NATIONAL CENTER FOR POLICY ANALYSIS

Dodd-Frank in the Congo

Issue Brief No. 176 by David Grantham November 2015

The consequences of the Dodd-Frank Wall Street Reform and Protection Act can be felt as far away as the Congo. Buried deep within the massive regulatory package is a conflict minerals statute that orders publicly-owned U.S. businesses to disclose to the Securities and Exchange Commission (SEC) their use of tungsten, tin, tantalum and gold sourced from the Democratic Republic of the Congo (DRC).

Dallas Headquarters:
14180 Dallas Parkway, Suite 350
Dallas, TX 75254
972.386.6272

www.ncpa.org

Washington Office:
202.830.0177
governmentrelations@ncpa.org

What do conflict minerals have to do with financial reform? Fair question. The minerals statute, known as Section 1502, does not address Wall Street or the financial crisis. Instead, the provision imposes costly regulations on producers and manufacturers, making products more expensive for the consumer. The provision has also proven disastrous for the Congolese people. The scope of the regulation may seem inconsequential compared to the larger measures within Dodd-Frank. But it has caused disproportionate harm to those it alleged to help.

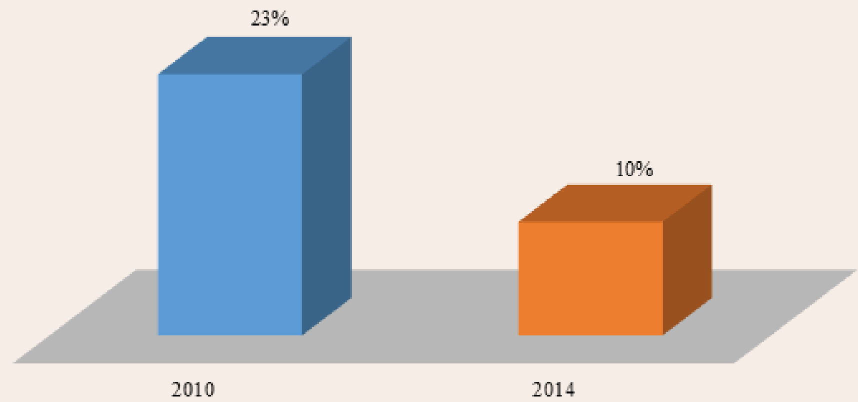
Why Conflict Minerals Are in Dodd Frank. The DRC, a former Belgian colony and second largest country in Africa, made news during its brutal, decade-long civil war, which claimed the lives of over five million people before the creation of a transitional government in July 2003. During his visit to Washington, D.C., in 2007, Congolese president Joseph Kabila explained to then-Senator Sam Brownback (R-Kan.) that conflict lingered in the eastern half of the country because rebels profited from the sale of minerals used in popular products, such as game consoles, cellular phones, lightbulbs and clothing.[1] A short year later, Brownback and Representative Jim McDermott (D-Wash.) introduced conflict minerals legislation that restricted trade in the Congolese mineral market in hopes of crippling the rebel forces. However, Congress had already turned its attention to the 2008 financial crisis. The primary advocates for the Brownback-McDermott bill, a group of investors and human rights organizations that made up the Responsible Sourcing Network, reorganized and successfully lobbied to have the conflict minerals language attached to Dodd-Frank.[2] In the end, the U.S. government's response to a domestic mortgage crisis included a bizarre regulation aimed at the Congolese rebels.

Court Overturns Portions of Dodd-Frank. In *National Association of Manufacturers v. Securities and Exchange Commission*, plaintiffs challenged both the implementation of the law and its constitutionality. Most notably, they alleged:

- The SEC did not conduct a proper cost-benefit analysis.
- The SEC did not consider the severe burdens in tracing mineral origins.
- The SEC did not account for business size.

- The law usurped corporate freedom of speech by requiring companies to declare themselves conflict free.[3]

Although the plaintiffs lost on all counts in the lower courts, the D.C. Circuit Court of Appeals disagreed, stating that the public disclosure requirement interfered “with the exercise of freedom of speech under the First Amendment.”[4] The SEC responded to the verdict with a larger, 356-page disclosure rule, essentially requiring supply chain audits be done in good faith.



