



Spot the difference: A minerals dealer shows the difference between tin ore from a rebel-held mine and a non-conflict mine.

Photo: Image Journeys/Sasha Lezhnev.

Conflict mineral rules: noble or nonsense?

Efforts to stem violence in Africa by tracing the origin of key metals used in optoelectronics are ongoing, despite interruption from a legal challenge.

The offices, cleanrooms and conference floors of the photonics industry seem a long way from metal mines and murder in the Democratic Republic of Congo (DRC). The link between optics and the 5.4 million-plus people estimated to have died as a result of DRC's ongoing humanitarian crisis since 1998 may not be immediately obvious. But they're connected thanks to the global web of trade, and since 2010, also the US Dodd-Frank Wall Street Reform and Consumer Protection Act.

Dodd-Frank makes the US Securities and Exchange Commission (SEC) responsible for regulating disclosures about key metals for optoelectronics that might originate from the DRC or adjoining countries. Specifically those metals are tin, tungsten, tantalum, and gold, collectively known as 3TG in short. Intended to limit cash-flow to armed groups in DRC, the Act's impacts reach far beyond US borders, and not only because the Europe is also considering similar regulations. The Dodd-Frank requirements mean the entire industrial supply chain must know where its metals come from. Publicly traded

Where do the rules stand?

The SEC's Conflict Minerals Rule was challenged shortly after it was issued, highlights Dynda Thomas, a conflict minerals expert and partner at law firm Squire Patton Boggs in Cleveland, Ohio, and a speaker at this afternoon's Photonics West panel session *For Wherever You Are in the Supply Chain*. The rule, issued in August 2012, required companies whose products contain the 3TG metals to make 'reasonable country of origin inquiries'.

Then, in many cases, they would have to conduct due diligence about the source and chain of custody of their 3TG. Were any metals not shown to be from reputable sources, companies would have had to describe the affected products as 'not found to be DRC conflict-free'.

However, in April 2014, a panel of the District of Columbia Court of Appeals suspended this requirement in response to a suit led by the US National Association of Manufacturers. "The court concluded that compelling companies to make that statement would violate

their First Amendment rights," Thomas says. But the need to investigate the supply chain remains, and it's still possible that an effort to restore the statement requirement will be taken to the US Supreme Court. "At this point, we still don't know whether that First Amendment ruling will be finally upheld," Thomas stresses.

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DYNDY THOMAS,
PARTNER AT SQUIRE PATTON BOGGS.

Meanwhile, Europe is considering its own draft conflict minerals regulation. "The original proposed regulation was issued in 2013 and was voted on by the European Parliament in May of 2015," Thomas notes. "We expect

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impact them. When the European Union adopts its own conflict minerals regulation, that will greatly expand the number of companies covered by a regulation and that actively gather and provide information.”

How do conflict minerals rules affect optoelectronics companies?

Optoelectronics companies will increasingly be receiving inquiries about the conflict minerals their products contain, Thomas says. “Over time, more of their customers will probably have a ‘DRC conflict-free’ policy or goal, and optoelectronics companies will need to have visibility throughout their supply chains in order to qualify as suppliers.”

The rule’s relevance to optoelectronics can be seen in the Conflict Minerals Reports from San Jose’s Avago Technologies. Selling a variety of relevant products, including LEDs and fiber-optic components and subsystems, Avago’s Conflict Minerals Policy focuses on checking its suppliers’ sources of 3TG minerals. “We do not typically have a direct relationship with 3TG smelters and refiners,” the company writes. “Avago’s relevant suppliers are required to implement measures to prohibit the purchase and use of conflict minerals from the Democratic Republic of Congo (“DRC”) and its adjoining countries...that fund armed conflict in those countries.”

In December 2013, that involved querying 188 suppliers, who together made 3251 references to a total of 383 smelters and refiners. As of December 2014 that had shrunk to 253 legitimate smelters and refiners, 132 validated as ‘conflict free’, and 53 being audited for that certification. Avago wrote that it intended to ‘implement steps to further mitigate the risk that con-

Digging holes: The Luwovo tantalum mine is near Rubaya in North Kivu, one of the most-conflict torn regions of DRC.

