

U.S. Conflict Minerals Requirements: Frequently Asked Questions



Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, known as the US Conflict Minerals Law, mandates supply chain traceability for publicly traded companies that use, make or sell products with “Conflict Minerals” (tin, tantalum, tungsten, gold and the ores from which they originate). These requirements are set to dramatically impact the global supply chain for the affected materials.

Because of our leading experience with conflict minerals traceability auditing and program development, THE ELM CONSULTING GROUP INTERNATIONAL LLC is frequently contacted with questions about the requirements of this new US law. To assist those interested, we developed this FAQ.

What companies are subject to the law? The law specifically applies to US companies that are already under the jurisdiction of the Securities and Exchange Commission (SEC) as a publicly-traded company. In some cases, foreign companies that are also registered under SEC in the US may also be subject to the law. SEC collectively refers to these companies as “issuers” or “registrants”. This is not limited to companies trading on NASDAQ or NYSE. SEC estimated in their proposed rules that 6,000 companies are potentially subject to the regulation, and only 1,200 would be required to implement the full extent of the law. However, this doesn’t reflect the “trickle down” effect. Because information is required from a registrant’s supply chain, vendors/suppliers that are not themselves regulated by SEC will need to establish programs to provide conflict minerals traceability/origin identification information to their customers.

What metals are subject to the law? There are only four ores/metals subject to the US requirements at this time.

- Coltan (columbite tantalite) and its derivatives (tantalum)
- Cassiterite and its derivatives (tin)
- Wolframite and its derivatives (tungsten)
- Gold

Reports of other metals (most commonly cobalt) being included are incorrect at this time. The list may be amended by the Secretary of State in the future.

How do I know if I have or use these metals? Begin with a review of basic material content documentation about your products and materials obtained from suppliers/vendors. Relevant information sources include MSDS, REACH, RoHS and similar data. It may also be helpful to contact your company’s engineering, quality and other internal groups. A few of the more common uses of the metals to look for include:

- **Tin:** solder (found in almost all electronic devices, including on/off switches, electronic controllers, LED lighting and LCD displays), metal alloys (brass, bronze), sheet metal housings and frames, metal plating, chemicals (including stannous fluoride and biocides), PVC manufacturing.
- **Tantalum:** capacitors, medical devices, industrial process equipment (such as reactors), specialty glass (lenses), jewelry. In carbide form, it is used in tools and aerospace components.
- **Tungsten:** weights (cellphone vibrators, fishing gear), golf clubs, ammunition, light bulb/x-ray filaments, industrial processes (chemical, leather tanning), jewelry. In carbide form, it is used in tools and aerospace components.
- **Gold:** jewelry, dental materials, antioxidant coatings (especially in electronics), medicinal use, specialty glassmaking, chemicals.

Is my company subject to the law if any of these metals are simply present on-site? No. The law applies only where “conflict minerals are necessary to the functionality or production of a product manufactured.” For instance, the use of tungsten carbide saw blades or drill bits for metalworking alone will not trigger the applicability of the law. However, if your company manufactures tungsten carbide saw blades or drill bits, then you would be subject to the requirements. In other words, if conflict minerals end up in your final product – or are necessary in an intermediate process (such as a chemical reaction) – then the law applies.

Is my company subject to the law if I only sell products that contain conflict minerals but are made by other companies? Possibly. The law applies to “products manufactured or contracted to be manufactured”. The final rules are expected to expand on this, but the proposed rules stated:

We intend that our proposed rules would apply to issuers that contract for the manufacturing of products over which they have any influence regarding the manufacturing of those products. They also would apply to issuers selling generic products under their own brand name 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 an issuer has contracted with another party to have the product manufactured specifically for that issuer. We do not, however, propose that our rules would apply to 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, or if those retailers do not sell those products under their brand name or a separate brand they have established and do not have those products manufactured specifically for them.

What is the status of the SEC’s final regulations? The Law itself was signed by President Obama on July 21, 2010, which mandated final regulations be promulgated by April 2011. SEC’s proposed regulations were published in the Federal Register on December 23, 2010. SEC has officially delayed promulgation of the final regulations until sometime between August and December 2011.

Is there an exemption for de minimis quantities of the conflict minerals in my products? No, not in the language of the law itself. However, it is expected that the final rules will establish a materiality threshold.

Are scrap materials and the complexities of that supply chain addressed? No. The law does not differentiate between scrap and virgin ore, but it is expected that the final rules will recognize the unique nature of scrap. The proposed regulations provided the following guidance:

... we would consider conflict minerals “recycled” that are reclaimed end-user or post-consumer products, but we would not consider those minerals “recycled” if they are partially processed, unprocessed, or a byproduct from another ore... Issuers whose conflict minerals originated from recycled or scrap sources would be required to disclose in their annual report, under the “Conflict Minerals Disclosure” heading, that their conflict minerals were obtained from recycled or scrap sources and that they furnished a Conflict Minerals Report regarding those recycled or scrap minerals.

