRACTICES**Box 24: OECD Guidance, Supplement on Tin, Tantalum, and Tungsten****Step 4: Carry-Out Independent Third-Party Audit of Smelter/Refiner's Due Diligence Practices**

Section B: Implement the audit in accordance with the audit scope, criteria, principles, and activities set out above.

1. Implementation of the audit, section d (For all downstream companies)

It is recommended that all downstream companies participate and contribute through industry organisations or other suitable means to appoint auditors [to carry out third-party independent audits of smelters] and define the terms of the audit in line with the standards and processes set out in this Guidance. Small and medium enterprises are encouraged to join or build partnerships with such industry associations.

Smelter Audits

Responses to questions on Step 4 of the OECD Guidance demonstrate that companies that do not have direct relationships with smelters rely on an industry process to meet recommendations to conduct third-party audits. The majority of the companies responded that their suppliers conduct audits as part of the CFS program.

Approximately 25 percent of the companies responded that they do not know whether their suppliers are being audited, and that they do not have visibility into which smelters are engaged in the CFS program.

In accordance with the Guidance (cited in Box 24), all respondents that are relying on third-party audits are using an industry scheme, specifically the CFS program. One company conducts smelter audits internally based on the OECD Guidance in addition to relying on the CFS program as part of its regular supplier auditing process.

Box 25: Illustrative Example – Managing Risks

“At this point in time, it is not clear if smelters in our supply chain are undergoing or have completed audits. To date, there has been very limited visibility as to which smelters are engaged with the EICC and GeSI CFS programs. We are working with these organisations to gain more visibility and subsequently support the CFS program. We have every intention of leveraging this work rather than creating a separate program, given the high degree of overlap in [different industries’] supply chains.”

“Currently and because this process is evolving we are concerned about verification of supplier information regarding smelter information and mine-of-origin. We plan to remedy this by implementing contractual language with our suppliers over time, and by including requirements in our supplier specifications followed by periodic supplier quality audits.”

CHALLENGES

As recommended by the Guidance, most downstream companies are using or planning on using an industry-wide scheme such as the EICC-GeSI CFS program to implement Step 4. Nevertheless, challenges remain. Specifically, some companies mentioned that:

- Creating a tipping point for smelter participation in the CFS program will be essential, particularly for smelters outside of the U.S. and Europe that are not subject to legislation and are outside the scope of direct influence or commercial pressure. Some suppliers exhibit reluctance to provide proprietary information due to competitive concerns.
- Customers that only accept audits from certain auditing firms may create administrative and cost burdens.
- Buying practices at the bottom of the chain are driven by cost, down to pennies per pound of material. Buyers change suppliers frequently, sometimes daily, increasing the complexity of obtaining information with associated smelters.
- Auditors require training on content and structure of the minerals supply chain. Building the capacity of trained auditors will take time and resources.
- There is very limited visibility into which smelters are engaged with the EICC-GeSI CFS program.

STEP 5: REPORT ANNUALLY ON SUPPLY CHAIN DUE DILIGENCE

Less than one-third of pilot respondents (nine out of 28) said they report publicly on due diligence procedures of minerals from conflict-affected and high-risk areas. Of this group, the majority (seven out of nine companies) provide information through their Corporate Social Responsibility reports. Five out of nine companies similarly report on their activities through their company website. Companies that are not currently reporting are awaiting final SEC regulations.

Box 25: Illustrative Example – Reporting Practices

“We currently report our policy position on this issue in the Corporate Citizenship report located on our website. We will report our due diligence activities when the U.S. regulations are promulgated and clarity of the requirements is provided.”

Of the companies that do report, more than two thirds (seven out of nine) report on an annual basis. The remaining two companies report only when “there is something to report.” Among those that report annually, one company reports both on an annual basis and periodically on the company blog. Another company is considering moving to a quarterly format to “keep the information fresh.”

CHALLENGES

At this stage in the OECD pilot baseline report, most companies are not implementing Step 5 of the Guidance. Companies, especially U.S. companies, are waiting for the SEC to issue the rules on Section 1502 of Dodd-Frank before implementing this step. Companies have identified concerns over the technical skills for auditors to audit conflict minerals reports, as it is a specialized report that differs from usual financial reports. Capacity building by the auditing firms will be required.

SECTION IV: CLARIFICATIONS BY THE OECD SECRETARIAT ON FINDINGS

General Clarifications

The OECD Secretariat has provided the following information to help clarify how the Guidance can address the challenges that companies have identified through the questionnaire.

There is a close relationship between the implementation of the reporting requirements under Section 1502 and the implementation of the Guidance. The OECD Guidance sets out due diligence processes through which issuers can work with their suppliers to describe measures taken to exercise due diligence on the source and chain of custody of the minerals, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

Under Section 1502, issuers will need to include in their report to the SEC a description of the products manufactured or contracted to be manufactured that are not “DRC conflict-free”. This refers to products that do not contain minerals which directly or indirectly finance or benefit armed groups in the DRC or adjoining countries. Under the law, the term “armed group” refers to groups that are identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices.

Downstream companies subject to U.S. Dodd-Frank requirements may label their products as “DRC conflict-free” when they and the mineral processors from which they source know and can show that they do not tolerate nor by any means profit from, contribute to, assist with, or facilitate the commission by any party of serious human rights abuses associated with the extraction, transport or trade of minerals. Companies also must show that they do not provide any direct or indirect support to non-state armed groups or public or private security forces.

Downstream companies can use the Guidance to make determination of whether their products are “not DRC conflict-free” or “DRC conflict-free” by assessing the due diligence of the smelters/refiners and verify whether smelters and their upstream suppliers are in line with the following recommended risk management strategies:

- If a company finds a risk in its supply chain that it may be supporting any armed groups (non-state, public, or private security forces) that commit serious human rights abuses, the recommended response is immediate suspension or disengagement (see paragraphs 1-2 of Annex II).
- If a company finds a risk in its supply chain that it may be supporting non-state armed groups (even if not involved in serious human rights abuses), the recommended response is immediate suspension or disengagement (see paragraphs 3-4 of Annex II of the Guidance).
- If a company finds a risk in its supply chain that it may be supporting public or private security forces (i.e. military) that are not involved in serious human rights abuses, the recommended response is the immediate adoption and implementation of a risk management plan by upstream suppliers. Also, the Guidance recommends that significant measurable improvement is demonstrated within six months from the adoption of the risk management plan (see paragraphs 5 and 10 of Annex II).

Many stakeholders participating in the forum on implementation on the Guidance submitted a letter to the SEC proposing that the description of products as “not DRC conflict free” is interpreted as follows. Public or private security forces that are not involved in serious human rights abuses would not qualify as armed groups under Section 1502 of the Dodd-Frank Act. Downstream companies subject to U.S. Dodd-Frank requirements sourcing from smelters implementing a time-bound risk management plan for identified risks of direct or indirect support to public or private security forces that are *not perpetrators of serious human rights abuses* should not describe their products as “not DRC conflict free.” The proposed interpretation would reconcile process-oriented provisions and result-based categorizations of products. This would also recognise that when public or private security forces are contracted to provide security services there may be still risks of extortion or illegal taxation which should not prevent trade to continue, but which requires immediate mitigation by smelters and other upstream actors as part of the due diligence process.

If the SEC final rules reflect the proposed interpretation of “DRC conflict-free” labeling and “not DRC conflict free” description of products, U.S. Dodd-Frank and the OECD Guidance eventually will result in a coherent framework and will be implemented in a consistent manner. This will also incentivize smelters and upstream actors to progressively improve their due diligence practices.

In the meantime, downstream companies should not impose requirements that go beyond U.S. law or depart from internationally agreed standards when developing their own schemes, since this may further discourage sourcing minerals from Central Africa.

Clarifications on Specific Steps in the Guidance

STEP 1: ESTABLISH STRONG COMPANY MANAGEMENT SYSTEMS

No clarifications are necessary.

STEP 2: IDENTIFY AND ASSESS RISKS IN THE SUPPLY CHAIN

Annex II of the OECD Guidance provides a model supply chain policy for companies (both upstream and downstream) to understand risks throughout their supply chains and set common expectations on how companies in the supply chains should respond to identified risks.

Downstream companies should identify risks in their supply chains by assessing the due diligence practices of their refiners against Annex II. Downstream companies should refer to the model supply chain policy to communicate (directly or through their suppliers) to the smelters in their supply chains about how they should respond to identified risk of serious human rights abuses or direct or indirect support to conflict in accordance with internationally agreed standards.

Under the Supplement on Tin, Tantalum, and Tungsten: downstream companies *should establish internal controls over their immediate suppliers and may coordinate efforts through industry-wide initiatives to build leverage over sub-suppliers, overcome practical challenges, and effectively discharge the due diligence recommendations contained in this Guidance.*” (Emphasis added)

STEP 3: DESIGN AND IMPLEMENT A STRATEGY TO RESPOND TO IDENTIFIED RISKS

Downstream companies should build and/or exercise leverage over the smelters with red flags in their supply chains, who are able to more effectively and directly mitigate the risks of contributing to conflict.

Downstream companies may build leverage over smelters through the inclusion of due diligence performance into contracts (where applicable), or working through industry associations and multi-stakeholder initiatives. It is important that companies ensure these initiatives take due account of social and economic effects on developing countries and of existing internationally recognized standards.

The Guidance expects downstream companies to identify the risks in their supply chain by assessing the due diligence practices of their smelters/refiners against Annex II of the Guidance. Downstream companies should:

- Take immediate steps to disengage with a smelter (directly or through sub-suppliers) if the smelter has not immediately suspended or discontinued engagement with its suppliers where reasonable risks of serious abuses (see paragraphs 1 and 2 of Annex II) or direct or indirect support to non-state armed groups exist (see paragraphs 3 and 4 of Annex II).
- When smelters are engaging in risk mitigation pursuant to Annex II¹, or where smelters are still in the process of fully implementing the due diligence recommendations contained in this Guidance, downstream companies should ensure refiners demonstrate significant and measurable improvement within six months from the adoption of the risk management plan.

STEP 4: CARRY OUT INDEPENDENT THIRD-PARTY AUDIT OF SMELTER/REFINER'S DUE DILIGENCE PRACTICES

No clarifications are necessary.

STEP 5: REPORT ANNUALLY ON SUPPLY CHAIN DUE DILIGENCE

No clarifications are necessary.

¹ See Paragraphs 10 and 14 of Annex II of the Guidance on risk management of direct or indirect support to public or private security forces, bribery, and fraudulent misrepresentation of the origin of minerals, money-laundering, and payment of taxes, fees, and royalties to governments.

SECTION V: TOOLS AND CURRENT PRACTICES

Despite the (current) limited number of tools available to help companies implement due diligence in their mineral supply chain, both industry-level and company-designed tools are being used by pilot respondents to aid in due diligence processes.

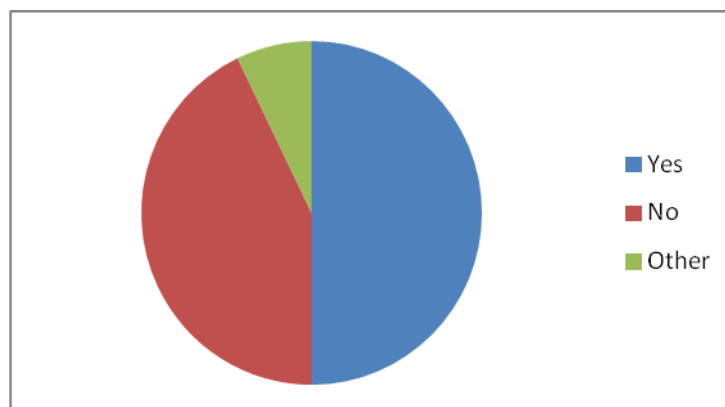


Figure 16: Companies that are relying on an industry-level scheme to conduct due diligence

DUE DILIGENCE TOOLS

Tools that provide basic information on conflict minerals, regulation, and due diligence expectations are plentiful.

- Industry associations such as AIAG, the EICC, GeSI and Association Connecting Electronics Industries (IPC) are providing their members with updates via webinars, information sheets, websites, and training so that their members and others are aware of what is expected of them and what they can do.
- Companies are educating their supplier bases by conducting supplier compliance symposium and providing as much information as they can on regulation and public expectations regarding minerals from conflict-affected areas.
- The OECD Guidance, Annex II, and the Supplement on Tin, Tantalum, and Tungsten all have proved to be helpful to companies as safe harbors to show compliance to due diligence.

Tools that gather information on the source of minerals are varied, as well.

The EICC-GeSI Due Diligence Common Reporting Template & Dashboard is a tool that companies can use to ask suppliers and sub-suppliers to provide due diligence information in the supply chain including identifying smelters. The tool was developed in 2011 with the intention to provide a standard questionnaire for suppliers to ease reporting burdens to different customers. The tool is an Excel-based questionnaire with XML programming that enables the spreadsheet to work with the MRPRO system (which can be downloaded from the EICC-GeSI site) or with any other data management system (such as eTasc, Enablon, SAP, etc.). The tool helps users “roll up” data into an aggregate report that will identify risks from information provided by suppliers. In addition the tool allows companies to get started on mapping and understanding their mineral supply chains before the SEC rule is finalised. For more information about the tool (or to see a demo), visit www.conflictreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm.

- The IPC is at the early stages of developing a data exchange standard. Companies are considering and using different formats provided by data management companies and software tools. Many companies have not yet identified a good data management system yet and note that the investment will likely come after the SEC’s final rules so that infrastructure is built to ensure compliance.

Challenges of the EICC-GeSI Due Diligence Tool:

The EICC-GeSI reporting template has gone through a new generation as of September 2011. One company reported that the new template is overly complex, and that the previous template was easier for suppliers to use and to reproduce for their suppliers. Suppliers stress that simplicity is necessary and agree that the new template is not providing this.

Another challenge cited by companies using the tool: follow-up and verification now must be done by each company. Positively, the tool allows for standardized data collection; however suppliers still receive multiple requests from their customers.

In addition, for companies requesting information, the validation of data and follow-up is completely up to them, and this requires an enormous effort and time commitment.

Tools that assess and verify smelters:

The EICC-GeSI CFS program is a voluntary program in which an independent third-party evaluates a smelter's procurement activities and determines if the smelter demonstrated that all the materials they processed originated from conflict-free sources. The CFS is a global smelter verification program that evaluates a smelter's input streams and risk management systems. However for minerals sourced in the DRC or surrounding countries (as well as other countries considered "high risk"), the CFS utilizes the iTSCi scheme and the OECD Guidance for verification of due diligence. The program aims to enable companies to "source conflict-free minerals."

The CFS will cover all four conflict minerals (tin, tungsten, tantalum, and gold), but so far, the program only has conducted audits for tantalum. Verification is valid for one year and smelters may choose to be audited annually.

Three independent audit firms are approved to audit smelters: UL-STR, SGS, and Liz Mueller & Partners.

Challenges of CFS Program:

Companies that source directly from smelters cannot be involved in the EICC-GeSI auditing process to avoid the risks of unfair competitive advantage. However, one pilot participant calls this rule problematic in that these companies have knowledge of this part of the supply chain and understand how smelters operate, and therefore the companies can support corrective action and help smelters become compliant. A different participant recommended that the suppliers procuring from smelters/refiners be responsible for conducting audits or certifying that they are part of the Conflict-Free Smelter (CFS) program.

THE ROLE OF INDUSTRY ASSOCIATIONS

- The EICC (www.eicc.info) and the GeSI (www.GeSI.org) jointly have created an Extractives Work group and have been working on conflict minerals since 2008. Through this workgroup, the duo of EICC-GeSI has developed and launched tools to help companies ensure that the minerals in their supply chains are conflict-free.
- AIAG has formed a workgroup to focus specifically on conflict minerals. Through the Conflict Minerals Working Group, AIAG has a formal Memorandum of Understanding (MOU) in place with EICC-GeSI to identify areas for collaboration. One such area is the development of the instructions for use of the EICC-GeSI Conflict Minerals Reporting Template & Dashboard. AIAG is currently evaluating how to best support the EICC-GeSI Conflict-Free Smelter (CFS) program.
- IPC is working to develop a data exchange standard together with iTSCi. In 2010, ITRI announced it is moving forward to Phase II of iTSCi. Phase II involves developing and implementing a system to ensure mineral

traceability from exporter back to the mine site and to develop chain of custody data. ITRI intends to trace the origin of minerals and ensure that those entering the supply chain are not sourced from militia-controlled mines. If they are successful, ITRI hopes to expand the project across the DRC and to initiate Phase III by 2013.

- Aerospace Industries Association (AIA), though not a part of this pilot, has recently launched a working group on conflict minerals.

EVALUATING CURRENT PRACTICES

Industry and Cross-Industry Collaboration

Collaboration—within and across industries, either through individual company participation or through industry associations—has increased the ability to develop and share tools, exchange ideas, and coordinate actions.

The most significant tool, according to the number of company references from the questionnaires, is the EICC-GeSI CFS program, developed by the ICT industry and increasingly utilized by other industries. Participants in the pilot noted that it will be critical to support this tool and to help the program “graduate” to becoming a credible and transparent scheme that all downstream companies utilize. However, several challenges will need to be addressed.

The biggest challenge of the program appears to be getting a critical mass of smelters to apply for verification. As of October 2011, six Tantalum smelters are verified “conflict-free.” One way that some pilot participants suggest addressing this challenge is to allow companies with direct relationships with the smelters to connect with smelters to instigate corrective action plans and support smelters in preparing for the audits. This has not been allowed due to competitiveness concerns.