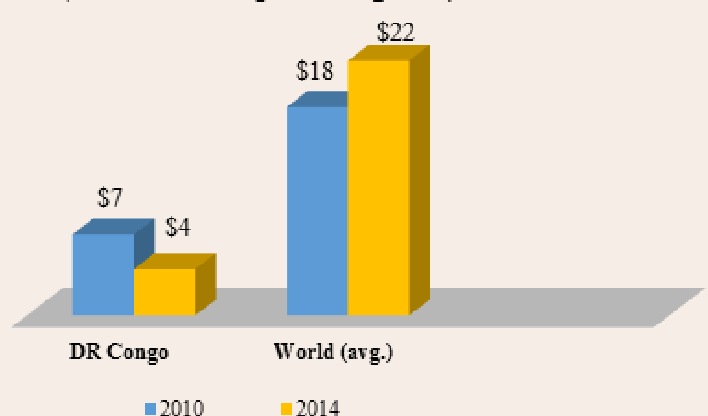
Source: "DRC-Growth with Governance in the Mineral Sector," World Bank, July 30, 2015. Available at http://documents.worldbank.org/curated/en/2015/07/24846929/congo-democratic-republic-drc-growth-governance-mineral-sector-p106982-implementation-status-results-report-sequence-09.

Businesses and Consumers Absorb Costs. Since companies are no longer legally obligated to publically declare themselves conflict free, the regulation has become a practice in due diligence. A company can claim to have undeterminable knowledge of a mineral’s origin or partial knowledge. The only real consequence for lack of information is simply additional paperwork that answers a variety of other, more probing questions. A business must *knowingly* fail to disclose the use minerals or fail to conduct an audit to face any sort of *civil* penalty. And despite the detailed questionnaire, those manufacturing and production companies subject to the law rarely return with conclusive evidence to satisfy the regulation. Government and media reports reflect the vanity of it all:

- In 2014, approximately 67 percent of 1,321 companies could not determine mineral origin.[5]
- Two-thirds did not even disclose the country of origin.
- Less than 25 percent of companies met the requirements for reporting, while 43 percent never demonstrated how they determined the origin of minerals used in production.[6]

Despite an inability or unwillingness to fully answer questions posed under 1502, companies have to at least provide documentation detailing their non-answers, which has cost nearly $8 billion since the law’s inception.[7] Moreover, a survey of affected businesses found that 89 percent had to hire at least one full-time employee to manage the conflict mineral issue and 6 percent hired at least five or more new workers.[8]

The Eastern Congo in Shambles. Roughly 11 million people in the DRC, particularly those in the war-torn eastern half, relied on artisan mining for survival. Since the new ruling, many large American companies have reduced operations or left the DRC altogether to avoid compliance costs and the stigma of conflict minerals. The exodus has exacerbated an already unstable situation. The absence of business has driven many deeper into poverty.[9]



Source: Sudarsan Raghavan, "How a well-intentioned U.S. law left Congolese miners jobless," *Washington Post*, November 30, 2014.

Meanwhile, the legislation has limited what business opportunities remain. Before Dodd-Frank, artisan miners could sell a kilogram of tin for $7, for example. That number then dropped to $4 a kilogram, despite the fact that the international market price for the mineral had risen significantly.[10] Once prices dropped, buyers stopped coming and mines began to close. The economic displacement has only contributed to a declining standard of living in the DRC.

Dodd-Frank has engineered a "de-facto international boycott" to the detriment the people it intended to help.[11] According to the Human Development Index, nearly 75 percent of the Congolese population remains in poverty.[12] Stories are rampant of mining families in the east turning to wholly unreliable subsistence farming for survival and, in more alarming cases, children joining militias for quick money to help feed themselves and their families.[13] This last fact remains particularly unnerving since Dodd-Frank should have diminished, not entrenched, rebel power.

Meanwhile, conflict continues in the east. Rebels simply substitute other valuable minerals for those audited by American companies, while corruption plagues enforcement. One analysis found that before Dodd-Frank rebels and miners had a shared interest in protecting the mines, albeit rebels remained the powerbrokers. After enactment, rebels became roving bandits stealing funds where they could. Drifting gangs increased conflict in many areas.[14] This reality truly undermines the whole purpose of the law.