What are the specific requirements my company has to comply with? Reporting requirements are prescribed in the law. However, it is anticipated that the final rules will clarify many aspects of this, including applicability of reporting where the source of materials cannot be identified. Section 1502(b) specifically mandates the following reporting requirements:

- Whether conflict minerals originated in DRC/surrounding countries
- Where CM did originate from the DRC/surrounding, submit to SEC a report that includes:
 1. a description of the measures taken to exercise due diligence on the source and chain of custody of such minerals
 2. an independent private sector audit conducted in accordance with standards established by the SEC
 3. a description of the products manufactured or contracted to be manufactured that are not DRC conflict free
 4. the entity that conducted the independent private sector audit
 5. the facilities used to process the conflict minerals
 6. the country of origin of the conflict minerals, and
 7. the efforts to determine the mine or location of origin with the greatest possible specificity.
- Annual disclosure of the above information to SEC and to the public on the company’s website

It is important to note that the law does NOT ban the use of DRC-sourced materials, nor does it mandate material or source substitutions. The intent of the reporting requirements is to provide transparency of a company’s supply chain to assist customers in making purchasing decisions.

I have read about smelter certification programs. Do I need to do anything more than get the certification documents? A handful of credible certification and traceability programs are emerging, some of which are directly sponsored by governmental entities. However, information/reports generated from such programs are a single element of a company’s due diligence efforts/management programs that are required. Beyond the legal requirements, each company must make their own determinations about the risk they are willing to take with regard to reliance on such information. The final rules are expected to address the use of this information within a company’s due diligence efforts.

Does this just involve my purchasing/procurement department? No. An appropriate program will include representatives from the sales, supply chain, legal, senior management, customer service, engineering, investor relations, quality, and EHS functions as well.

Can I just send out questionnaires to my suppliers asking for this information? Supplier communications are a critical element of the supply chain due diligence process, but more effort is necessary for compliance. In addition, suppliers are already complaining of “questionnaire fatigue” and expressing a lack of information availability within their own supply chain. Electronics and automotive industry groups have begun efforts to create standardized supplier questionnaires to simplify the information gathering processes. Each company must make their own determinations about how much risk they are willing to take with regard to level of reliance on questionnaires from suppliers. We strongly advise working with suppliers/vendors on collecting information and implementing processes/programs to augment supplier questionnaires.

What if I don't have, or can't get, information on the source of my materials to know if they are from the DRC/surrounding countries? The language of the law does not address this. The final regulations are expected to provide clarifications, although companies will not simply be able to claim they have no information and end their activities with that. Doing so would create a major compliance loophole and defeat the intent of the law. The proposed regulations stated that

If an issuer is unable to determine, after a reasonable country of origin inquiry, that its conflict minerals did not originate in the DRC countries, that issuer still would be required to submit a Conflict Minerals Report and obtain an independent private sector audit of that Conflict Minerals Report.

Since the final regulations have not been issued, shouldn't I just wait? No. The activities and programs can be complicated and very time consuming to develop, implement, communicate through the supply chain, prepare for and complete the required audit. The US State Department issued its statement on the matter in late July, stating

...it is critical that companies begin now to perform meaningful due diligence with respect to conflict minerals. To this end, companies should begin immediately to structure their supply chain relationships in a responsible and productive manner.

What if I don't implement the programs? Because this is federal law, legal compliance risks exist for those companies directly regulated by SEC. The State Department is also evaluating “punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo.” Potentially more significant are the potential business risks of not responding to customer information and/or product specification requirements that stem from the law. In addition, reputational impacts may result from the publicly reported information.

Where/how do I start? This is perhaps the most common question. While the specific due diligence and auditing standards are not yet finalized, we recommend that companies maintain a few key perspectives as they begin evaluating and developing programs.

- The concept of **reasonable assurance** should be applied. Media reports and the emotional nature driving the fundamental issue (human right atrocities in the DRC) create expectations of “complete certainty” and zero tolerance. Given the current status/availability of information, combined with the global nature of many supply chains, absolute certainty is not possible. No other SEC audit program demands absolute certainty and this should be no different.
- Start with easy answers and evolve programs from there. Addressing obvious or simple materials, suppliers or programs first will provide your company with learnings that can then be applied to more complex situations.
- Carefully consider your communication plan with vendors, suppliers and customers. This includes how you plan to use questionnaires to gather information from suppliers, evaluating the business risks of relying on questionnaire responses and how to respond to conflict minerals traceability requests made to your company.
- Understand that the law mandates only the development of a traceability due diligence process, with related public reporting and auditing. The law does not ban the use of DRC-sourced materials, require alternative sources/materials or product labeling.

To assist with navigating the legal requirements, we offer a range of services for conducting and guiding gap assessments, program development and third party audits. ELM has also developed the Self-Implemented Conflict Minerals Audit Preparation[©] tool, or SICMAPSM.

ABOUT THE ELM CONSULTING GROUP INTERNATIONAL LLC

Founded in 2001, THE ELM CONSULTING GROUP INTERNATIONAL LLC is a specialty health, safety, environmental and sustainability management firm with 11 offices in the United States, Mexico, Argentina, Venezuela, New Zealand, Indonesia, China and a network of over 100 hand-selected affiliates in 22 other countries. As independent auditors, we limit our services to audit program support and maintain US and international HSE auditor certifications. We invite you to visit our website at www.elmgroup.com.

ELM completed third-party tantalum traceability audits in 2010 resulting in two of the three inaugural “Conflict-Free Smelter” designations, covering sites in the US and Japan. Since that time, we applied our expertise in conflict minerals and audit program development to produce the Self-Implemented Conflict Minerals Audit Preparation[©] tool, or SICMAPSM.*

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* The Conflict Free Smelter (CFS) program is emerging as the leading conflict minerals third party certification program for smelters by the electronics industry.