

On March 5, 2014, the European Commission proposed its long-awaited draft Regulation on conflict minerals. What it proposed is a voluntary self-certification system that is intended to reduce the ability of armed groups to use the trade of conflict minerals to fund their activities in conflict-affected and high-risk areas. The Regulation was proposed after many months of public consultation, an impact assessment and extensive consultations with the Organisation for Economic Cooperation and Development (OECD), industry and individuals.

Typically, most of the drafting and debate on a draft EU regulation is accomplished before it is proposed, so what is ultimately adopted is usually very similar to the regulation proposed. However, there has been such a strong reaction to the voluntary nature of the scheme, and members of Parliament and non-governmental organizations (NGOs) have expressed such dissatisfaction with the proposal, that it seems likely that the proposal will be amended during the legislative (co-decision) procedure. It is possible to track the progress of the proposal through this legislative process by accessing the EU's [Legislative Observatory](#).

In the meantime, companies that are not importers of conflict minerals into the EU will not be directly impacted by the draft Regulation and will not need to consider whether to opt-in to its requirements. However, customers of EU importers may, in future years, find those importers to be more responsive to conflict minerals supply chain inquiries. This increased flow of information will, no doubt, continue to enhance the ability of all companies to gather information about conflict minerals and will improve the quality and accuracy of supply chain information.

Background

The draft Regulation is the response to a 2010 call by the European Parliament for the EU to adopt conflict minerals legislation similar to the requirement that had been adopted in the US as part of the Dodd-Frank Act. The draft Regulation was intended to address the fact that a large number of European companies are not subject to the requirements of the US conflict minerals rule.

There are three stated goals of the draft Regulation: first, to break the link between minerals extraction and trading and financing of armed conflict; second, to create a market for responsibly traded minerals from conflict regions; and third, to improve the ability of EU companies to comply with existing due diligence frameworks. The ultimate focus of the Regulation is to increase the flow of information about sources, smelters and refiners to downstream users.

Summary of Regulation

In summary, the draft Regulation:

- Focuses on the upstream portion of supply chains (the portion closer to the ultimate source of the minerals) by focusing on the more than 400 companies that import conflict minerals into the EU.
- Creates a voluntary system for supply chain due diligence and self-certification for those importers.
- Offers incentives to importers that undertake the prescribed due diligence measures.
- Consistent with the US rule, defines "Conflict Minerals" as tin, tantalum, tungsten and gold (3TGs).
- Is global in scope and is not limited to central Africa, unlike the US conflict minerals rule.

This difference in geographic scope is important. Importers that choose to participate in the EU system will be required to identify countries that are "conflict affected and high-risk areas." The EU has not and will not provide a list of affected countries. The identities of countries that might qualify as conflict-affected or high-risk are "fluid and unstable" – conflict can change from day to day. However, existing templates, such as the World Gold Council Conflict-Free Gold Standard, can assist companies work with these requirements.

Self-Certification and Reporting

The draft Regulation places the diligence burden on importers into the EU with a voluntary process in which the importers of 3TGs can choose to "self-certify" that they do not contribute to the financing of armed conflict in conflict-affected and high-risk areas. If an EU importer opts-in to the process, it will be required to conduct due diligence on its supply chains in a manner consistent with the five steps of the due diligence framework described by the OECD in its Due Diligence Guidelines. This is the same due diligence framework that is being used by companies to comply with the US conflict minerals rule. According to the draft Regulation, by March 31 of each year, the EU importers are required to report the "responsible smelters and refiners" in their supply chains for the prior calendar year. They are also required to make all of their supply chain due diligence findings available to their customers (subject to confidentiality concerns). The EU will gather the reported information from the importers and publish an annual list of "responsible smelters and refiners." The intent of these requirements is to enhance the flow of information from the importers to their downstream customers.

Incentives

While the draft Regulation is voluntary, it does provide incentives for participation, including:

- public procurement incentives for companies selling products that contain 3TGs;
- financial support of the due diligence efforts of small and medium sized enterprises; and
- “visible recognition” for companies that source responsibly.

The EU combines these incentives with the voluntary nature of the Regulation hoping to avoid the *de facto* embargo of conflict minerals, which has been a significant unintended consequence of the US conflict minerals rule. Many feared that the EU regulation would overlap with or be inconsistent with the US rule at the same time as US reporting companies are preparing their first reports under the US rule. In response to this concern, the drafters stated that they intended the draft EU Regulation to be complementary to the US conflict minerals rule. One EU official stated, “This is not a stand-alone proposal. But we don’t want to repeat what has already been done. Dodd-Frank takes care of downstream users, and the European Union is taking care of the upstream.”

Possible Changes to the Regulation

As expected, the draft Regulation covers the same conflict minerals as are covered by the US conflict minerals rule: tin, tantalum, tungsten and gold. Also as expected, the geographic scope of the draft Regulation is not limited to the Democratic Republic of Congo and adjoining countries, instead focusing on armed conflict and the trade of 3TGs in conflict-affected and high-risk areas throughout the world. But, until more recently, many observers had expected the draft Regulation to propose a mandatory (not a voluntary) system. As indicated above, Members of Parliament and many non-governmental organizations (NGOs) were disappointed with the voluntary approach proposed in the draft Regulation. Shortly after the release of the draft Regulation, several NGOs released a [joint statement](#) expressing their dissatisfaction, stating, “Rather than building on the significant momentum generated by legislation passed in the US, thereby raising the bar for responsible sourcing globally, the Commission’s proposal threatens to lower international standards and start a race to the bottom.” The voluntary nature of the self-certification scheme is likely to be hotly debated before any final Regulation is adopted and implemented.

The [draft Regulation](#) and a [set of FAQs](#) accompanying the draft Regulation can be found online.

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