Defenders of the conflict minerals statute passively admit to the consequences of the regulation and are now pushing the U.S. government and public companies to contribute money for so-called livelihood funds for the artisan miners. The U.S. Agency for International Development (USAID) already contributed $20 million to community revitalization projects and nearly $5.8 million to create a transparent system for mineral trade.[15] Generosity should have been the starting point. Using more taxpayer money to perpetuate a failed regulation seems ill-conceived, at best.

Conclusion. Considering the consequences of the law's directives and its victims, rather than its scope, one can see how a seemingly minor regulation can have enormous repercussions. A well-intentioned campaign has done immeasurably more harm to people's livelihoods than it has in stopping conflict. American businesses and consumers are forced to absorb the costs of the failed regulation. Congress needs to repeal the provision completely or, at minimum, amend the regulation to include a sunset clause set to expire within one year.

The conflict minerals statute is a microcosm of the Dodd-Frank legislation: a costly regulatory monster which not only failed to accomplish its intended purpose, but hurt those it was supposed to help.

David Grantham is a senior fellow at the National Center for Policy Analysis.

Notes

1. Elizabeth Dias, “First Blood Diamonds, Now Blood Computers?” *Time*, July 24, 2009. Available at http://content.time com/time/world/article/0,8599,1912594,00.html.
2. Tom Burgis, “Dodd-Frank’s Misadventures in the Democratic Republic of Congo,” *Politico*, May 10, 2015. Available at http://www.politico.com/magazine/story/2015/05/dodd-frank-democratic-republic-of-congo-117583?o=0.
3. Michael V. Seitzinger and Kathleen Ann Ruane, “Conflict Minerals and Resource Extraction: Dodd-Frank, SEC Regulations, and Legal Challenges,” *Congressional Research Service*, April 5, 2015, page 4. Available at https://www fas.org/sgp/crs/misc/R43639.pdf.
4. *National Association of Manufactures v Securities and Exchange Commission* (D.C. Circuit 2015) USCA Case no. 13-5252, page 24. Available at http://www.faegrebd.com/webfiles/08_15_mine.pdf.
5. U.S. Government Accountability Office, *Report to Congressional Committees: SEC Minerals Rule.*
6. Morgan Winsor, “Congo’s Conflict Minerals: U.S. Companies Struggle to Trace Tantalum, Tungsten, Tin, Gold In Their Products,” *International Business Times*, September 18, 2015. Available at http://www.ibtimes.com/congos conflict-minerals-us-companies-struggle-trace-tantalum-tungsten-tin-gold-their-2102323.
7. Lauren Wolfe, “How Dodd-Frank Is Failing Congo,” *Foreign Policy*, Voice, February 2, 2015. Available at http: foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.
8. Carrie Wells, “Businesses trying to comply with ‘conflict minerals’ law,” *Baltimore Sun*, June 5, 2015. Available at http://www.baltimoresun.com/business/bs-bz-conflict-minerals-20150605-story.html.
9. Sudarsan Raghavan, “How Well-Intentioned Law Left Congolese miners jobless,” *Washington Post*, November 30, 2014. Available at http://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html?elq=~~eloqua..type--emailfield..syntax--reci pientid~~&elqCampaignId=~~eloqua..type--campaign..campaignid--0..fieldname--id~~.
10. Ibid.
11. “Who Really Benefits From Celebrity Activism?” *Guardian*, July 10, 2015. Available at http://www.theguardian.com/ lifeandstyle/2015/jul/10/celebrity-activism-africa-live-aid.
12. United Nations Development Programme, Human Development Index. Available at http://hdr.undp.org/en/countries/ profiles/COD.
13. Lauren Wolfe, “How Dodd-Frank is Failing Congo.”
14. Dominic Parker and Brian Vadheim, “The Unintended Consequences of Conflict Mineral Policies,” April 2, 2013. Available at http://www.aae.wisc.edu/mwiedc/papers/2013/parker_nick.pdf.
15. Lauren Wolfe, “How Dodd-Frank is Failing Congo;” “Sustaining Livelihoods,” Enough Project, available at http:// www.enoughproject.org/conflicts/eastern_congo/sustaining-livelihoods; and USAID Land Tenure and Property Rights Portal, “Capacity Building for Responsible Minerals Trade: Democratic Republic of the Congo,” available at http:// usaidlandtenure.net/project/capacity-building-responsible-minerals-trade-democratic-republic-congo.