Second, companies currently do not have access to information describing how smelters are currently verified, and the CFS program does not provide enough information on what the verification process entails (i.e. rules for recycled or scrap metal), what the auditors are investigating, or the scope of the investigations themselves. The CFS program lists smelters but does not explain why they are considered compliant. It also neglects to list smelters that have failed to comply. Some pilot participants believe the CFS is essentially a “red light” or “green light” system that only shows “green light” smelters with little visibility into the determination.

One solution is to invest in a fully independent, transparent standards program to certify smelters (akin to ISO 9000 certification). While the ICT industry has taken a leadership position to develop the CFS program and open it to any industry, companies have a preference that the program to be managed by an independent third-party organisation that is not industry-led. In addition, there are capacity constraints for the EICC-GeSI to roll out the program across all 3Ts and gold globally. This is an area which the OECD could potentially help fund and support.

Tracing and tracking in-country

In order for the downstream process to work, the upstream process must be reliable and in place. The ITRI and iTSCi in-region validation scheme was cited as a useful collaborative effort to get information on targeted risk assessments up to the smelter level. The iTSCi scheme is a chain of custody, traceability, and due diligence system that includes independent and third-party risk assessment and audits. It is designed to comply with the OECD Guidance. It will be a critical tool to verify the upstream process once it is fully scaled. It is currently challenged to be up and running fully in the region.

SECTION VI: CONCLUSIONS, RECOMMENDATIONS AND NEXT STEPS

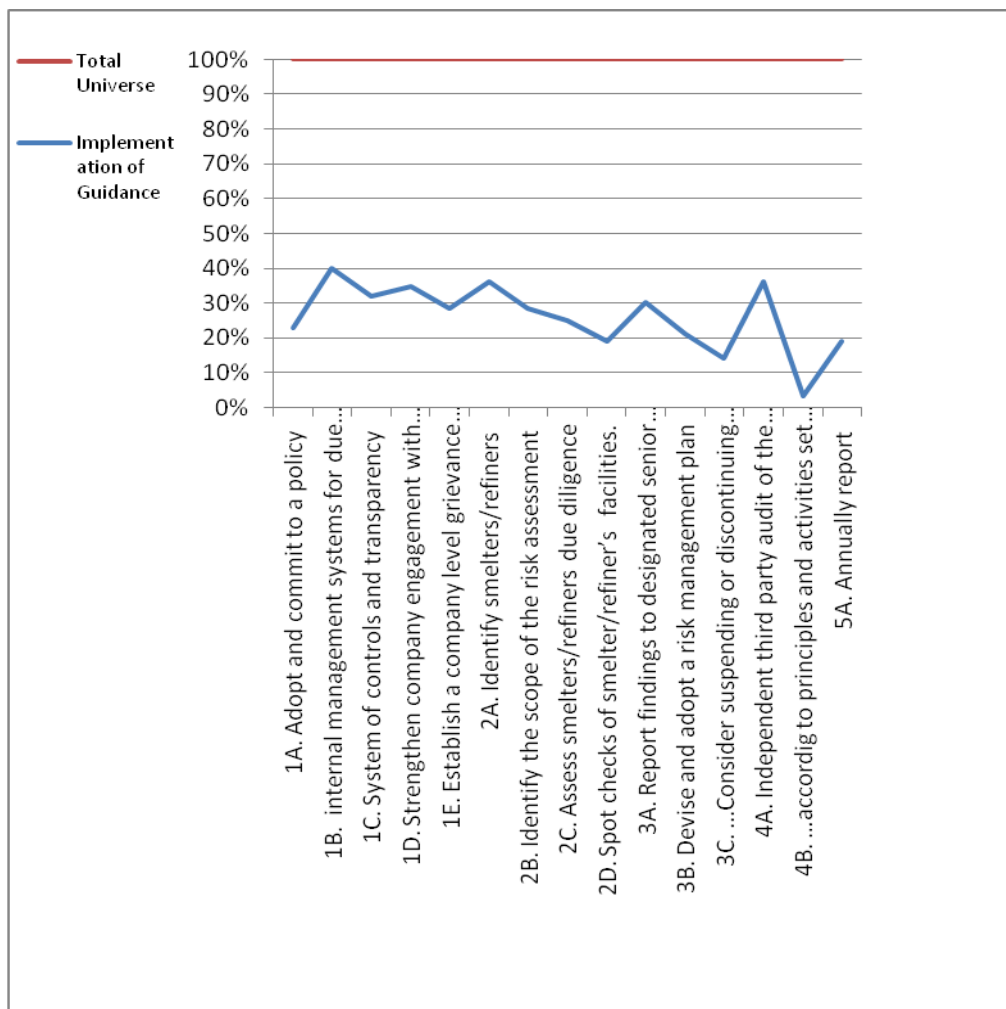
CONCLUSIONS

Along with the obvious concern of contributing to conflict and human rights abuses through their supply chains, companies participating in the pilot identified compliance, customer pressure (including company reputation), and corporate responsibility as primary drivers for implementing responsible due diligence.

Companies are interested in implementing due diligence processes and systems that will provide a “safe harbor” of legal requirements while finding a way to ensure their supply chains are “conflict-free.”

The Guidance has been a useful resource for companies to begin planning implementation and ensure the ability to put processes in place quickly once SEC rules are adopted. Companies anticipate further implementing the Guidance with more exposure to the Pilot process. We anticipate seeing this progress in the next update report.

There is continued uncertainty surrounding the Dodd-Frank Act since the SEC rules have not been finalised. Many companies are waiting for the final SEC rules on the Dodd-Frank Act before developing internal policies and procedures, and imposing obligations on suppliers. This creates a tension for implementing best practices in advance of final legal requirements of companies, whereas the OECD Guidance aims at being used by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas – even companies which are not subject to the Dodd-Frank Act.



KEY RECOMMENDATIONS

Continue to raise awareness beyond the ICT industry companies

The predominant role of the ICT industry and ICT companies in the OECD pilot demonstrates that companies in the ICT industry have taken a leadership role on the sourcing issue and have developed tools and strategies in advance of many other industries.

The OECD Guidance intends to serve the development of more responsible sourcing practices beyond ICT and U.S. listed companies subject to Dodd-Frank. As the scope of the Guidance stretches beyond the U.S. law, broadening participation in the pilot will benefit companies subject to the law by increasing knowledge, awareness, and compliance to due diligence practices throughout subject industries. It also should raise overall standards of practice—particularly for non-OECD country companies. In particular, there is a need for more participation from companies outside the ICT industry, suppliers of OEM, component manufacturers, metal exchanges and metal traders.

Downstream participants to this OECD pilot project represent a relevant foundation for these further developments to happen. Companies and suppliers alike will benefit from increased participation further down the supply chain and among a broader industry base.

Responsible sourcing from conflict-affected areas requires the cooperation of multiple stakeholders

A sustainable and actionable solution requires the support, cooperation, and coordination of many parties including governments (in-region, regional and international), local stakeholders, international organisations, and all industries that use minerals in their products.

There is a need to move due diligence processes forward through industry-led coordination and cross-industry collaboration to meet international standards such as the OECD Guidance. This includes building upon current tools and developing new tools and processes that can improve upon current challenges. A few areas for improvement are data collection and validation, streamlined processes, and cost reduction throughout the supply chain. Appropriate levels of coordination and governance between companies, industry associations, other stakeholders, and OECD are welcome to ensure consistent and tailored application of the Guidance throughout different industries and down the value chain.

Downstream companies need to build on the OECD risk management strategies to make them more specific to individual processes.

Risk assessment is significantly different at all of the points along the downstream supply chain. Some companies therefore have to work at three levels of the Guidance—for themselves, their clients and their suppliers. Each company can deal with specific issues that the Guidance is too broad to address.

The OECD should provide a convening space to ensure harmonization of interrelated systems to make a fully transparent supply chain.

Companies throughout the supply chain are still learning about the Guidance, and efforts need to be taken by all to help raise the level of understanding and comprehension for implementing responsible and transparent practices. The OECD needs to provide additional clarity on which aspects of the Guidance are expected to be an individual company's responsibility and which aspects can be implemented through shared industry or cross-industry schemes.

Areas where companies are looking for OECD support:

1. The OECD should continue to use its international leverage and influence with the UN to motivate and encourage non-OECD country alignment with a specific focus to outreach to non-OECD countries that are significant players in the supply chain.

2. The OECD should make the Guidance more accessible, using easy-to-understand language with diagrams and flow charts, to help educate suppliers and companies about the OECD Guidance, expectations, and information on available tools.
3. The OECD should explore ways to create an independent organisation/body that can take on the validation and certification of minerals that are “conflict-free.” It would be beneficial to have a fully transparent and independent organisation with a multi-stakeholder governance structure managing cross-industry schemes such as the EICC-GeSI CFS Assessment Program.
4. The OECD could review individual companies’ conflict mineral policies to ensure alignment with the model policy Annex II in the Guidance.

Pilot Expectations

The Pilot should provide clarity for companies on practical aspects of implementation using the OECD Guidance. Some specific suggestions:

- Design a collaborative approach in collecting supply chain due diligence information, thereby leveraging impact and reducing duplication of efforts by individual companies. This could be done via cloud computing or some other shared data approach.
- Explore a risk-based strategy whereby certain industries focus due diligence efforts on certain metals, or certain parts of the supply chain.
- Create one data clearinghouse for country-of-origin status so that information can be accessed quickly and efficiently.
- Provide companies with a clear framework and show how requirements can be fulfilled in a way that is doable for companies without major effort.
- Align the effort with regulatory requirements (e.g. final Dodd-Frank rules) and with the approaches to supply-chain management that companies employ for other supply chain issues/challenges.
- Identify best practices that are consistent with the OECD Guidance including identifying what is not practical and not appropriate for companies to implement.
- Learn if there are alternative and compelling methods to accomplish the various steps in the process, or to improve efficiency of the overall approach.
- Accumulate and acquire benchmarking information as to the maturity of the compliance process to the OECD Guidance by various industries and companies.

NEXT STEPS

Focus of next report: Progress Report

Cycle 2 of the Implementation Pilot Project aims to provide an update on how companies have progressed since their responses on due diligence implementation provided in this Baseline report. The next report is due March 2012.

This next progress report aims to achieve the following:

- Demonstrate progress on due diligence performance since the start of the reporting cycle.
- Develop references, such as performance indicators or benchmarks for practical progress.
- Provide update on challenges and tools.
- Identify best practices and recommendations for companies to move forward.
- Describe how the OECD Guidance can be used for reporting under Dodd-Frank requirements.

APPENDIX - Questionnaire for Downstream Companies on the Implementation of the OECD Supplement on Tin, Tungsten and Tantalum

General Questions

1. In which industries do you operate? (please check all that apply)
 - Aerospace
 - Automotive
 - Consumer Products
 - Energy
 - Extractives
 - Information, Communications & Technology
 - Medical Devices
 - Other: _____
2. What is the name of your company?
3. Where is your company headquarters located? (city, country)
4. How much did your company earn in revenues in 2010?
5. Where is your company located on the downstream mineral supply chain? (select all that apply)
 - Metal exchangers
 - Metal traders
 - Component and intermediary manufacturers
 - OEM /brand
 - Other: _____
6. In which industries do your customers operate?
 - Aerospace
 - Automotive
 - Consumer Products
 - Energy
 - Extractives
 - Information, Communications & Technology
 - Medical Devices
 - Other: _____
7. Where are your suppliers located in the mineral supply chain? (select all that apply)
 - Metal exchangers
 - Metal traders
 - Component and intermediary manufacturers
 - OEM brand
 - Other: _____
8. Which minerals are used in your product line? (select all that apply)
 - Tin
 - Tungsten
 - Tantalum
9. In which regions do your business units that process these minerals operate?
10. What types of product categories are manufactured using these minerals?

11. What is the estimated overall share of tin, tungsten, and tantalum in your procurement?

	Tin	Tungsten	Tantalum	Other	Total	%
Volume (approx.) metric kilos/tons						
Value in \$US or other (approx.)						
Number of suppliers						

Step I: Establish Strong Company Management Systems

I.A	Adopt and commit to a supply chain policy for minerals originating from conflict-affected and high-risk areas
I.A.1	<i>A policy commitment setting forth principles for common reference on mineral extraction, transport, handling, trading, processing, smelting, refining and alloying, and export, against which the company will assess itself and the activities and relationships of supplier. This policy should be consistent with the standards set forth in the model supply chain policy in Annex II: Security, artisanal miners, bribery, money laundering, transparency on taxes</i>
I.A.2	<i>A clear and coherent management process to ensure risks are adequately managed. The company should commit to the due diligence steps and recommendations outlined for the various levels identified in the OECD Guidance.</i>

Supply Chain Policy on Minerals from Conflict Areas

1. Has your company adopted a policy on minerals from conflict areas?
 - Yes (please attach the policy or provide the link to your website)
 - No
 Provide any comments: _____

2. Is this policy consistent with Annex II of the Guidance that provides a model supply chain policy for responsible global supply chain minerals from conflict-affected and high-risk areas?
 - Yes (please attach or provide the link to your website)
 - No
 Provide any comments: _____
 - a. If yes, which elements of Annex II are referenced in your policy? (check all that apply)
 - Serious abuses associated with the extraction, transport or trade of minerals
 - Risk management of serious abuses
 - Direct or indirect support to non-state armed groups
 - Risk management of direct or indirect support to non-state armed groups
 - Public or private security forces
 - Risk management of public or private security forces
 - Bribery and fraudulent misrepresentation of the origin of minerals
 - Money laundering
 - Payment of taxes, fees and royalties due to governments
 - Risk management of bribery and fraudulent misrepresentation of the origin of minerals, money-laundering and payment of taxes, fees and royalties to governments

3. If your company has not adopted a specific policy on minerals from conflict areas, do you incorporate guidance on conflict-free mineral supply chains into existing corporate policies (i.e. sustainability policy, code of conduct, human rights policy, supplier code, etc.)?
 - No, none of our existing corporate policies address minerals from conflict areas.
 - Yes, we have corporate policies that address minerals from conflict areas. (please attach the policy or provide a link to the policy on your website)

Name of Policy	Conflict-free aspect covered by policy (Please refer to question 3 above)	Reference page (of policy)

Topics Covered by your Company Policy on Minerals

1. Please check which approach best matches your policy on minerals from conflict areas:
 - Not applicable: no policy exists
 - Not to source minerals from conflict areas in any region
 - Not to source minerals from conflict areas in the DRC
 - Not to source any minerals from the DRC
 - Aim to source from DRC (among other countries) but from conflict-free mines or sources
 - Other: _____

Communicating the Policy

1. Is your company's policy on minerals from conflict areas publicly available? Where?
 - Yes, as a standalone policy.
 - Yes, as part of a broader policy.
 - No, it is not publicly available.
2. If it is not made public, how/where/to whom have you communicated it?

Discussion Questions

1. What challenges did you experience in developing the policy?
2. What other collaborative processes or examples have you used to help with developing your policy? (examples of industry or other initiative)
3. What areas are still necessary to develop?

I.B	Structure internal management systems to support supply chain due diligence
I.B.1	Assign authority and responsibility to senior staff with the necessary competence, knowledge and experience to oversee the supply chain due diligence process
I.B.2	Ensure the availability of resources necessary to support the operation and monitoring of these processes.
I.B.3	Put in place an organizational structure and communication process that will ensure critical information, including the company policy, reaches relevant employees and suppliers.
I.B.4	Ensure internal accountability with respect to the implementation of the supply chain due diligence process.

Responsibilities and Resources

1. Please describe your internal management systems to support supply chain due diligence of minerals.
2. What accountability procedures have you developed?
3. What accountability issues have you tried to address through these procedures?
4. Have these procedures been implemented?
5. Describe the level and role of senior management that is accountable for the performance of conflict-free mineral supply chains.
 - No one has been designated to the conflict-free minerals program.
 - Yes, someone has been designated to performance on conflict-free mineral supply chains. (describe the level and role)

6. Who has operational responsibility to implement the policy on minerals from conflict areas at your company? (describe the level and role)

7. Are resources available to support this responsibility? To what degree? Please describe resources available in each field below.

a. Human resources

- i. How many people and from which departments?
- ii. How much time/percentage of role is estimated for each person?

Department	Number of people	% time on conflict-free supply chains	Annual estimated costs invested (US\$)
Purchasing			
Finance			
Legal			
Audit/Quality			
IT/Data management			
External consultants			

b. Is your company a member of any industry or multi-stakeholder organization that focuses on responsible supply chain initiatives, and or conflict-free mineral supply chains? (please list)

c. Does your company support conflict-free mineral supply chain initiatives through its philanthropic arm? If so, please describe.

Communications

1. What **internal communication** process on conflict-free mineral supply chains have you developed?
 - o No internal communications on conflict-free mineral supply chains has taken place.
 - o Communications with staff. Specify type of communication process in place.
 - o Communications with management. Specify target population: senior management, all management, only certain departments, etc. and type of communication process in place.
 - o Communications with board members.
 - o Other: _____
2. What **external communication** process on conflict-free mineral supply chains have you developed and for whom?
 - o None
 - o Suppliers: Specify categories and communication process in place.
 - o Business partners: Specify categories and communication process in place.
 - o Consumers/General public: Specify categories and communication process in place.
 - o NGOs: Specify categories and communication process in place.
 - o Government: Specify categories and communication process in place.
 - o Other (industry associations, multi-stakeholder groups, etc.)

Discussion Questions
1. What are your biggest challenges in developing management systems to ensure that you have a “clean” source of tin, tantalum and tungsten? 2. Have you found collaborative processes (with an industry association or other companies/stakeholders) to be helpful? Why/why not? 3. Where do you see the greatest need for improvement in your company with regards to carrying out Step 1 of the Guidance?