Photo: MONUSCO/Sylvain Liechti.

flict minerals that are necessary to the functionality or production of our products finance or benefit armed groups in the DRC.’

Leading applications of potential conflict metals in optoelectronics include gold coatings used on mirrors and gratings, observes Rosemarie Szostak, senior analyst at Tolland, Connecticut, research and advisory firm Nerac, and chair of the Photonics West 2015 panel session. Tin used as a solder in mounting devices and tantalum used in capacitors are also important, as they are across the electronics industry. Szostak has been working to help companies meet the SEC’s regulations, and emphasizes that full compliance would call for great vigilance and cost.

Are the rules working?

The motivation to audit the supply chain is reduced by the minor consequences of not complying with the regulations, Szostak admits. “Right now, all companies have to do is say ‘Oh, well, we tried and we didn’t find anything,’” she told *Show Daily*. The SEC has limited taxpayer funds for monitoring and enforcement, while the Court of Appeals ruling made it easier for companies not to do anything substantial, Szostak emphasizes. “They do not have to say ‘mea culpa’ to their shareholders or customers. Best effort, the letter of the

law – that’s all the SEC can ask for. But some companies are embracing the spirit of the law. They are spurred by Dodd-Frank to clean up their supply chain.”

Szostak’s experience has led her to call Dodd-Frank’s conflict mineral provisions ‘a can of worms’. At best it’s unleashed problems that are not easily solved, and at worst it’s not working at all. “They’re using a regulation in one part of the world and expecting it to favorably impact another part,” she says. It’s impossible to control the outcome of such measures, Szostak adds. “The use of in-country oversight, security forces, and assistance to

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“Companies should not dismiss these issues as ‘soft stuff’.”

DOUGLAS HILEMAN,
CONSULTING COMPLIANCE EXPERT.



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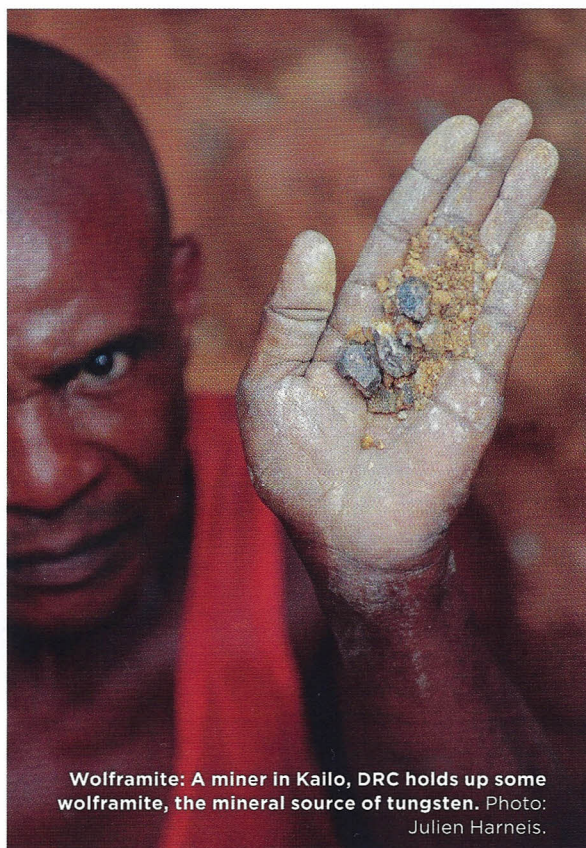
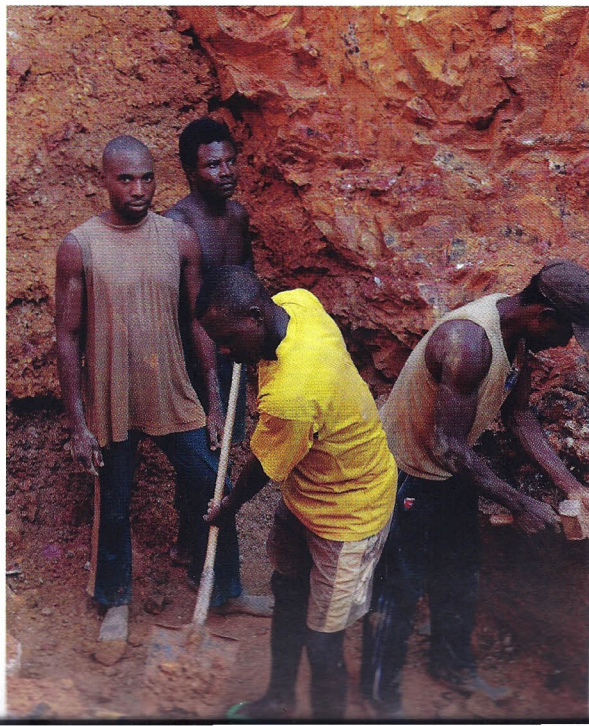
local miners has reduced the illicit mineral trade slightly since the enactment of Dodd-Frank, as noted in the November 2015 US Government Accountability Office (GAO) Congressional testimony. But in the DRC there are bad people and they're not going to let up, no matter how much you try to regulate their source of funding away. Sadly the artisanal miners are ultimately hurt by removing their source of income."