I. C	Establish a system of controls and transparency over the mineral supply chain.
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I.C.1	Introduce a supply chain transparency system that allows the identification of the smelters/refiners in the company's mineral supply chain through which the following information on the supply chain of minerals from "red flag locations of mineral origin and transit" should be obtained: the identification of all countries of origin, transport and transit for the minerals in the supply chains of each smelter/refiner. Companies which, due to their size or other factors, may find it difficult to identify actors upstream from their direct suppliers may engage and actively cooperate with industry members with whom they share suppliers or downstream companies with whom they have a business relationship to identify which smelters are in the supply chain.
I.C.2	Maintain related records for a minimum of five years, preferably on a computerised database.
I.C.3	Support extending digital information-sharing systems on suppliers to include smelters/refiners, and adapt systems to assess supplier due diligence in the supply chain of minerals from conflict-affected and high-risk areas, utilizing the criteria and process recommended in this Guidance, with due regard to business confidentiality and other competitive concerns.

Understanding How You Make Internal Decisions

Red flag locations of mineral origin and transit:



The minerals originate from or have been transported via a conflict-affected or high-risk area.



The minerals are claimed to originate from a country that has limited known reserves, likely resources or expected production levels of the mineral in question (i.e. the declared volumes of mineral from that country are out of keeping with its known reserves or expected production levels).



The minerals are claimed to originate from a country in which minerals from conflict-affected and high-risk areas are known to transit.

Supplier red flags:



The company's suppliers or other known upstream companies have shareholder or other interests in companies that supply minerals from or operate in one of the above-mentioned red flag locations of mineral origin and transit.



The company's suppliers' or other known upstream companies are known to have sourced minerals from a red flag location of mineral origin and transit in the last 12 months.

1. Have you established a method for identifying minerals from "red flag locations of mineral origin and transit" in your supply chain? (refer to the box above for a definition on "red flag" locations)
 - Yes
 - No

2. Have you established a method for identifying minerals from "red flag suppliers"? (refer to the box above for a definition on "red flag" suppliers)
 - Yes (please describe the system you use for identifying "red flag suppliers")
 - No

3. On which basis do you decide which products and associated suppliers to identify? (click all that are relevant)
 - Bill of materials
 - Product category
 - Known suppliers of tin, tantalum and tungsten
 - Geographic location (please define or describe parameters)
 - Political situation
 - Other (please describe): _____

4. What level of visibility do you have on "red flag locations of mineral origin and transit" in your supply chain?
 - Unknown
 - Tier 1
 - Tier 2
 - Tier 3 and beyond (please specify): _____

5. What drove the internal decision to identify suppliers using the 3Ts (tin, tantalum and tungsten)? (check all that apply)

- Compliance (subject to the SEC or other regulatory ruling)
- Customer pressure
- Other (please specify): _____

Maintaining Records

1. Have you established a data collection system?
 - Yes, explain how you maintain records
 - No
 Provide any comments: _____
2. Are you relying on existing data collection tools for monitoring/reviewing downstream supply systems?
 - Yes
 - No
 - a. If yes, how is it incorporated into your company's existing monitoring/review systems?
3. Are you relying on an industry-level scheme?
4. When did you start storing records/data? (year)
5. How long are records stored for? (ie. minimum of five years, preferably on a computerised database)
6. What type of data is collected specific to the 3Ts? (please list the top five types of data)

Discussion Questions

1. What challenges did you face in increasing transparency in your supply chain, and data management in particular? How did you address these challenges?
2. What collaborative processes have you used to help with data management? What works well? What does not?
3. What are the main areas for improvement in data management (may be covered above)?

I.D	Strengthen company engagement with suppliers. A supply chain policy should be incorporated into contracts and/or agreements with suppliers. Where possible, assist suppliers in building capacities with a view to improving due diligence performance.
I.D.1	Establish, where practicable, long-term relationships with suppliers as opposed to short-term or one-off contracts in order to build leverage over suppliers.
I.D.2	Communicate to suppliers their expectations on responsible supply chains of minerals from conflict-affected and high-risk areas, and incorporate the supply chain policy and due diligence processes set out in this Guidance into commercial contracts and/or written agreements with suppliers which can be applied and monitored, including, if deemed necessary, the right to conduct unannounced spot-checks on suppliers and have access to their documentation.
I.D.3	Consider ways to support and build capabilities of suppliers to improve performance and conform to company supply chain policy.
I.D.4	Commit to designing measurable improvement plans with suppliers with the involvement, if relevant and where appropriate, of local and central governments, international organisations and civil society when pursuing risk mitigation.

Engaging with Suppliers

1. Please describe your company relationship with suppliers who are subject to due diligence.
 - Generally one-off contracts (under 3 months)

- Seasonal and/or short term (under 1 year)
 - Long term relationships (more than 1 year, or multi-year relationships)
2. Have you communicated your policy on minerals from conflict areas to your suppliers?
- Not applicable (We do not have a policy on minerals from conflict areas policy.)
 - Yes, we have communicated as part of our external communication process.
 - Not yet, but we plan to. (If so, please tell us when – year)
3. With which suppliers do you communicate?
- Tier 1
 - Tier 2
 - Tier 3
 - Beyond Tier 3
- a. If yes, what have you communicated?
- Company's policy expectations
 - Expectations on information collection and sharing
 - Expectations on communicating with their suppliers
 - SEC requirements
 - Other (please explain): _____
4. What methods have you used to communicate to your suppliers on minerals from conflict areas?
- Letters sent directly to suppliers
 - Through industry associations
 - Other (please specify, e.g. supplier workshops): _____

Contracts

1. Have you incorporated a policy on minerals from conflict areas into your contractual relationships? Since when? (please describe and provide examples)
2. Do you plan to track corrections and close/complete improvement plans if/when remediated?
- Yes, please explain
 - No
 - Not applicable
3. Do you have improvement plans/corrective action plans in place regarding minerals from conflict areas?
- Yes
 - No
 - Not applicable (if N/A, why?)
- Provide any comments: _____
4. Which departments are involved in defining and tracking improvement/corrective action plans with suppliers? (please check all that apply)
- Procurement
 - Internal audit
 - Quality
 - Finance
 - Other (please specify): _____

Discussion Questions

1. How do you choose which suppliers to communicate with regarding minerals from conflict areas?

- Bill of materials
- Product category
- Known suppliers of tin, tantalum and tungsten
- We talk to all of our 3T suppliers.
- We do not communicate with our 3T suppliers on minerals from conflict areas.
- Other (please describe): _____

2. Have you participated in capacity building efforts with your suppliers? If yes, was it to better understand your: (check all that apply)

- Policy?
- Company expectations?
- Information collection and sharing tools?
- Communicating efforts to their suppliers?
- SEC requirements?
- Other (please explain): _____

3. Please provide examples of how you help support and build capabilities of suppliers to improve performance and conform to supply chain policies.

4. What collaborative processes have you used to help with these elements? (e.g. tools developed in collaboration with peer companies or business partners)

5. What specific challenges in developing or implementing the collaborative method would you outline? What are areas for improvement?

I.E	Establish a company-level, or industry-wide, grievance mechanism as an early-warning risk-awareness system.
I.E.1	Develop a mechanism allowing any interested party (affected persons or whistle-blowers) to voice concerns regarding the circumstances of mineral extraction, trade, handling and export in a conflict-affected and high-risk area. This will allow a company to be alerted of risks in its supply chain as to the problems in addition to the company fact and risk assessments.
I.E.2	Provide such a mechanism directly, or through collaborative arrangements with other companies or organisations, or by facilitating recourse to an external expert or body (i.e. ombudsman).

Grievance Mechanism

1. Do you have a grievance mechanism available to report any problems/non-conformance regarding your policy on minerals from conflict areas?
 - Yes
 - No
 - Not applicable
 - a. If yes, please describe the grievance mechanisms in place
 - Toll free number
 - Direct contact point
 - Whistle blower access
 - Ombudsman
 - Other (please describe): _____

Access

2. Is the availability of your grievance mechanism publicly communicated?
 - Yes
 - No
 - Not applicable

Discussion Questions

1. Have you used collaborative approaches to help develop a grievance mechanism?
2. Were there any challenges in developing or implementing the collaborative method?
3. What are areas for improvement?

Step II: Identify and Assess Risk in the Supply Chain.

II.A	Identify, to the best of their efforts, the smelters/refiners in their supply chain.
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Mapping the Supply Chain

1. What efforts have you used to identify the smelters/refiners in your supply chain?
 - Direct communications with the companies' immediate suppliers and sub-suppliers (please provide details)
 - Incorporated (confidential) supplier disclosure requirements into supplier contracts (please provide details)
 - Specify to direct suppliers the smelters/refiners that meet the requirements of the OECD Guidance (please provide details)
 - Utilize electronic information-sharing systems on suppliers and/or through industry wide schemes to disclose upstream actors in the supply chain (please provide details)
 - Other (please describe): _____

2. Have you identified any smelters/refiners in your supply chain?
 - Yes
 - No (please describe why)
 - a. If yes, what tools or methodologies were used to identify the smelters/refiners in your supply chain?
 - b. If yes, please provide details on the challenges you faced in identifying those smelters/refiners and how the company dealt with those challenges (e.g. balancing confidential and proprietary information with the need to identify and evaluate the due diligence of smelters/refiners).
 - c. If yes, what percentage of your tin, tantalum or tungsten supply base do those identified smelters/refiners represent? (please provide your best estimate)
 - d. If yes, in what percentage of your total products containing tin, tantalum and/or tungsten have the smelters/refiners been identified? (please provide your best estimate)
 - < 5%
 - 6% - 15%
 - 16% - 30%
 - 31% - 50 %
 - 51% – 75%
 - > 75%

II.B	Identify the scope of the risk assessment of the mineral supply chain.
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Red flag locations of mineral origin and transit:

The minerals originate from or have been transported via a conflict-affected or high-risk area.



The minerals are claimed to originate from a country that has limited known reserves, likely resources or expected production levels of the mineral in question (i.e. the declared volumes of mineral from that country are out of keeping with its known reserves or expected production levels).



The minerals are claimed to originate from a country in which minerals from conflict-affected and high-risk areas are known to transit.

Supplier red flags:

The company's suppliers or other known upstream companies have shareholder or other interests in companies that supply minerals from or operate in one of the above-mentioned red flag locations of mineral origin and transit.



The company's suppliers' or other known upstream companies are known to have sourced minerals from a red flag location of mineral origin and transit in the last 12 months.

Targeting Risk Assessment to Smelters Triggered by Red Flags

1. Have you obtained initial information from the identified smelters/refiners in your supply chain on country of mineral origin, transit and transportation routes used between mine and smelters/refiners?
 - Yes
 - No
 - a. If yes, please provide details on how you have done so and the challenges you faced in obtaining that information.
 - b. If no, why not?
2. What process do you use to verify countries of mineral origin and transit in the supply chain of those smelter/refiners that have been identified?
3. Do you have a process to evaluate whether those countries, suppliers or smelters are triggered by the "red flags"?
 - Yes
 - No
 Provide any comments: _____

II.C

Assess whether the smelters/refiners have carried out all elements of due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.

Assessing the Due Diligence of Smelter/Refiner's Triggered by Red Flags

- Have you identified if smelters have carried out due diligence for conflict-free mineral supply chains?
- Yes
 - No (please describe why not)

If yes, have you cross-checked evidence of due diligence practices of the smelter/refiner against the supply chain policy and due diligence processes contained in the OECD Guidance. (Please provide examples of how you have reviewed each due diligence step (1-5) of the smelter.)

- A. What mechanisms do you use to verify smelter due diligence processes (e.g. self-assessment questionnaires; electronic tools and dashboards; external verifications and documentation reviews; interviews and/or other follow-up)

Have you participated in any capacity building (such as supplier training) efforts with/for identified smelters?

Did you use collaborative processes (ie. industry associations) to help with these elements?

- No
- Yes, which one?

II.D	Where necessary, carry out, including through participation in industry-driven programs, joint spot checks at the mineral smelters/refiner's own facilities.
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Conducting Spot Checks Smelters/Refiners

1. Has your company determined whether spot checks at the mineral smelters/refiners are necessary?
 - Yes
 - No
2. Have you already carried out spot checks at the mineral smelter/refiners?
 - Yes
 - No
3. Is the assessment team industry-based?
 - Yes
 - No
4. Please specify whether you have carried out joint spot checks through participation in industry-driven programs. (If so please list which programs.)

Discussion Questions

1. What were the tools or methodologies used to identify the specific smelters/refiners in your supply chain?
2. How did you identify potential risks associated with your smelters/refiners?
3. What challenges did you encounter identifying these risks?
Did you experience any challenges with collaborative efforts around assessing smelters/refiners' due diligence?
4. Did you encounter any difficulties when conducting spot checks at the smelters?
5. What specific areas for improvement would you call out?

Step III: Design and Implement a Strategy to Respond to Identified Risks

III.A	Report findings to designated senior management, outlining the information gathered and the actual and potential risks identified in the supply chain risk assessment
III.B	Devise and adopt a risk management plan.
III.C	Implement the risk management plan, monitor and track performance of risk mitigation, report back to designated senior management and consider suspending or discontinuing engagement with a supplier after failed attempts at mitigation.
III.D	Undertake additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.

Communicating the Risks

1. Is there a communication process that has been put in place to ensure that findings outlining the actual and potential risk are reported to designated senior management?
 - No process in place
 - Yes (please describe)

2. Please list the actual and potential risk categories that have been raised at the board or senior executive level in the last three years (2009-2011). (please check all that apply)
 - Serious abuses associated with the extraction, transport or trade of minerals
 - Risk management of serious abuses
 - Direct or indirect support to non-state armed groups
 - Risk management of direct or indirect support to non-state armed groups
 - Public or private security forces
 - Risk management of public or private security forces
 - Bribery and fraudulent misrepresentation of the origin of minerals
 - Money laundering
 - Payment of taxes, fees and royalties due to governments
 - Risk management of bribery and fraudulent misrepresentation of the origin of minerals, money-laundering and payment of taxes, fees and royalties to governments
 - Other (please describe)

Managing Risks

1. What is your company's approach to managing risk of sourcing from minerals from conflict areas? Please choose one.
 - Approach not yet defined
 - We use the model supply chain policy from Annex II of the OECD Guidance to determine whether the identified risks can be mitigated by continuing, suspending or terminating the relationship with suppliers.
 - We use our own company defined factors on risks. (please define)

2. How do you support your upstream suppliers in managing risk identified in the supply chain as a result of their due diligence process?
 - Provide capability-training to enable suppliers to conduct and improve due diligence performance within their supply chain

- Participate in industry membership organizations' supplier training/improvement programs to develop and implement due diligence capability-training modules in cooperation with relevant international organizations, NGOs, stakeholders and other experts.
 - Provide financial assistance to suppliers to participate in external trainings or industry available support (please describe)
 - Other (please describe)
3. Did you consult with local and central authorities, upstream companies, international or civil society organisations and affected third parties?
 - Yes (Provide examples of these consultations.)
 - No
 4. Please provide the approximate timeline of your risk management plan.
 5. Do you track the performance of risk mitigation?
 - We do this through a process already in place. (please specify)
 - We do not track performance. (please explain why)
 6. Do you conduct a risk assessment/follow-up once corrective plans/trainings have occurred?
 7. If you relied on the model policy to determine if and how identified risks with suppliers could be mitigated, please let us know what aspects were helpful, and what could be improved.

Discussion Questions
<ol style="list-style-type: none"> 1. Do you encourage industry membership organizations to develop and implement due diligence capacity training modules? Is this done in cooperation with relevant international organizations, NGOs, stakeholders and other experts? 2. What are the areas for improvement in collaborative organizations?

Step IV: Third-Party Audit of Smelters/Refiners' Due Diligence Practices

OBJECTIVE: To carry out an independent third-party audit of the smelter/refiner's due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas and contribute to the improvement of smelter/refiner and upstream due diligence practices, including through an institutionalised mechanism to be established at the industry's initiative, supported by governments and in cooperation with other stakeholders.

The OECD Guidance recommends that due diligence should take place at the smelter level only. The intention is that by focusing on audits at the smelter level, the number of audits across all tiers of the supply chain will be reduced over time, and ultimately save the industry time, money and energy. The Guidance does not suggest that downstream companies should necessarily conduct the audit themselves, but rather ensure that an audit of the smelter's due diligence has occurred, through collaboration with other supply chain partners.

IV.A	Plan an independent third party audit of the smelter/refiner's due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.
IV.A.1	The scope of the audit: The audit scope will include all activities, processes and systems used by the smelter/refiner to conduct supply chain due diligence of minerals from conflict-affected and high-risk areas. This includes, but is not limited to, smelter/refiner controls over the mineral supply chain, the information disclosed to downstream companies on suppliers, chain of custody and other mineral information, smelter/refiner risk assessments including the on-the-ground research, and smelter/refiner strategies for risk management.
IV.A.2	The audit criteria: The audit should determine the conformity of the smelter/refiner due diligence process against the standards and processes of this due diligence Guidance.
IV.A.3	The audit principles: Independence, Competence, Accountability
IV.A.4	The audit activities: Audit preparation, Document review, In-site investigations, Audit conclusions

1. Within your supply chain of tin, tantalum and tungsten, who conducts the audits of smelters?
 - We conduct smelter audits internally.
 - Our suppliers conduct the audit.
 - Our 3T smelters are part of the EICC/GeSI Conflict-Free Smelter Program
 - We rely on an industry initiative other than the Conflict-Free Smelter Program that conducts the smelter audit for its members (please name)
 - We do not know if our smelters are audited or by whom
 - Other (please describe): _____
2. If you **conduct your own audits of smelters**, please describe your approach:
 - Based on OECD Guidance
 - Company-own guidance (please describe)
 - 3rd party/Industry guidance (please describe)
 - Other (please describe): _____
3. If you **do not conduct your own audit of smelters**, how do you obtain information that the smelter within your supply chain provides conflict-free minerals?
 - Our suppliers provide us with validated audits/reports on the smelters in question.
 - We participate in an industry scheme which provides proof that the smelter is conflict-free. (Please describe which scheme and means of data sharing report, validated audit, certification scheme, etc.).
 - We do not have this information.
 - Other means (please describe): _____

4. If you **do not conduct your own audit of smelters but rely on 3rd parties**, do you know if these audits are based on:
 - OECD Guidance
 - Some other, independent/non OECD guidance (please describe or name)
 - We do not know what the 3rd party audit is based on.

5. What do you see as the biggest challenge for your company (companies like yours in general) in ensuring that smelters in the supply chain are conflict-free?

6. What would help you meet this recommendation of the Guidance?

IV.B	<p>Implement the audit in accordance with the audit scope, criteria, principles and activities set out above.</p> <p>Under current circumstances, all actors in the supply chain should cooperate through their industry organizations to ensure that the auditing is carried out in accordance with audit scope, criteria, principles and activities listed above.</p>
-------------	--

Step V: Report Annually on Supply Chain Due Diligence.

V.A	Annually report or integrate, where practicable, into annual sustainability or corporate responsibility reports, additional information on due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.
------------	---

1. Do you report publically on your due dilligence policies and practices?
 - Yes
 - No

2. How is information reported?
 - Annual Report
 - CSR/Sustainability report
 - Other report specific to conflict-free mineral sourcing
 - Published on company website
 - Internal documents only
 - Information is not reported

3. How frequently do you report?
 - Annually
 - Quarterly
 - Only when there is something to report
 - Information is not reported

4. What are the main areas for improvement in reporting on conflict-free mineral supply chains?

Wrap-up Questions

1. Are there other documents that we should obtain to help us better understand your company's efforts to ensure a responsible supply chain with regards to the 3Ts?
2. Is there anyone else from your company we should speak to? (please list name and contact number)

Process Improvement Questions (Help us make this Pilot useful for you)

3. What would be a useful outcome of this Pilot process?
4. We are considering hosting a company-only meeting to share learnings – would this be of interest to you to attend?
5. How can we improve the questionnaire, interviews?

Closing

Thank you for taking the time to complete this questionnaire and allowing us to speak with you. Please submit the completed questoinnaire to BSR by 5 September, 2011.

Next steps:

- Baseline report draft in late October/early November
- You are invited to the multistakeholder meeting on 3Ts in Paris (OECD) on 29-30 November 2011.

Do you have any questions for us?

Please contact:

Amaya Gorostiaga, BSR

Telephone: +33 1 46 47 28 02

Email: agorostiaga@bsr.org



**EICC Extractives website: (www.eicc.info/extractives.htm)
training, request template, FAQs, Conflict-Free Smelters (CFS) list**

Introduction

This conflict minerals reporting template was created by the Electronic Industry Citizenship Coalition® (EICC®) and the Global e-Sustainability Initiative (GeSI) as a common means for the collection of sourcing information related to “Conflict Minerals”. Companies may adopt this template as an element of their due diligence program to verify the responsible sourcing of materials and to support compliance to new legislation*. This template is consistent with EICC and GeSI’s related activities including the Conflict Free Smelter (CFS) Program**.

* In 2010, a U.S. federal law was passed concerning “Conflict Minerals” originating from the Democratic Republic of the Congo (DRC) or adjoining countries. By the end of 2011, the SEC is expected to publish final rules associated with the disclosure of the source of Conflict Minerals by U.S. publicly traded companies (see the proposed rules at <http://www.sec.gov/news/press/2010/2010-245.htm>). The proposed rules reference the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, (<http://www.oecd.org/dataoecd/62/30/46740847.pdf>), which guides suppliers to establish policies, due diligence frameworks, and management systems.

** See information on the EICC and GeSI Conflict-Free Smelter (CFS) Program (www.conflictreesmelter.org/) and other information (www.eicc.info/extractives.htm).

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Instructions for completing Company Information (rows 7 - 17).

Provide answers in ENGLISH only

Note: Entries with (*) are mandatory fields.

1. Insert your company's Legal Name. Please do not use abbreviations
2. Insert your companies unique identifier number or code (DUNS number, VAT number, etc)
3. Insert your full company address (street, city, state, country, postal code)
4. Please identify the authorized management representative responsible for the accuracy of the data in this template
5. Insert the authorized representative's Title, Email and Phone Number (as applicable)
6. If your company prefers a different contact person than the authorized representative, please input this contact person's name
7. Insert the Contact person's Email and/or Phone Number
8. Please enter the Date of Completion for this form using the drop down menus provided
9. Save the file name as: companyname-date.xls



Instructions for completing the five Due Diligence Questions (rows 20 – 46).

Provide answers in ENGLISH only

These five questions define the usage, origination and sourcing identification for each of the metals

For each of the five questions, fill in an answer for each metal using the pull down menus to select Yes, No or Unknown

Fill comments in the Comment sections as required to clarify your responses.

Note: If the answer for each metal in Question 1 is NO, then no further answers are required and your declaration is considered complete.

Instructions for completing Questions A. – K. (rows 53 - 73).

Provide answers in ENGLISH only

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas defines “Due Diligence” as “an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict”. Due diligence should be an integral part of your company’s overall DRC conflict free sourcing strategy. Questions A. thru K. are designed to assess your company’s DRC conflict-free minerals sourcing due diligence activities.

- A. Please answer “Yes” or “No”. Provide any comments, if necessary.
- B. Please answer “Yes” or “No” and provide the web link.
- C. Please answer “Yes” or “No”. Provide any comments if necessary. “DRC conflict-free” is defined in the US Dodd-Frank Wall Street Reform and Consumer Protection Act as “products that do not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country”.
- D. Please answer “Yes” or “No”. Provide any comments, if necessary.
- E. Please answer “Yes” or “No”. Examples of due diligence measures may include: communicating and incorporating into contracts (where possible) your expectations to suppliers on conflict-free mineral supply chain; identifying and assessing risks in the supply chain; designing and implementing a strategy to respond to identified risks; verifying your direct supplier’s compliance to its DRC conflict-free policy, etc. These due diligence measure examples are consistent with those of a recognized industry standard like the OECD Guidance.
- F. Please answer “Yes” or “No”. If “No”, please describe what you request your suppliers to complete (e.g., certificate of compliance, custom form, etc.).
- G. Please answer “Yes” or “No”. Provide any comments, if necessary.
- H. Please answer “Yes” or “No”. Provide any comments, if necessary.
- I. Please provide if and how your company verifies the responses provided by your suppliers. The “3rd party audit” refers to on-site audits of your suppliers conducted by independent third parties. “Documentation review only” refers to an audit of supplier submitted records and documentations conducted by independent third parties and, or your company personnel. “Internal audit” refers to on-site audits of your suppliers conducted by your company personnel.
- J. Please answer “Yes” or “No”. If “Yes”, please describe how you manage your corrective action process.
- K. Please answer “Yes” or “No”. The SEC disclosure requirements apply to US stock market-listed companies that are subject to the US Securities Exchange Act.

Instructions for completing the Smelter and Mine List Tab.

Provide answers in ENGLISH only

Note: Columns with (*) are mandatory fields

1. Metal (*) - Use the pull down menu to select the metal for which you are entering smelter information.
2. Smelter Name (*) - Fill in the name of all the smelters you identified that your company and its suppliers use. Use a separate line for each metal / smelter combination that you identified.

3. Smelter Facility Location (Street / City / Country) (*) - Fill in the city and the country where the smelter processes the minerals that enter your supply chain. This is the physical location of the smelter where the minerals are being processed. Do not list the headquarters of the company. Example: 12 Dutch Street / Amsterdam / Netherlands
4. Smelter Facility Contact Name - Fill in the name of the Smelter Facility Contact you worked with.
5. Smelter Facility Contact Email - Fill in the email address of the contact person at the smelter.
Example: John.Smith@SmelterXXX.com
6. Is this smelter on the EICC-GeSI CFS list? (*) - Fill in the metal that is being processed by the smelter. Select one metal from the drop down menu. If the smelter is providing two or more metals, then use a separate line for each metal.
The latest version of the CFS list is published on the EICC and GeSI website, click on: [\[link to EICC/GeSI Conflict Free Smelter \(CFS\) list on website\]](#) at top of Smelter and Mine List tab. Check whether the smelter is included on the CFS list and choose your answer from the drop down menu.
7. Proposed next steps, if applicable - Provide the actions you will take with the smelter if the facility is not listed on the EICC-GeSI CFS list.
Example: request smelter facility to be assessed through the CFS program, remove from preferred supplier list, etc.
8. Name of Mine(s) or if recycled or scrap sourced, state "recycled" or "scrap" - Provide the name of the mine that extracted the metal noted in column B. If the metal was provided from "recycled" or "scrap" sources, note which (scrap or recycled) in the field provided. See definitions for "recycled" and "scrap"
9. Location (Country) of Mine(s) or if recycled or scrap sourced, state "recycled" or "scrap" - In the field provided, identify the country in which the mine is located. Example: Australia. If the metal was provided from "recycled" or "scrap" sources, note which (scrap or recycled) in the field provided. See definitions for "recycled" and "scrap"
10. Product Category that uses the metal - In the field provided, identify the product category that contain the metal listed in column J. The product category would be the product you manufacture or assemble for your customers. Example: motherboards, keyboards, resistors, CPU, capacitors, etc.
11. Additional Product Detail - In the field provided, list additional details of the product shipped to your customers. Example: product numbers, purchase part number, product family, description, etc.

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ITEM	DEFINITION
Adjoining Country	Countries that share an internationally recognized boarder with the Democratic Republic of Congo. Note: The CFS Program also includes Kenya as an adjoining country.
CFS Compliant List	Conflict-Free Smelter Assessment Program Compliant List. A list of smelters that are compliant to the CFS protocol. The list can be found here: (http://www.conflictreesmelter.org/)
CFS Program	Conflict-Free Smelter Assessment Program. Further details on the CFS Program can be found here: (http://eicc.info/documents/Conflict-FreeSmelterFAQ.pdf)
Conflict Mineral	Tantalum, tin, tungsten and gold. Source: 2010 United States legislation, Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502 ("Dodd-Frank") (http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf)
Conflict Mineral Free Policy	A company-wide policy on the responsible and ethical sourcing of Conflict Minerals.
Dodd-Frank	2010 United States legislation, Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502 ("Dodd-Frank") (http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf)
DRC	Democratic Republic of Congo
DRC Conflict-Free	Is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Source: 2010 United States legislation, Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502 ("Dodd-Frank") (http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf)
EICC	Electronics Industry Citizenship Coalition (www.eicc.info)
GeSI	Global e-Sustainability Initiative (www.gesi.org)
Gold Smelter	A metallurgical operation that produces fine gold with a concentration of 99.5% or better from gold and gold-bearing materials with lower concentrations
OECD	Organization for Economic Co-operation and Development
Recycled and Scrap Materials	Conflict Minerals are considered "recycled" that are reclaimed end-user or post-consumer products, but not considered "recycled" are minerals that are partially processed, or a byproduct from another ore. Source: SEC Proposed Rules (http://www.sec.gov/rules/proposed/2010/34-63547.pdf)
SEC	Security Exchange Commision (www.sec.gov)

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Smelter	A company that procures and processes mineral ore, slag and or recycled materials & scrap into refined metal or metal intermediate products. The output can be pure metals, powders, ingots, bars, oxides or salts.
Tantalum Smelter	A company that produces tantalum powder, tantalum wire, tantalum oxide powder, pure tantalum ingot, K ₂ TaF ₇ (K-Salt) or tantalum bars.
Tier Level	An automatically calculated field in the Smelter Mine Tab to indicate the levels in the supply chain that this smelter is being used. The automatic functionality will only work with EICC-GeSI template and dashboard tools.
Tin Smelter	A company procuring tin concentrates, crude tin, tin scrap or secondary tin material for conversion to refined or crude tin in the form our ingots or bars.
Tungsten Smelter	A company that converts W ore, W concentrate, or W recycle or scrap material into Ammonium Para-Tungstate (APT). Tungsten smelters often produce subsequent products from APT, such as blue tungsten oxide, yellow tungsten oxide, pure tungsten metal or tungsten-carbide metal.

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Conflict Minerals Reporting Template

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The purpose of this document is to collect sourcing information on tin, tantalum, tungsten and gold used in products

Mandatory fields are noted with an asterisk (*). The information collected in this template should be updated annually. Any changes within the annual cycle should be provided to your customers

Company Name (*):			
Company Unique Identifier:			
Address:			
Authorized Management Representative (*):			
Representative Title:			
Representative Email (*):			
Representative Phone:			
(If different than representative named above) Contact Name (*):			
Contact Email (*):			
Contact Phone:			
Date of Completion (*):	Day: (*)	Month: (*)	Year: (*)

1) Are any of the following metals necessary to the functionality or production of your company's products that it manufactures or contracts to manufacture? If no for all metals, you are done with this survey. (*)

	Answer	Comments
Tantalum (Ta) (*)		
Tin (Sn) (*)		
Gold (Au) (*)		
Tungsten (W) (*)		

2) Do the following metals (necessary to the functionality or production of your company's products) originate from the DRC or an adjoining country? (*)

	Answer	Comments
Tantalum (Ta) (*)		
Tin (Sn) (*)		
Gold (Au) (*)		
Tungsten (W) (*)		

3) Do the following metals (necessary to the functionality or production of your products) come from a recycler or scrap supplier? (*)

	Answer	Comments
Tantalum (Ta) (*)		
Tin (Sn) (*)		
Gold (Au) (*)		

Tungsten (W) (*)		
-------------------------	--	--

4) Have you identified all the smelters your company and its suppliers use to supply the following metals? (*)

	Answer	Comments
Tantalum (Ta) (*)		
Tin (Sn) (*)		
Gold (Au) (*)		
Tungsten (W) (*)		

5) Are all of the smelters your company and its suppliers use on the EICC-GeSI Conflict-Free Smelter (CFS) list for the following metals? (*)

	Answer	Comments
Tantalum (Ta) (*)		
Tin (Sn) (*)		
Gold (Au) (*)		
Tungsten (W) (*)		

Answer the Following Questions:

	Answer	Comments and Attachments
A. Do you have a policy in place that includes DRC conflict-free sourcing? (*)		
B. Is this policy publicly available on your website? (*)		
C. Do you require your direct suppliers to be DRC conflict-free? (*)		
D. Do you require your direct suppliers to source from smelters validated as DRC Conflict-Free using the EICC-GeSI Conflict-Free Smelter (CFS) list? (*)		
E. Have you implemented Conflict Minerals sourcing due diligence measures? (*)		
F. Do you have completed Conflict Minerals reporting templates from all your suppliers? (*)		
G. Do you request your suppliers to fill out this Conflict Minerals reporting template? (*)		
H. Do you request smelter names from your suppliers? (*)		
I. Do you verify Conflict Mineral Responses from your suppliers? (*)		
J. Does your verification process include corrective action management? (*)		
K. Are you subject to the SEC disclosure requirement rule? (*)		

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Conflict-Free Smelter Program: Smelter Introductory Training and Instruction Document

Revision: 16 July 2012

Note: Items highlighted in **RED** are changes from the previous version.

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This document and other materials related to the Conflict-Free Smelter Program can be found at www.conflictreesmelter.org.

Contact info@conflictreesmelter.org for more information on the Program or information contained on the CFS Program site.



ACRONYMS

3T	Tin, tantalum, tungsten
ASM	Artisanal and small scale mining
BGR	German Federal Institute for Geosciences and Natural Resources (Bundesanstalt für Geowissenschaften und Rohstoffe – BGR)
CTC	Certified trading chain
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act
DRC	Democratic Republic of Congo
EICC®	Electronic Industry Citizenship Coalition®
GeSI	Global e-Sustainability Initiative
GLR	Great Lakes Region of Africa
ICGLR	International Conference on the Great Lakes Region
ITRI	Tin industry association
iTSCi	ITRI Tin Supply Chain Initiative
NGO	Nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
PAC	Partnership Africa Canada
PPA	Public-Private Alliance for Responsible Minerals Trade
RCM	ICGLR's Regional Certification Mechanism
SEC	U.S. Securities and Exchange Commission
UN	United Nations



Conflict Minerals and the Conflict-Free Smelter Program

Minerals are one of the resources in the Congo that are being exploited to partially fund ongoing conflict between armed militias in the eastern provinces of the Democratic Republic of the Congo (DRC). However, companies cannot alone bring about peace, increase regional governance, or ensure security in the region. All actors in the regions – the governments, industry, civil society, and the citizens themselves – have a role to play in bringing about lasting stability in the region. EICC and GeSI members use tantalum, tin, tungsten and gold in their products. Regardless of the amount of these minerals being used, EICC and GeSI members are concerned about the minerals being used to generate revenue for illegal armed militias and are committed to taking action by developing tools and programs to help enable companies to source conflict-free minerals from the DRC.

One such program is the Conflict-Free Smelter (CFS) Program. The CFS Program, developed by the EIC and GeSI, is a voluntary initiative in which an independent third party audits smelter/refiner procurement and tolling activities and determines if the smelter or refiner demonstrated that all the minerals¹ they processed originated from conflict-free sources. The program aims to enable companies to source conflict-free minerals.

The CFS is a global program. Audits are conducted for any smelter or refiner that is processing minerals and wants to be identified as conflict-free. The smelters and refiners are globally distributed, located in such countries as Australia, Canada, China, Indonesia, Japan, Malaysia, Russia, United States, and others.

The CFS Program publishes the list of smelters and refiners who have been found compliant to the CFS Program protocol, on the publically available CFS Program website (www.conflictreesmelter.org). The CFS Program updates the list periodically with additional names of smelters/refiners that were shown to be compliant since the last posting of the list.