Douglas Hileman, whose eponymous Los Angeles, California, firm performs audits outlined in the SEC's conflict minerals rules, emphasizes that the measures overall might be working. He points to an August 2015 GAO report mentioning two analyses by Fairfax, Virginia consulting firm ICF International on sexual violence in the DRC. It compares data from 2007 and 2013-2014, finding a statistically significant decline in sexual violence. According to Hileman, who is also speaking on today's panel, this stands out from anecdotal evidence on both sides of the debate over whether the rule is effective. "This is the only objective, published report of a statistically based study I'm aware of," he says.

The August 2015 GAO report also found that 1,321 companies filed 'specialized disclosure' conflict minerals reports in 2014. This was substantially lower than SEC's original estimate of 6,000 companies that could possibly be affected by the rule, though SEC officials said that estimate was 'intentionally overly inclusive'. The GAO report also found that 67% of companies that did file reports were unable to determine the country of origin of the 3TG metals they had used. 24% said their metals did not originate in the DRC or its neighbors, while just 4% said that they did. The remaining 5% either used recycled material, or didn't provide a clear determination.

More than money; more than law

Hileman notes that although the SEC is currently unlikely to enforce 3TG rules aggressively, those companies



Wolframite: A miner in Kailo, DRC holds up some wolframite, the mineral source of tungsten. Photo: Julien Harnéis.

either not filing, 'egregiously flouting' requirements, or making unsupported conclusions do risk SEC action. "The quality of these submissions is also being reviewed and analyzed by non-governmental organizations and other parties," Hileman adds. "They are getting more sophisticated and more demanding. Consequences of inadequate SEC filings can also include adverse publicity. For companies in their supply chain – including the majority of affected companies in the photonics industry – non-responses or inadequate completion of conflict minerals reporting templates risk unwanted attention from customers, or even losing customers."

Furthermore, the consultant urges manufacturers to consider the full societal context of the regulations. "It is tempting to look at this rule as a single data point," Hileman says. "It is also tempting to look at a single court decision or legal opinion as the defining answer for conflict minerals, or to achieve legal compliance. As a matter of practice and risk management, this is just one of many drivers in the landscape of new, emerging, and stricter requirements for management, oversight, and reporting related to the supply chain. This one happens to be very visible right now because it's an SEC rule, and because some of the requirements are in flux."

Beyond Dodd-Frank, other non-financial information is becoming important for companies to provide. Areas involved include human trafficking, forced labor, fair pay, gender equality, environmental preservation and degradation, energy efficiency and greenhouse gas emissions. Some questions are regulatory, such as on human trafficking in the UK and California, and others are specific to industries or customer requirements, Hileman explains – but all should all be answerable. "Companies should not