Any smelter or refiner may participate in the CFS program and potentially be found compliant with the CFS Program protocol. Participating in the CFS Program: 1) provides downstream customers with verified information about the smelter's/refiner's sourcing activities, 2) assists smelters/refiners in demonstrating conformance to the OECD Due Diligence Guidance, 3) assists downstream companies in meeting Dodd-Frank reporting requirements, and 4) enables downstream companies to source conflict-free minerals which helps to remove the incentive for violence in the Democratic Republic of the Congo (DRC). Participating in the CFS Program is one potential way of helping to assure your customers that the metal(s) you supply are conflict-free. Downstream customers can use the CFS compliant smelter/refiner list as a reference source for due diligence information on their mineral supply-chain.

¹ The term "conflict mineral" is defined in Section 1502(e)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC countries.

How does the Conflict-Free Smelter Program work?

The CFS program consists of a review at a smelter's or refiner's site(s) and evaluates the following two concepts:

Business Process Review

- Evaluate company policies and/or codes of conduct relating to conflict minerals
- Evaluate how the policies are incorporated in management and procurement procedures

Material Analysis Review

- Conduct a complete material analysis to demonstrate that all sources of materials procured by the smelter/refiner site are conflict-free
- Evaluate whether source locations are consistent with known mining locations
- Establish whether material identified as "recycled or scrap" meets the definition of secondary material

The CFS Program estimates the time it takes for a mineral to flow through the entire supply chain from ore extraction to delivery of a finished consumer electronic item is approximately nine months. It could take longer for electronic items that are components of other products. Due to the length of time in the supply chain, the CFS Program believes it is imperative to audit one year of smelter sourcing records. Similarly, all smelter/refiner participants of the CFS Program will need to complete an annual re-audit to verify continued compliance to the Program protocol and maintain inclusion of their company name on the publically available list of smelters and refiners that have been found to be compliant to the CFS Program protocol. Any change in re-audit standards or frequency will be communicated to all CFS Program participants upon implementation of such changes.

All smelter/refiner sites within a particular company/organization will need to submit to an audit and be found compliant before that company/organization will be included on the CFS compliant smelter/refiner list. Compliance determination is unique to each metal a smelter/refiner produces and therefore there will be a separate CFS compliant list for each metal (tantalum, tin, tungsten and gold).

A CFS Program audit of a smelter or refiner consists of three main phases (typical timeline for each phase is noted):

1. Pre-audit activities (7-14 calendar days)
2. Audit Activities (15-45 calendar days which includes 3-5 calendar days per smelter/refiner facility for on-site third party audit)
3. Post-Audit Activities (if needed, up to 90 calendar days)

The following schematic includes additional details regarding the audit process.



These phases are discussed in even more detail in the sections below. A detailed process flow is in [Appendix B](#).

Pre-Audit Activities

What is a smelter/refiner pre-audit visit?

EICC and GeSI member company representative(s) can, at the request and/or agreement of the smelter/refiner, travel to a smelter/refiner site to complete a pre-audit visit. The pre-audit visit provides a valuable opportunity for the EICC and/or GeSI representative and the smelter/refiner to have a face to face exchange of information regarding conflict minerals. As downstream² companies, EICC and/or GeSI representative see the pre-audit visits in line with Step 2 of the OECD Guidance³. Smelters and refiners find it a useful and efficient way to obtain information about the CFS Program and its compliance requirements.

The pre-audit visit activities are intended to:

- Understand the smelter/refiner operations at that company's site(s)
- Understand the smelter's/refiner's ability to trace materials from their factory back to the mine of origin
- Understand generally the smelter's/refiner's current sources for incoming materials
- Provide an initial review of the smelter/refiner's ability to meet the compliance expectations of the CFS program and provide suggestions on ways to close gaps prior to a CFS Program audit
- Understand if the smelter/refiner is willing to participate in the CFS Program
- Establish a CFS Program contact person for the smelter/refiner to receive answers to follow-up questions regarding the CFS program

A pre-audit visit typically takes one day to complete. The pre-audit visit is a complimentary service provided by EICC and/or GeSI member company representative(s).

² Downstream refers to any company beyond the smelter/refiner who incorporates any of that smelter's/refiner's tin, tantalum, tungsten or gold metal-bearing product into the company's manufactured products. This also includes and companies who re-sell those tin, tantalum, tungsten or gold metal-bearing products within the manufacturing portion of the supply chain.

³ See Step 2, section II, C, 4 of "The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas." From the OECD webpage http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html.



Results of a pre-audit visit will not be used to determine a smelter's/refiner's compliance to the CFS Program protocol and is not part of the actual CFS Program audit which must be completed by an approved third party auditor.

What documents need to be completed before the CFS Program audit?

There are three documents that must be completed before a CFS Program audit takes place:

1. The CFS Audit Program Manager (APM) will work with the smelter/refiner to gain signatures on the Non-Disclosure Agreement (NDA, or also termed the AECI⁴) and the Auditee Agreement. If needed, a smelter/refiner and the CFS APM may negotiate alternative terms within this document to ensure the necessary legal protections exist for both parties. Both documents are required before the next step of the process that includes sharing of smelter/refiner company and procurement details. The smelter/refiner is also welcome to initiate a separate NDA with the third party auditor if required by the smelter/refiner.
2. The smelter/refiner must also complete the Pre-Audit Checklist which defines their operations' breadth, products and complexity. The audit firms use this document to provide a bid for completing the audit.
3. The last document is the Line-Item Summary that includes documentation of the procurement and incoming materials transactions for the full audit period as well as the inventory estimates. The auditors use this information during the onsite audit to reconcile the mass balance. The Line-Item Summary must be provided to the auditor at least two (2) weeks prior to commencing the onsite audit.

What is the cost of a CFS Program audit?

Smelters/refiners that choose to participate in the CFS Program fund the costs associated with the audit. Audit costs range, on average, from \$5 000 USD - \$10 000 USD per smelter/refiner site and largely depends on the number and complexity of procurement activities. The audit fee covers the third party auditor's time to review company-specific documentation and travel expenses to the smelter/refiner site(s).

A smelter/refiner can minimize their audit costs by properly preparing and ensuring all required documentation is available during the on-site audit. This reduces the time auditors are present at the facility reviewing the sourcing documentation. Additional audit costs may be incurred if the auditor has follow-up questions after the on-site audit or if a second visit is required to review additional documentation.

There are currently three third party audit firms, each with global operations that are approved to conduct CFS Program audits. The CFS Program uses multiple audit firms to create a cost competitive audit program and using regional auditors minimizes auditor travel costs. Using a small number of audit firms is currently seen as a benefit to establishing auditor consistency during the early phases of Program. The CFS Program expects to institute an auditor accreditation program to facilitate auditor standards as the program and auditor base expands.

⁴ AECI - Agreement for Exchange of Confidential Information is the EICC's title for its non-disclosure agreement document (NDA).

A fund⁵, the Early Adopters Fund, has been established as an incentive for participating in the CFS Program. Smelters/refiners who are found CFS compliant can request a rebate from the fund to offset a portion of their third party audit costs of a first-year audit.

How is the audit firm selected for a specific audit?

The CFS Audit Program Manager (APM) selects the auditor team based on availability, with an attempt to use auditors that are closest in vicinity to the smelter/refiner site(s) and are fluent in the predominant language for that particular region.

Based on the Pre-Audit Checklist, the CFS APM will choose which audit team is best suited to complete the audit based on location and language, and will provide an audit cost quotation back to the smelter/refiner. The CFS APM will notify the smelter/refiner when an auditor has been selected and will provide the necessary auditor contact information. Once selected, that same auditor team will be used to audit all sites for a particular smelter/refiner.

How is an audit scheduled, and what is the typical audit duration and agenda?

Smelters/refiners schedule directly with the auditors to complete the audit. Auditors will travel to the smelter/refiner facility to review the smelter/refiner performance to the CFS Program audit protocol. Typical on-site audit duration is 3-5 business days but is ultimately dependent on the total volume of smelter/refiner documentation requiring review to determine the company's program compliance. A typical agenda for the on-site audit includes:

- *Opening meeting and Management Review:* review the purpose, scope, and methodology of the audit with the facility management team; identify key smelter/refiner personnel who will assist throughout the audit process
- *Facility Tour:* conduct an entire walkthrough analyze the processes, storage, receiving and shipping including a physical inventory check of on-site and off-site storage warehouses
- *Documentation Review:* review the smelter/refiner conflict minerals policy and its usage within management and procurement procedures; conduct a mass balance review (including total material receipts, current inventory, and sales volumes), validating recycled/scrap purchases, ore, concentrate and other non-recycled/scrap material source documentation
- *Closing meeting and Management Review:* communicate audit results to the facility management including recap of the audit findings and non-compliances found during the assessment

Audit Activities

An auditor will assess the following during the onsite audit:

- 1) Conflict minerals policy
- 2) "Mass balance" of materials

⁵ See <http://www.resolve.org/wp-content/uploads/2012/04/CFS-Early-Adopters-Fund-Launch-Press-Release-FINAL.pdf> for more information, or contact RESOLVE (Beth Weaver, bweaver@resolve.org or Stephen D'Esposito, sdesposito@resolve.org) on the incentive eligibility and request process.

3) Procurement and incoming materials documentation

These three items are covered in more detail in the following sections.

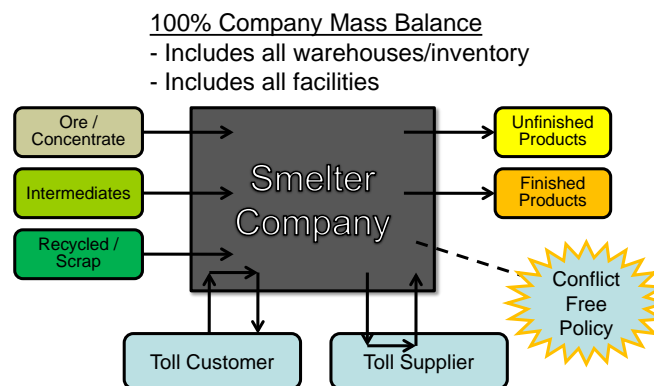
Conflict Minerals Policy

The smelter/refiner must have a documented, effective and communicated policy for procurement of materials that explicitly avoids utilization of minerals from a conflict source. Specifically the policy must include:

- Tin/tungsten/tantalum/gold containing materials
- Conflict regions
- Public communication of the policy
- Policy embedded into standard operating procedures and those individuals that use the SOP are trained on the policy
- Effective date of the policy
- For those companies sourcing from Level 2B and Level 3 countries, their sourcing policy must conform to Annex II of the OECD Guidance for tin, tantalum and tungsten⁶ and gold⁷.
- For those companies sourcing tantalum, the policy must additionally cover adherence to international transportation regulations (class 7) due to the possible radioactivity of the metal.

"Mass Balance" of Materials

During an audit, an auditor calculates a "mass balance" by summing all the inputs (starting inventory + material receipts) minus all the outputs (product shipments and losses). This mass balance difference needs to be within $\pm 10\%$ of the closing inventory. This check on the amounts purchased/processed/sold during the one (1) year period of the review forms the basis of the audit.



⁶ A smelter's 3T's conflict minerals policy should be in compliance with requirements of the *OECD Due Diligence Guidance for Responsible Supply Chains on Minerals from Conflict-Affected and High-Risk Areas and Supplement on Tin, Tantalum and Tungsten* (http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html).

⁷ A refiner's Gold conflict minerals policy should be in compliance with requirements of the *OECD Due Diligence Guidance for Responsible Supply Chains on Minerals from Conflict-Affected and High-Risk Areas: Final draft Supplement on Gold v3.0* (http://www.oecd.org/document/60/0,3746,en_2649_34889_49137660_1_1_1_1,00.html).

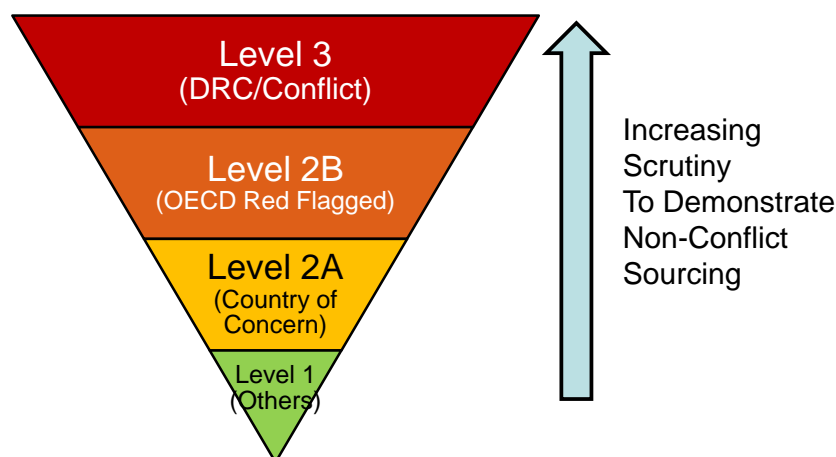
In preparation for the mass balance activity, the smelter/refiner must accurately document their inventory and procurement information for all incoming materials and list in the Line-Item Summary. They must also document their product shipment and loss information so the auditor can complete the mass balance calculation efficiently.

Further mass balance details and explanation can be found in the metal-specific CFS audit protocol which can be found on the CFS Program website (<http://www.conflictreesmelter.org>).

Procurement Documentation

What are the general Audit documentation expectations?

Documentation requirements have been separated into four (4) levels depending on the minerals country of origin. Countries have been separated as depicted in the diagram below.



Each level requires increasing documentation as the source of the mineral/metal approaches countries known to have conflict sources. If the mineral source is stated to be from a country not known to produce a particular mineral, further scrutiny is applied.

How does the CFS Program define the four country levels?

The four country levels are:

- **Level 1:** countries with known active ore production that are not identified as conflict regions or plausible areas of smuggling, or export of conflict minerals. (e.g. China or Indonesia for tin, China or Russia for tungsten, Australia or Brazil for Tantalum, China or South Africa for Gold)
- **Level 2A:** known or plausible countries for export out of region, smuggling, or transit of conflict minerals. (e.g. Kenya for tin/tungsten/tantalum, Kenya or United Arab Emirates for Gold)
- **Level 2B:** the nine countries adjoining the DRC which have been outlined in section 1502 in the Dodd Frank Act.

- **Level 3:** ore sources for countries currently within conflict regions that are potentially supplying ore materials.

Note that different metals have different known export routes out of Level 2B and Level 3 countries and therefore the lists of countries-of-concern differ by metal (see Level 2A). Procurement from any company-of-concern (e.g. identified in U.N. Group of Experts reports) may lead to greater scrutiny of documentation on exact source of the material. Finally, note that the country lists are not applicable to secondary materials as identification of ore source is not required. Documents on secondary materials sourced from Level 2B and 3 countries will be scrutinized 100% instead of randomly sampled for verification as recycled/scrap material.

The specific document requirements for each level are contained in the CFS audit protocol specific to the metal. The audit protocols can be found on the CFS website (<http://www.conflictreesmelter.org>). If a smelter/refiner is having difficulty obtaining the necessary documents from a Trader due to business confidentiality concerns, the smelter/refiner may request the trader send the documents directly to the CFS auditor for review.

NOTE: In the forthcoming versions of the CFS Program audit protocols that will be published in Summer 2012, the four (4) country level system will be consolidated into three (3) levels: Level 1, Level 2, and Level 3. In this framework, Level 2B and Level 3 will be collapsed into a single level (Level 3) and Level 2A will be relabeled to Level 2. Within Level 3, Sudan will be replaced with South Sudan as it is now the adjoining country to the DRC. Contact info@conflictreesmelter.org with any questions.

What other types of documentation exist?

The following section lists some other types of documentation that may be required.

- **ASM Sourcing Documentation**
For artisanal and small-scale mining (ASM), it may not be possible to trace back to the mine of origin, feasible to make on-site visits, or to obtain documentation normally only relevant to large scale mines, such as site assays and concession licenses. For all ASM sourcing, smelters/refiners should obtain a declaration of country region of origin from their supplier to supplement needed export documents. As with other sources, the documentation requirements for ASMs are defined by the country's level.
- **Secondary Material Documentation**
Secondary materials are generally defined as recycled or scrap materials. Recycled materials as defined by the *OECD Guidance*⁸ are “reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing including: excess, obsolete, defective, and scrap metal materials which contain refined or processed metals that are appropriate to recycle in the production of tin.” In addition, “minerals partially processed, unprocessed or a by-product from another ore are not recycled metals.”⁹

⁸ *OECD Due Diligence Guidance for Responsible Supply Chains on Minerals from Conflict-Affected and High-Risk Areas* [http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html]

⁹ The recycled materials definition contained within this document will be updated upon the publication of the SEC rule provisions on conflict minerals.

Buying and selling of secondary and process by-product materials¹⁰ are specific by metal industry but may represent a significant percentage to a smelter's/refiner's business in both value and total inputs/outputs. In some cases, secondary material purchases may account for thousands of procurement transactions. It is therefore important to include all secondary materials into the mass balance calculation and document each in the Line-Item Summary. The auditors will both (1) physically validate that scrap and recyclable inputs meet the definition as such and (2) where appropriate, use a random sampling process to audit secondary material input transactions (as defined in the CFS Program audit protocols).

What happens once the on-site audit is completed?

At the conclusion of the onsite CFS Program audit, the auditor will create an audit summary report and deliver it to the smelter/refiner and the CFS Program Audit Review Committee (ARC). The ARC reviews the report and the auditor's testimony to the ARC. Together, the auditor and the ARC review the auditor's work to agree on the auditor's compliance recommendation of the smelter/refiner.

The ARC's audit review process consists of the following steps:

- The CFS Audit Program Manager (APM) distributes the completed audit report to ARC members for pre-reading
- The auditor presents the audit report to the ARC for review during its weekly meeting
- ARC members vote the auditor's recommendation of the smelter/refiner compliance to the CFS Program audit protocol and make a final determination of compliance to the CFS Program protocol
- If the smelter/refiner is found to be compliant with the CFS Program protocol, the CFS APM drafts and sends a Compliance Letter and the company will be added to the publically available CFS compliant smelter/refiner list.
If the smelter/refiner is found not to be compliant with the CFS Program protocol, the APM drafts and sends a Non-compliance Letter. This letter includes findings and if relevant, possible solutions or corrective actions (see Post Audit Activities).

Note: All smelter/refiner sites within a particular company/organization will need to submit to and pass an audit before that company/organization will be included on the CFS compliant smelter/refiner list. Additionally, compliance determination is unique to each metal a smelter/refiner produces.

Post-Audit Activities

Post-Audit activities are required for those smelters/refiners that have not demonstrated effective compliance to the audit protocol during the initial audit visit. In this situation, the smelters/refiners are required to complete follow-up actions to be eligible for compliance to the CFS Program protocol.

The post-audit activity may require a second auditor visit to confirm that corrective actions have been implemented. However, some audit corrective actions can be evaluated remotely when

¹⁰ Refer to the Conflict-Free Smelter program Audit Standard and Instruction Documents (<http://www.conflictreesmelter.org/CFSAuditStandardandInstructionDocuments.htm>) for further industry specific descriptions for secondary and process by-product information.



there are simple documentation gaps and where documents can be easily transmitted and confirmed electronically. Additional auditor charges may be incurred during post-Audit activities.

If the auditor determines the gaps are satisfactorily addressed, the ARC will again vote to confirm the auditor's recommendation and if applicable, the CFS Audit Program Manager (APM) will issue the smelter/refiner a Compliance Letter.

All post-audit activities must be completed within 90 calendar days from the date of issuance of the Non-compliance Letter.

Audit Gap Closure

If the auditor and ARC determine the smelter/refiner has not fully demonstrated compliance to the CFS Program protocol, the auditor and ARC will identify items where compliance was not properly demonstrated (gaps) and the ARC will issue a Non-compliance Letter that will include a brief explanation of additional information needed to determine compliance. All findings of non-compliance during the audit will be noted in the Non-compliance Letter issued to the smelter/refiner. If the ARC determines the smelter/refiner is not compliant to the CFS Program protocol:

- The smelter/refiner must provide the necessary supplemental information (in accordance with the Non-compliance letter) to the auditor within 60 calendar days of issuance of the Non-compliance Letter as a means to address the identified gap(s).
- The remaining 30 calendar days of the 90 day gap closure timeline is allocated for the auditor to review and validate the provided supplemental information and subsequent review by the ARC. If necessary, an auditor may be required to complete an additional on-site visit (at the smelter's/refiner's expense) to review the supplemental information and resolve the identified gaps.
- If the gaps are resolved and the smelter/refiner subsequently meets the requirements of the CFS Program protocol per the recommendation of the auditor and determination by the ARC, a Compliance Letter is issued to the smelter/refiner.
- If the smelter/refiner that has a repeat non-compliance issue identified, or was unable to complete closure on open items within the 90 day post audit mitigation period, the smelter/refiner will be deemed as non-compliant and will be exempted from participating in the CFS Program for a period of six months. A smelter/refiner may request an audit at the conclusion of the six month exemption period.
- If at the end of the 90 day post-audit time period the ARC concludes the smelter/refiner remains non-compliant to the CFS Program protocol but the smelter/refiner does not agree with that conclusion, the smelter/refiner may challenge the non-compliance conclusion by filing a written request of exception to the ARC via the APM.

General Information about a CFS Program Audit

How does the CFS Program processes protect a smelter's/refiner's information?

The protection of identifiable and confidential materials is very important to the EICC and GeSI. To address this concern, there are processes in place within the CFS Program to secure confidential information, including:

- Non-Disclosure Agreements (NDAs), also known as AECIs¹¹, are established between the audit firms, EICC and GeSI (which covers members of the ARC), any other ARC participants (such as academic and partner company members), and the CFS Audit Program Manager.
- Auditors are required to protect details of the smelter/refiner information assessed onsite during the audit (e.g. export certificates, transportation documents). If a smelter/refiner requires an NDA with the auditor they must arrange that outside any discussions with the EICC and GeSI. Such an NDA cannot conflict with the auditor completing their audit tasks.

Note that the audit report only reflects the results of the onsite documentation analysis and the mass balance summary and does not include confidential individual procurement transaction information. The ARC is provided a copy of the Line-Item Summary created by the smelter/refiner for comparison to the mass balance summary.

- Audit reports are the property of the smelter/refiner. The auditor provides a copy of the report to the Audit Program Manager for distribution to the ARC for the purposes of the audit review with the auditor. ARC members are expected to return or delete audit reports if terminating participation in the ARC.
- The independent academic participant on the ARC will aggregate high-level findings about the audit review process and report publicly on findings and ARC process improvement suggestions. Findings will focus primarily on the ARC's processes and not detailed data from audit reports or specific audit information.
- Compliant smelters/refiners are published publicly on the CFS website, by name and with aggregated Level 1 & 2A sourcing information, and specific Level 2B & Level 3 sourcing information.
- Non-compliant smelters/refiners or those in the continuous improvement phase are undisclosed beyond the ARC and Audit Program Manager. Additionally, the CFS Program will not publically disclose if a smelter/refiner has not undergone or elects not to participate in CFS Program audit; the CFS Program also will not publically disclose smelters and refiners that have agreed to participate but have not yet completed the CFS Program audit. All questions regarding smelter/refiners that are not on the public CFS list will be directed back to the smelter/refiner company or its supply chain as they are best positioned to communicate their participation and status within the CFS Program to their customer base.

¹¹ AEI - Agreement for Exchange of Confidential Information is the EICC's title for its non-disclosure agreement document (NDA).



- Aggregate numerical indicators are maintained on the CFS website for several categories of CFS status. Company-specific information is not provided with the indicator information.

Where should a smelter/refiner go for help in becoming compliant with the CFS Program protocol?

For general questions, a smelter/refiner may contact the Audit Program Manager at info@conflictreesmelter.org.

For help in developing or validation of a conflict-free sourcing program that conforms to the *OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Afflicted and High-Risk Areas*, see the list of consultants on the CFS website (www.conflictreesmelter.org).

Who is involved in the Conflict-Free Smelter Program?

The following upstream and downstream entities are actively involved in the Conflict-Free Smelter Program:

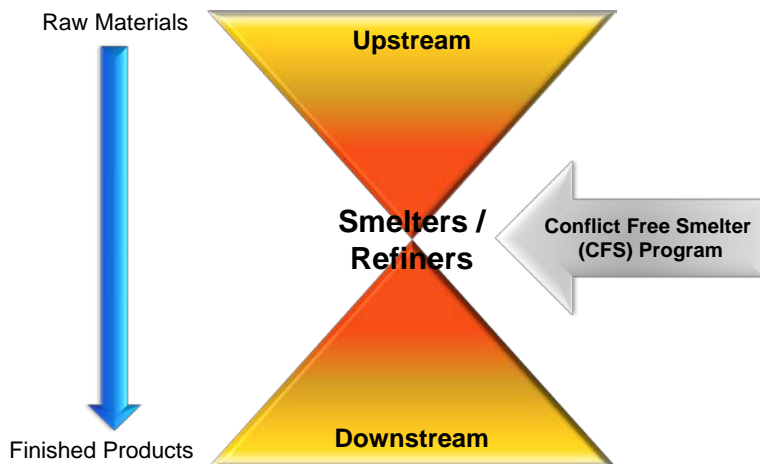
- **Smelters and refiners.** Smelter/refiner processing is a critical step in the supply chain where identifiable types of materials such as ore concentrate and secondary materials are converted into a homogeneous metal or metal containing intermediate product (e.g. metallic salt). Any smelter or refiner that wants to be found compliant to the CFS Program protocol and have their name listed on the compliant smelter/refiner list can volunteer to participate in a CFS Program audit.
- **Auditors.** Audit firms conduct the assessment of smelters and refiners. The auditors have been trained in the CFS Program protocols and are familiar with the issues related to conflict minerals, have familiarity with the in-region transportation/trade paths, and understand the goals of in-region schemes which assist in the minerals' traceability.
- **Audit Review Committee (ARC).** The ARC is the committee that determines a smelter's/refiner's compliance to the CFS Program protocol based on review of the audit summary report and testimony from the auditor. The ARC, via the APM, will issue all compliance and non-compliance letters directly to the smelter/refiner. In the event of non-compliance findings, the ARC will also review any follow-up documentation needed to resolve non-compliance issues in a manner similar to that of the original review.
- **Audit Program Manager (APM) and/or Audit Program Administrators.** The APM is responsible for managing all administrative tasks associated with execution of the CFS Program including distribution and completion of CFS Program paperwork (e.g. agreements and checklists), auditor selection and coordination activities, organization of the ARC meeting, issuance of compliance and non-compliance letters and general maintenance associated with the CFS compliant smelter list and CFS website.
- **Downstream Companies.** Material buyers and companies throughout the supply chain can use the information from the CFS Program to understand the source of minerals in their supply chain from the smelters/refiners they directly or indirectly procure from. The

EICC and GeSI invite downstream companies and industries to work with EICC and GeSI to collaboratively develop a process for responsible sourcing with a goal that smelters/refiners can use it to satisfy their customer's concerns. Conflict minerals impact any industry that uses tin, tantalum, tungsten and gold in their products including the automotive, aerospace, jewelry, packaging, defense, transportation, toy and other consumer products, textiles, food, pharmaceuticals and construction industries.

Why focus on smelters/refiners as the key layer of supply chain?

The producers and traders of minerals provide them to smelters/refiners and the smelters/refiners provide the resulting metals (or intermediates) to a large number of downstream consumers. Smelting/refining is the conversion point of identifiable types of materials such as ore concentrates and secondary materials into a common product for all downstream consumers. Because of this transformation process, smelters/refiners are in the position to know the origin of the material before it is commingled and processed for distribution to a wide variety of downstream users. As well, smelters and refiners are small in number relative to the number of upstream suppliers and downstream users. For these reasons, smelters/refiners are identified as the "pinch point" of the supply chain.

Visually, the supply chain looks like an hour glass timer with smelters/refiners at the middle:



NOTE: A smelter or refiner in the CFS Program is considered to be all the facilities of a single commercial entity for a particular metal.

How does the CFS Program define smelters/refiners?

There is a separate CFS compliant smelter/refiner list for each metal. It is therefore necessary to uniquely identify the types of facilities that are targeted to participate in the CFS Program.

- ***Tantalum (Ta) smelter:***

A tantalum smelter is a company that converts tantalum containing ores, slags, powder or scrap into Ta containing products (such as Ta powders, Ta components, Ta oxides, alloys, wires, sintered bar or similar final products) or intermediate products (such as

KTaF (also known as KSalt), Ta hydroxides and Ta unrefined powders, synthetic ores and other Ta digestion materials).

Some Ta smelters also use intermediate products to supplement their own conversion processes. Companies which convert the intermediate products to other usable finished products such as Ta ingots, sheets, rods, and wire are also considered to be smelters.

- ***Tin (Sn) smelter:***

A tin smelter is a company treating tin containing ore concentrates in order to produce crude or fully refined tin ($\geq 99.85\%$ pure). Secondary smelters are companies which treat secondary¹² materials for the production of crude or fully refined tin. Refiners are companies that treat crude tin or suitable secondary materials to produce fully refined tin. Companies may be one of, or a combination of, the above.

- ***Tungsten (W) smelter:***

A tungsten smelter is defined as a company converting W ore (wolframite and scheelite-iron manganese tungstate), W concentrates, or W-bearing secondary material for conversion to tungsten containing intermediates such as Ammonium Para-Tungstate (APT), Ammonium Meta-Tungstate (AMT), ferrotungsten, and tungsten oxides. APT production is the typical identifying capability of a tungsten smelter.

- ***Gold (Au) refiner:***

A gold refiner is a metallurgical operation that produces fine gold with a concentration of 99.5% or higher from gold and gold-bearing materials with lower concentrations.

Examples of smelters and refiners by company name can be found in [Appendix C](#).

Who are the audit firms and how are they selected?

Presently, three firms are qualified to complete smelter/refiner audits using the CFS Program protocol. It is expected this number will increase as the program matures.

The CFS Program's current audit firms are:

- 1) Liz Mueller, Inc.: www.lizmuller.com
- 2) SGS: www.sgs.com
- 3) UL-STR: www.strquality.com/en-us/responsible-sourcing/Pages/default.aspx

The auditor selection process includes three main criteria:

- 1) The audit company meets and follows ISO19011 audit program standards
- 2) The audit company is able to meet the audit expectations of the OECD Guidance audit process

¹² Referenced as "conflict minerals from recycled or scrap" in the U.S. Securities and Exchange Commission (SEC) December 2010 Conflict Minerals draft rule. Note that the Dodd-Frank Act defines "conflict minerals" as including their derivatives, and thus the metals and compounds including tin, tungsten, tantalum and gold.

- 3) The audit company is a global company, with staff in key countries where tantalum, tin, or tungsten smelters or gold refineries are located, and has experience in evaluating procurement transaction records and traceability schemes

How are auditors trained in the CFS Program protocols?

Auditors selected to work with the CFS Program have similar existing auditing experience. To become familiar with the CFS Program:

- The ARC educates audit firms as new metals are introduced into the CFS Program scope
- The audit firms are invited to participate in mock audits for each metal where a smelter/refiner has offered to host a mock audit
- Auditors are provided a copy of the Plausibility Report for each metal which profiles industry specific and market information by country and any known issues with particular U.N. embargoed companies
- Whistleblower information is provided to audit firms for use during audits while evaluating smelter/refiner documentation

What is the makeup of the Audit Review Committee (ARC)?

The ARC currently consists of company representatives from the EICC, GeSI, Automotive Industry Action Group (AIAG), as well as a representative from academia.



Note: The ARC is limited to seven members, plus the Auditor.

ARC participant requirements include four main criteria:

- 1) Representative from an OEM company (electronics or other EICC/GeSI partner association/company)
- 2) Has participated in at least one pre-audit visit at a smelter/refiner
- 3) Has an in-depth understanding of the CFS Program processes, procedures and protocol.
- 4) Has previous auditing experience (e.g. quality auditor)

The ARC is limited to seven total members.

What is the Relationship of the Conflict-Free Smelter Program to other initiatives?

What is the relationship between the CFS Program and the *OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Afflicted and High-Risk Areas*?

The *OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Afflicted and High-Risk Areas* (Guidance) provides management recommendations for globally responsible supply chains of minerals help companies to respect human rights and avoid contributing to conflict through their mineral or metal purchasing decisions and practices. The Guidance is for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas.¹³

Because the Guidance is an international instrument, the CFS Program makes reference to it as a means for smelters/refiners to assist in their due diligence when sourcing from the DRC and adjoining countries. A smelter/refiner that is sourcing from the DRC and adjoining countries via an OECD-conformant scheme is eligible to participate in the CFS Program. This eligibility requirement was made a part of the CFS Program starting April 1, 2011.

What is the “*Conformance and Compatibility Analysis*”?

The Conformance and Compatibility Analysis is a report that was commissioned by EICC and GeSI and conducted by Estelle Levin, Ltd.¹⁴ This research was designed to look at the alignment between the *OECD Guidance* and the CFS Program.

While the programs are generally aligned, one significant difference is the CFS program was specifically designed to assist downstream customers with their compliance to Section 1502 of the Dodd-Frank Act while the iTSCi program focuses on conformity to the OECD Guidance. Other findings include

- *Time periods covered by the CFS audit protocol*
- *US conflict minerals map*
- *Harmonisation of language*
- *Storage of CoC documentation at the smelter*
- *Etc.*

¹³ See http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html for more information.

¹⁴

<http://www.conflictreesmelter.org/documents/ConformanceandCompatibilityAnalysis20111128FINAL.pdf>

Appendix A: CFS Program Supporters

Who are the EICC & GeSI?

The **Electronic Industry Citizenship Coalition (EICC)** is a not-for-profit organization established in 2004 to improve social, economic, and environmental conditions in the global electronic supply chain through use of a standardized code of conduct. The EICC was incorporated in 2007 as an association to ensure greater awareness of the Code, and to expand its adoption across the industry. Through the EICC, members are committed to a common approach in addressing these corporate social responsibility issues in the global electronics supply chain, and will engage external stakeholders to provide input on the issues and possible solutions. The EICC includes over 65 global electronics companies. For more information or to view the EICC Code of Conduct, see www.eicc.info.

The **Global e-Sustainability Initiative (GeSI)** is a strategic partnership of the Information and Communication Technology (ICT) sector and organizations committed to creating and promoting technologies and practices that foster economic, environmental and social sustainability. Formed in 2001, GeSI's vision is a sustainable world through responsible, ICT-enabled transformation. GeSI fosters global and open cooperation, informs the public of its members' voluntary actions to improve their sustainability performance, and promotes technologies that foster sustainable development. GeSI has 31 members representing leading companies and associations from the ICT sector. GeSI also partners with two UN organizations - the United Nations Environment Program (UNEP) and the International Telecommunications Union (ITU) - as well as a range of international stakeholders committed to ICT sustainability objectives. These partnerships help shape GeSI's global vision regarding the evolution of the ICT sector, and how it can best meet the challenges of sustainable development. For more information, see www.gesi.org.

What is the joint EICC and GeSI Extractives Workgroup?

The EICC and GeSI started review of the minerals now associated with conflict in the DRC nearly a decade ago. In 2002, GeSI commissioned a study of the use and supply of coltan (i.e., tantalum) by the information and communications technology (ICT) sector.¹⁵ In 2007 the EICC and GeSI commissioned a joint study on minerals associated with conflict as they might relate to the electronics supply chain.¹⁶

Additional work on this topic found that the conflict minerals issue is extremely complex; resolution will require the commitment and cooperation of a broader range of businesses, governments, development agencies, and nongovernmental organizations.¹⁷ Specific to individual company efforts, members were finding it difficult individually to verify the origin of the metals used in their products. Therefore, collaboration on industry-wide solutions to conflict minerals challenges resulted in the creation of the Extractives Workgroup. By focusing on

¹⁵ *Coltan Mining in the Democratic Republic of Congo: How tantalum-using industries can commit to the reconstruction of the DRC*, <http://gesi.org/LinkClick.aspx?fileticket=PoQTN7xPn4c%3d&tabid=60>

¹⁶ *Social and Environmental Responsibility in Metals Supply to the Electronic Industry*, <http://www.eicc.info/documents/SERMetalsSupplyreport.pdf>

¹⁷ *Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics*, <http://www.eicc.info/documents/TracingPathForward.pdf>



extractives and conflict minerals, EICC and GeSI aim to create responsible supply chains that source materials only from responsible sources. Currently, the joint EICC and GeSI Extractives Workgroup consist of EICC and GeSI member companies as well as partner companies and association representatives.

In order to help enable companies to source conflict-free minerals, the Workgroup has driven actions that are leading to development and implementation of mineral traceability processes in the Great Lakes Region of Africa. Specifically, the Workgroup developed the [Conflict Free Smelter \(CFS\) Program](#) to help enable conflict-free sourcing, and the Conflict Minerals Reporting Template to gather smelter/refiner information in the supply chain. Through the EICC and GeSI, the workgroup also supports in-region sourcing schemes to help enable future legitimate trade from DRC and surrounding countries and collaborates with stakeholders for efficiency.

In 2012, the workgroup goals include:

1. Institutionalize the Conflict-Free Smelter (CFS) Program
 - a. Continue the CFS program rollout to smelters/refiners of all four conflict metals (tantalum, tin, tungsten, and gold)
 - b. Continue to enhance and improve the CFS website and overall process
2. Develop a common industry approach to support the disclosure and due diligence expectations of the U.S. SEC¹⁸, OECD¹⁹ and UN²⁰; consider other models as they develop
 - a. Participate in the OECD Due Diligence Guidance Pilot project
 - b. Continue improvement, proliferation, and standardization of the Conflict Minerals Reporting Template tool
3. Support the implementation of a verifiable minerals traceability scheme for the Democratic Republic of Congo (DRC) and neighboring countries
 - a. Support programs related to the Public Private Alliance for Responsible Minerals Trade, such as iTSCi, ICGLR Certification, BGR Certified Trading Chains, Solutions for Hope, etc.
 - b. Engage stakeholders regarding sourcing efforts in the DRC and neighboring countries (e.g. nongovernmental organizations, governments, and other industry sectors)
 - c. Drive convergence and harmonization of in-region traceability schemes
4. Begin development and implementation of a self-sustaining, multi-industry Conflict-free Mineral Supply Chain program
5. Build and maintain strong industry relationships and increase transparency and efficiency to enhance credibility of the Extractives Work Group activities
 - a. Communicate with stakeholders on our positions and initiatives related to metals derived from conflict minerals

¹⁸ U.S. Securities and Exchange Commission

¹⁹ Organisation for Economic Co-operation and Development

²⁰ United Nations

- b. Encourage multi-industry and multi-stakeholder support for responsible sourcing in the DRC and neighboring countries for conflict-free minerals
- c. Continue to communicate to interested government entities on the progress of our initiatives

Who are Partner Industry Associations and Companies of EICC and GeSI in the Extractives Workgroup?

The latest Program Supporters list can be found on the CFS website (www.conflictreesmelter.org) by using the link in the upper right corner of every page.



How long has the EICC and GeSI been focused on conflict minerals?

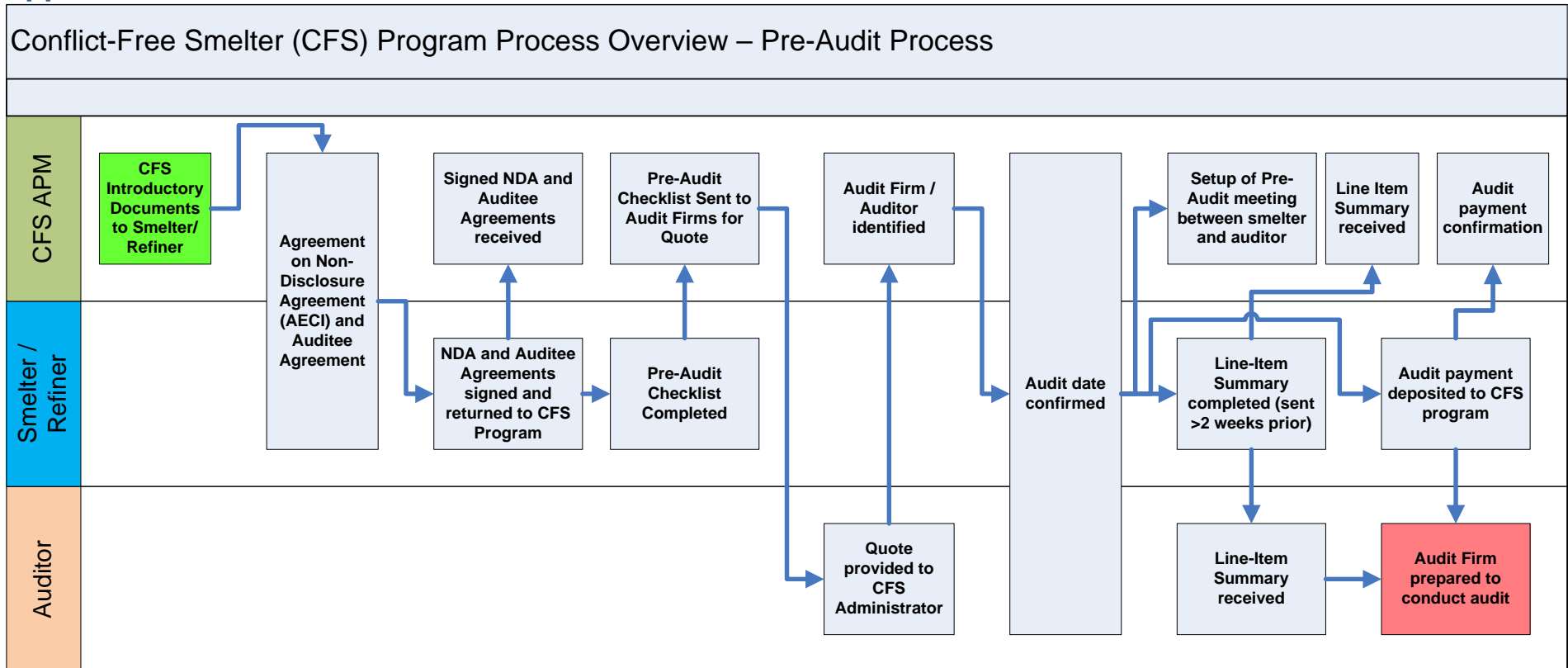
The EICC and GeSI have been focused on the conflict minerals issue for almost a decade. The below timeline documents some of the key milestones.

Timing	Activity
2002	GeSI commissions a report on coltan (tantalum) usage and supply in the ICT sector.
2007	Nongovernment organizations (NGOs) came to the EICC and GeSI to notify the organizations about the problem of the war in Eastern Democratic Republic of the Congo (DRC). They explained that the minerals of cassiterite (tin), columbite-tantalite (tantalum), wolframite (tungsten) and gold (3T's & G) were fueling the armed rebel groups and their deplorable practices against humanity. The NGOs started a public campaign describing how the electronics industry is a large user of these metals. Their efforts focused on encouraging purchasers of electronics to tell the product companies of their desire to ensure no conflict minerals are in the products they purchase.
July 2007	The EICC and GeSI form a task force to explore the issue of conflict minerals and the impact to the organizations.
June 2008	The GeSI and the EICC commission a study designed to help the EICC and GeSI to understand how aluminum, cobalt, copper, gold, palladium and tin are mined, recycled, purchased and where they are used in electronics products.

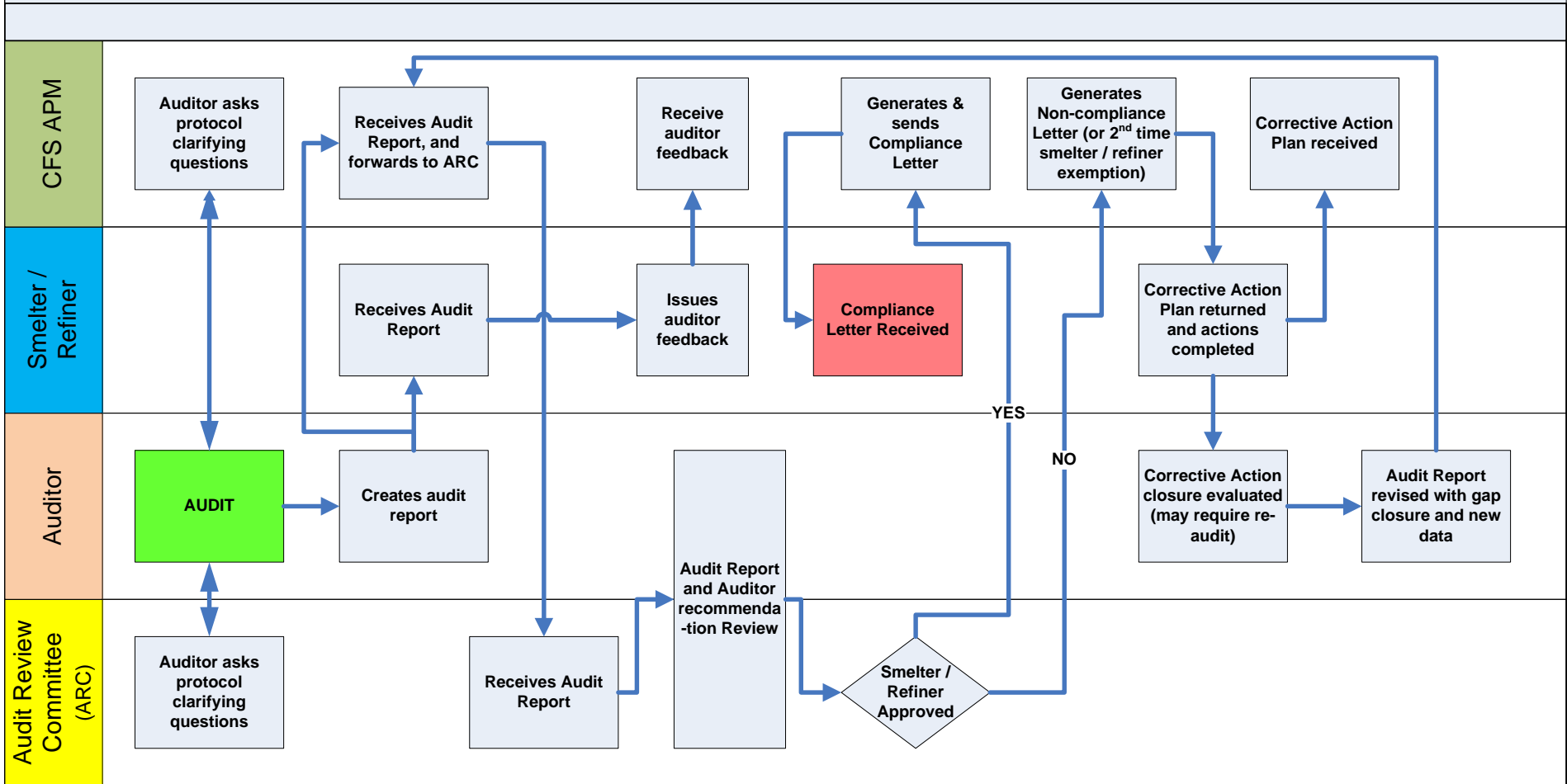
Timing	Activity
	<p>The report's author, GHGm, draws conclusions and recommendations on whether and how the members of the EICC and GeSI could effectively influence social and environmental issues associated with production of metals used in electronic products.</p> <p>The report can be found at http://www.eicc.info/documents/SERMetalsSupplyreport.pdf.</p>
July 2008	<p>The EICC and GeSI formalize the task force into a workgroup with an ongoing mandate to develop tools and resources to assist members in addressing conflict minerals in their supply chain.</p>
February 2009	<p>The EICC and GeSI release statements indicating that mineral extractions and transport activities that fuel conflict are unacceptable.</p>
September 2009	<p>The EICC and GeSI host the first tantalum supply chain workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesSeptMeetingFINAL.pdf.</p>
December 2009	<p>The EICC and GeSI host the second tantalum supply chain workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesNovMeetingFinal.pdf.</p>
April 2010	<p>The EICC and GeSI host the third tantalum supply chain workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesApril72010.pdf.</p>
April 2010	<p>The EICC and GeSI commission a report from RESOLVE designed to:</p> <ul style="list-style-type: none"> • Assess the challenges and ability to create a transparency model by mapping the supply chain for tin (solder and solder paste), tantalum (capacitors and deposition targets), and cobalt (batteries and magnetic recording media) used in electronics • Assess suppliers' use of codes of conduct addressing social, environmental, health, and labor issues • Identify the challenges of collecting this data and consider ways to enhance and maintain transparency of the supply chain <p>The EICC and GeSI used the recommendations documented in the report to support current and future work in materials extraction. The report can be found at http://www.eicc.info/documents/TracingaPathForward.pdf.</p>
May 2010	<p>The EICC and GeSI host the first tin supply chain workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesSnWorkshopIFINAL.pdf.</p>
December 2010	<p>The EICC and GeSI launch the Conflict-Free Smelter Program with the finalization of the CFS Program tantalum protocol. More information can be found at www.conflictreesmelter.org and http://www.eicc.info/documents/PRExtractivesSmelterAuditLaunch.pdf.</p>

Timing	Activity
December 2010	The EICC and GeSI host the fifth supply chain workshop, the first to cover more than one metal. More information can be found at http://www.eicc.info/documents/PRExtractivesSnWorkshopIFINAL.pdf .
April 2011	The EICC and GeSI tie the Conflict-Free Smelter Program more closely to the <i>OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Afflicted and High-Risk Areas</i> . More information can be found at http://www.eicc.info/documents/EICCPRCFSUpdate.pdf .
June 2011	The EICC and GeSI publish the first list of smelters compliant to the CFS Program tantalum protocol. More information can be found at http://www.eicc.info/documents/PRExtractivesCFSTantalumListFINAL.2.pdf .
June 2011	The EICC and GeSI host the sixth supply chain workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesExtractivesWorkshopVIFINAL.pdf .
August 2011	The EICC and GeSI launch the Conflict Minerals Reporting Template and Dashboard. More information can be found at www.conflictreesmelter.org and http://www.eicc.info/documents/PRExtractivesDueDiligencetoolFINAL.pdf .
August 2011	The EICC and GeSI finalize the CFS Program tungsten and gold protocols. The protocols can be found at www.conflictreesmelter.org .
September 2011	The EICC and GeSI finalize the CFS Program tin protocol. The protocol can be found at www.conflictreesmelter.org .
September 2011	The EICC and GeSI host the seventh supply chain workshop. More information can be found at http://www.eicc.info/documents/PRConflictMineralsSupplyChainWorkshopVIIFINAL.pdf .
October 2011	JEITA in collaboration with EICC and GeSI hosts the eighth supply chain workshop event, and the first in Asia (Tokyo).
November 2011	The EICC and GeSI each join the US State Department's Public-Private Alliance for Responsible Minerals Trade. More information can be found at http://www.eicc.info/documents/PRPPAannouncementFINAL_000.pdf .
January 2012	The EICC and GeSI welcome the first non-member, academic participant to the CFS Program Audit Review Committee. More information can be found at http://www.eicc.info/documents/PRSYoungJoinsARCFINAL_003.pdf .
April 2012	The EICC and GeSI host the ninth conflict minerals workshop. More information can be found at http://www.eicc.info/documents/PRExtractivesWorkshopIXFINAL.pdf .

Appendix B: Audit Process Flow Details



Conflict-Free Smelter (CFS) Program Process Overview – Audit and Post Audit Process





Appendix C: Example Smelter and Refiner lists

The smelters/refiners listed below (including all sites of these smelters/refiners which may not all be listed, that are receiving any tantalum/tin/tungsten/gold-bearing materials as defined previously above) illustrate the types of companies contemplated to be audited as identified by EICC and GeSI or its partner companies or partner industry sectors.

Tantalum

(This list does not include every tantalum smelter in the world.)

Smelter Name	Country	Smelter Name	Country
Duoloshan	China	Ningxia	China
Exotech	USA	Niotan	USA
F&X	China	Plansee	Austria
Gannon & Scott	USA	Solikamsk	Russia
Global Advanced Metals (formerly Cabot)	USA	Tantalite Resources	South Africa
H.C. Starck GmbH	Germany	Ulba	Kazakhstan
Jiujiang Tambre	China	Zhuzhou	China
Mitsui	Japan		

Tungsten

(This list does not include every tungsten smelter in the world.)

Smelter Name	Country	Smelter Name	Country
ATI Metalworking Products	USA	Global Tungsten & Powders Corp.	USA
Chaozhou Xianglu Tungsten Industry Co., Ltd.	China	H.C. Starck GmbH	Germany
China Minmetals Corp.	China	Jiangxi Rare Earth & Rare Metals Tungsten Group Corp.	China
Chongyi Zhangyuan Tungsten Co., Ltd.	China	Jiangxi Tungsten Industry Co., Ltd.	China
Ganzhou Grand Sea W & Mo Group Co., Ltd.	China	Wolfram Bergbau und Hütten AG	Austria
Ganzhou Huaxing Tungsten Products Co., Ltd.	China	Wolfram Company CJSC	Russia
Ganzhou Nonferrous Metals Smelting Co., Ltd.	China	Xiamen Tungsten Co., Ltd.	China



Tin

(This list does not include every tin smelter in the world.)

Smelter Name	Country	Smelter Name	Country
Cookson	USA	PT Babel Surya Alam Lestari	Indonesia
CV DS Jaya Abadi	Indonesia	PT Bangka Kudai Tin	Indonesia
CV Duta Putra Bangka	Indonesia	PT Bangka Putra Karya	Indonesia
CV JusTindo	Indonesia	PT Bangka Timah Utama Sejahtera	Indonesia
CV Makmur Jaya	Indonesia	PT Belitung Industri Sejahtera	Indonesia
CV Nurjanah	Indonesia	PT BilliTin Makmur Lestari	Indonesia
CV Prima Timah Utama	Indonesia	PT Bukit Timah	Indonesia
CV Serumpun Sebalai	Indonesia	PT Eunindo Usaha Mandiri	Indonesia
CV United Smelting	Indonesia	PT Fang Di MulTindo	Indonesia
EM Vinto	Bolivia	PT HP Metals Indonesia	Indonesia
Gejiu Zi-Li	China	PT Koba Tin	Indonesia
Gold Bell Group	China	PT Mitra Stania Prima	Indonesia
Jiangxi Nanshan	China	PT Refined Banka Tin	Indonesia
Liuzhou China Tin	China	PT Sariwiguna Binasantosa	Indonesia
Malaysia Smelting Corp	Malaysia	PT Stanindo Inti Perkasa	Indonesia
Metallo Chimique	Belgium	PT Sumber Jaya Indah	Indonesia
Minsur / Mineração Taboca S.A.	Peru / Brazil	PT Timah (includes Tambang)	Indonesia
Mitsubishi Material	Japan	PT Timah Nusantara	Indonesia
Novosibirsk	Russia	PT Tinindo Inter Nusa	Indonesia
OMSA	Bolivia	PT Yinchendo Mining Industry	Indonesia
PT Alam Lestari Kencana	Indonesia	Thailand Smelting and Refining Co., Ltd.[Thaisarco]	Thailand
PT Artha Cipta Langgeng	Indonesia	Yunnan Tin	China
PT Babel Inti Perkasa	Indonesia	Yunnan Chengfeng	China



Gold

(This list does not include every gold refinery in the world.)

Refinery Name	Country	Refinery Name	Country
Allgemeine Gold- und Silberscheideanstalt A.G.	Germany	Metalor Technologies SA	Switzerland
Almalyk Mining and Metallurgical Complex (AMMC) — Almalyk	Uzbekistan	Metalor USA Refining Corporation	USA
AngloGold Ashanti Mineração Ltda	Brazil	Met-Mex Peñoles, S.A.	Mexico
Argor-Heraeus SA	Switzerland	Mitsubishi Materials Corporation	Japan
Asahi Pretec Corp	Japan	Mitsui Mining and Smelting Co., Ltd.	Japan
Atasay Kuyumculuk Sanayi Ve Ticaret A.S.	Turkey	Moscow Special Alloys Processing Plant — Moscow	Russia
Aurubis AG	Germany	Nadir Metal Rafineri San. Ve Tic. A.S.	Turkey
Bangko Sentral ng Pilipinas (Central Bank of the Philippines)	Philippines	Navoi Mining and Metallurgical Combinat — Navoi	Uzbekistan
Boliden AB	Sweden	Ohio Precious Metals	USA
Caridad	Mexico	OJSC "The Gulidov Krasnoyarsk Non-Ferrous Metals Plant" (OJSC Krastvetmet)	Russia
Cendres & Métaux SA	Switzerland	OJSC Kolyma Refinery — Khasyn	Russia
Central Bank of the DPR of Korea	Korea	PAMP SA	Switzerland
Chimet SpA	Italy	PX Précinox SA	Switzerland
Codelco	Chile	Western Australian Mint trading as The Perth Mint	Australia
Dowa	Japan	Prioksky Plant of Non-Ferrous Metals — Kasimov	Russia
FSE Novosibirsk Refinery	Russia	PT Aneka Tambang (Persero) Tbk	Indonesia
Heraeus Precious Metals GmbH & Co. KG	Germany	Rand Refinery (Pty) Ltd	South Africa
Heraeus Ltd Hong Kong	Hong Kong	Royal Canadian Mint	Canada
Inner Mongolia Qiankun Gold and Silver Refinery Share Company Limited	China	Schöne Edelmetaal	Netherlands
Ishifuku Metal Industry Co., Ltd.	Japan	SEMPSA Joyeria Plateria SA	Spain
Istanbul Gold Refinery	Turkey	The Refinery of Shandong Gold Mining Co., Ltd	China
Japan Mint	Japan	Shandong Zhaojin Gold & Silver Refinery Co Ltd	China
Jiangxi Copper Company Limited	China	SOE Shyolkovsky Factory of Secondary Precious Metals	Russia
Johnson Matthey Limited	Canada	Solar Applied Materials Technology Corp.	Taiwan
Johnson Matthey Inc	USA	Sumitomo Metal Mining Co., Ltd.	Japan
JSC Ekaterinburg Non-Ferrous Metal Processing Plant	Russia	Tanaka Kikinzoku Kogyo K.K.	Japan
JSC Uralelectromed	Russia	The Great Wall Gold and Silver Refinery of China	China
JX Nippon Mining & Metals Co., Ltd	Japan	Tokuriki Honten Co., Ltd.	Japan
Kazzinc Ltd	Kazakhstan	Toyo Smelter & Refinery	Japan
Kyrgyzaltyn JSC	Kyrgyz Republic	Umicore Brasil Ltda	Brazil
L'azurde Company For Jewelry	Saudi Arabia	Umicore SA Business Unit Precious Metals Refining	Belgium
LS-Nikko Copper Inc	Korea	Valcambi SA	Switzerland
Materion	USA	Xstrata Canada Corporation	Canada



Refinery Name	Country	Refinery Name	Country
Matsuda Sangyo Co. Ltd	Japan	Zhongyuan Gold Smelter of Zhongjin Gold Corporation	China
Metalor Technologies (Hong Kong) Ltd	Hong Kong	Zijin Mining Group Co. Ltd	China

SEC PROPOSED RULES TO SECTION 1502 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (THE "CONFLICT MINERALS PROVISION")

Sherry L. Scott

"It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b)."¹

Section 1502(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") required the U.S. Securities and Exchange Commission ("SEC"), by April 15, 2011 to issue regulations requiring public companies to disclose annually whether conflict minerals that are necessary to the functionality or production of a product they manufacture originated in the Democratic Republic of the Congo ("DRC") or an adjoining country.²

In furtherance of this requirement, the SEC issued a proposed rule on December 15, 2010.³ According to the proposed rules, "any issuer for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the [DRC] or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals."⁴

The SEC, in accordance with the Conflict Minerals Provision, is proposing a three step process for the disclosure requirement. Briefly, the 3 steps are:

- Step 1: Determine whether the issuer is subject to the Conflict Minerals Provision

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), Section 1502(a).

² "Adjoining country" is defined as a country that shares an internationally recognized border with the DRC. The Act, Section 1502(e)(1).

³ 17 CFR 229 (Dec. 15, 2010). As of the date of this paper, the SEC has yet to issue the final rule. Thus, the information contained in this paper relies on the text of the proposed rule issued on December 15, 2010.

⁴ *Id.*

- Step 2: If the issuer is subject to the Conflict Minerals Provision, the issuer must determine whether its conflict minerals originated in the DRC countries.
- Step 3: If the issuer determines that its conflict minerals originated in the DRC, or is unable to determine that its conflict minerals did not originate in the DRC countries, a Conflict Minerals Report must be furnished.

These three steps are discussed in more detail below.

Step 1 - To whom does the proposed rule apply?

The proposed rules will apply to any issuer that files reports with the Commission under Section 13(a) or 15(d) of the Exchange Act, provided that the issuer is a “person described” under the Conflict Minerals Provision.

The Conflict Minerals Provision defines a “person described” as “one for whom conflict minerals are ‘necessary to the functionality or production of a product manufactured by such person.’”⁵ It is important to note that conflict minerals include gold, columbite-tantalite (coltan), cassiterite and wolframite (including their derivatives such as tin, tantalum and tungsten), or any other mineral or its derivatives as may be designated in the future by the Secretary of State.⁶

“Person Described” – Only Certain Issuers are Included

The SEC recognized that this provision could be interpreted broadly to apply to any company, not just those that are subject to Commission reporting requirements. Given the lack of Congressional direction to apply the Conflict Minerals Provision beyond reporting companies, the SEC proposed not to extend them beyond reporting companies. Consistent with the statutory language, the proposed rule would apply to domestic companies, foreign private issuers and smaller reporting companies.

Although the SEC declined to provide a definition of “manufacturer,” it stated that the proposed rules would apply to the following:

- Issuers that manufacture products
- Issuers that contract to manufacture their products
- Issuers selling generic products under their own brand or a separate brand name that they have established, regardless of whether those issuers have any influence over the manufacturing specifications of those products, as long as the issuer has contracted with another party to have the product manufactured specifically for that issuer.

⁵ The Act, Section 1502(b).

⁶ *Id.* Section 1502(e)(4).

The proposed rules will not, however, apply to the following:

- “Pure retailers,” i.e., retailers that sell “pure ‘white label’ products” over which they have no influence regarding their manufacture.
- Retail issuers that sell only the products of third parties if those retailers have no contract or other involvement regarding the manufacturing of those products
- Retail issuers that do not sell those products under their brand name or a separate brand name they have established and do not have those products manufactured specifically for them.

The SEC has requested additional comment on whether it should define the term “manufacture” and whether to extend the rules to both issuers that manufacture and contract to manufacture products in which conflict minerals are necessary to the functionality or production of those products.

With respect to mining issuers, the SEC is proposing an instruction that mining issuers should be considered to be manufacturing conflict minerals when they extract conflict minerals, but requested further comment on that issue.

Conflict Minerals “Necessary” to a Product

As stated above, an issuer is a “person described” if “conflict minerals are *necessary to the functionality or production of a product* manufactured by such person.” The SEC has proposed no definition as to the meaning of this phrase but has suggested that it includes situations where a mineral is necessary to a product, or if the conflict mineral is intentionally included in a product’s production process and is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product. However, the SEC explained that “conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of the product even if that tool or machine is necessary to producing the product. For example, if an automobile containing no conflict minerals is produced using a wrench that contains conflict minerals necessary to the functionality of that wrench, we would not consider the conflict minerals in that wrench necessary to the production of the automobile.” Notably, there is no materiality threshold in the Conflict Minerals Provision for disclosure. The SEC requested further comment on whether the rules should define the phrase and how it should be applied.

Step 2 – Did the Conflict Minerals Originate in the DRC Countries?

If the answer to both questions in Step 1 is yes (i.e., conflict minerals are necessary to the functionality or production of a product manufactured by the issuer), then the analysis proceeds to Step 2.

Step 2 requires an issuer to make a reasonable country of origin inquiry as to whether its conflict minerals originated in the DRC countries and make certain disclosures accordingly.

The SEC has not set forth what constitutes a reasonable country of origin inquiry because the reasonableness of any inquiry would depend upon the issuer's particular facts and circumstances. Such an inquiry should include due diligence on the source and chain of custody of its conflict minerals. According to the SEC proposed rule, one example in which an issuer may reasonably rely on a facility's representations regarding the source of its conflict minerals is if the smelter was identified as one that processes only "DRC conflict free" minerals under recognized national or international standards after receiving an independent third party audit of the source and chain of custody of the conflict minerals it processes.

Under the proposed rules, if the issuer determines that its conflict minerals did not originate in the DRC countries, the issuer must include that information in its annual report and on its website. Within the annual report, the issuer must disclose the internet address on which the disclosure is posted and retain the information on the website at least until the issuer's subsequent annual report is filed with the SEC. The issuer must also describe in its annual report the reasonable country of origin inquiry undertaken to determine that its conflict minerals did not originate in the DRC countries and maintain business records to support its determination.

If, however, any of the issuer's conflict minerals originated in the DRC countries, or if the issuer is unable to determine after a reasonable country of origin inquiry that any such conflict minerals did not originate in the DRC countries, the SEC's proposed rules would require the issuer to disclose this in the body of the annual report and include a Conflict Minerals Report as an exhibit to the annual report. In addition, the issuer must make available its Conflict Minerals Report on its website, disclose in the body of the annual report that the Conflict Minerals Report is posted on its website and include the Internet address on which the Conflict Minerals Report is posted in the annual report.

Because the rules are not yet final, the SEC requested further comment as to whether the Conflict Minerals Report should be an attachment to the annual report, whether the contents of the Conflict Minerals Report should be included somewhere in the annual report, whether issuers should describe their reasonable country of inquiry, whether issuers should maintain reviewable business records if it determines that its conflict minerals did not originate in the DRC countries, etc.

Step 3 – What is Included in the Conflict Minerals Report?

An issuer that determines (or is unable to determine) that its necessary conflict minerals originated in the DRC countries must submit a Conflict Minerals Report that includes, among

other things, a description of the measures taken to exercise due diligence on the source and chain of custody of its conflict minerals, including an independent private sector audit of the Conflict Minerals Report. The audit is a “critical component of [the] due diligence in establishing the source and chain of custody of such minerals.”⁷ The components of the Conflict Minerals Report are discussed below.

Description of Due Diligence

Under the proposed rules, the Conflict Minerals Report must describe the due diligence measures taken by the issuer on the source and chain of custody of their conflict minerals.

Other than requiring an independent private sector audit, the proposed rules do not dictate the standard for or otherwise provide guidance concerning the due diligence process. However, the SEC expects that “an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding conflict minerals supply chains would provide evidence that the issuer used due diligence in making its supply chain determinations.”⁸

Independent Audit

The Conflict Minerals Report must include a certification that it was reviewed by a certified independent private sector auditor. The audit, which is a “critical component of due diligence,” must be conducted in accordance with the standards established by the Comptroller General of the United States.

The report must further describe products that are not “DRC conflict free,”⁹ identify the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts taken to determine the mine or location of origin with the greatest possible specificity.

Issuers unable to determine that their conflict minerals did not originate in the DRC countries must also provide the same information as above. It must describe all of its products that contain such conflict minerals and identify those products as not “DRC conflict free.” However, the issuer may provide additional disclosure explaining that although those products are labeled as not “DRC conflict free,” the issuer was unable to determine the source of the conflict minerals, including whether the conflict minerals in the products benefited or financed armed groups in the DRC countries.

⁷ 17 CFR 229 (Dec. 15, 2010), n.20.

⁸ 17 CFR 229 (Dec. 15, 2010).

⁹ “DRC conflict free” minerals are those that do not directly or indirectly finance or benefit armed groups in the DRC countries. Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

In addition to the Conflict Minerals Report, the proposed rules would require the issuer to identify and furnish the audit report prepared by the independent private sector auditor.

Location of the Report

According to the proposed rules, the Conflict Minerals Report (including the audit report) would be attached as an exhibit to an issuer's annual report on Form 10-K, Form 20-F or Form 40-F, as applicable. Per the SEC, the Conflict Minerals Report and audit report would not be "filed" for purposes of Section 18 of the Exchange Act; therefore, the reports would not be subject to Section 18 liability unless the issuer states explicitly that the reports are filed under the Exchange Act. Likewise, those reports would not be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporated them by reference into the documents.

Although the Conflict Minerals Report would not be subject to Section 18 liability (except as narrowly provided for above), failure to comply with the Conflict Minerals Provision of the Exchange Act would deem the issuer's due diligence process "unreliable" and would not satisfy the proposed rules. In that situation, issuers that fail to comply with the proposed rules would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.

What About Recycled and Scrap Conflict Minerals?

The proposed rules would treat conflict minerals from recycled and scrap sources differently than from mined sources due to the difficulty of determining the origins of the minerals. However, minerals that are partially processed, unprocessed or a byproduct from another ore would not be considered "recycled." Issuers using recycled or scrap conflict minerals may consider those minerals to be DRC conflict free. Such issuers would be required to disclose in their annual report that their conflict minerals were obtained from recycled or scrap sources and state in their Conflict Minerals Report that their recycled or scrap minerals are considered DRC conflict free. Those issuers would also describe the measures taken to exercise due diligence in determining that their conflict minerals were recycled or scrap.

In the situation where an issuer uses both recycled or scrap conflict minerals mixed with new conflict minerals, the issuer must follow the processes for both recycled/scrap conflict minerals and new conflict minerals as described above.

When Does My Company Have to Comply?

Issuers must provide their initial conflict minerals disclosure and, if necessary, their initial Conflict Minerals Report after their first full fiscal year following promulgation of the SEC's final rules. In the proposed rules, the SEC explained that, assuming the rules were adopted in April

2011 (which has passed with no adopted rules), a December 31 fiscal year-end issuer would first have to provide conflict minerals disclosure or a Conflict Minerals Report after the end of its December 31, 2012 fiscal year. However, an issuer with a May 31 fiscal year-end would have to provide the disclosure or report in its annual report for the fiscal year that encompasses the period from June 1, 2011 through May 31, 2012.

After the proposed rules were not adopted in April 2011, the SEC predicted it would adopt the rules between January and June 2012. The proposed rules have yet to be adopted, though the SEC announced it will hold a work group session in August 2012 to consider the proposed rules. Thus, it is possible the proposed rules could be adopted by the end of 2012.