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*New York Law School, 2016*

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## Conflict Minerals, Ineffective Regulations: Comparing International Guidelines to Remedy Dodd-Frank's Inefficiencies

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## CONFLICT MINERALS, INEFFECTIVE REGULATIONS

### I. INTRODUCTION

“Laws or ordinances unobserved, or partially attended to, had better never have been made . . . .”<sup>1</sup> Placing regulations on corporations and similar entities to control the flow of conflict minerals out of the Democratic Republic of the Congo (DRC) and adjoining countries sounds like a great way to stop the trampling of human rights. Many international organizations and states have been working to minimize the use of conflict minerals in supply chains—particularly for electronic and technological goods.<sup>2</sup> The U.S. government has regulated this through a series of reporting regulations under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). However, the current regulations are undemanding; their existence leads to the misuse of corporate resources—wasting significant time and money—and fails to help the intended beneficiaries (those being oppressed and harmed in the DRC). This note examines the current regulations and how they are implemented and enforced, and conducts a comparative analysis of the recently proposed European Union (EU) regulations as well as the International Conference on the Great Lakes Region’s (ICGLR) and the London Bullion Market Association’s (LBMA) guidelines for conflict mineral reporting. It ultimately contends that the Dodd-Frank conflict mineral reporting requirements for U.S. public corporations are ineffective and must be amended with more robust regulations to fulfill their purpose.

The Dodd-Frank regulations are ineffective because (1) the reporting requirements—especially as they have been narrowed by *National Ass’n of Manufacturers v. SEC*<sup>3</sup>—are not bringing about the intended public awareness; (2) the due diligence requirements are cumbersome and convoluted; (3) the regulations do not require third-party due diligence certification; and (4) the scope of what constitutes a “conflict-affected” area is too narrow, as there are many other areas in Africa and around the world that are experiencing similar problems.

The conflict in the DRC is the “deadliest war since WWII.”<sup>4</sup> The rebel groups of the DRC attack the civilian population to exploit their labor and land for the mining of gold and other minerals, which the rebel groups then use to buy guns and

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1. Letter from George Washington to James Madison (Mar. 31, 1787), in 11 THE WRITINGS OF GEORGE WASHINGTON 1785–1790, at 130, 133 (Worthington Chauncey Ford ed., New York and London, G. P. Putnam’s Sons 1891) [hereinafter Letter].
  2. See Memorandum from Gibson, Dunn & Crutcher LLP to Clients & Friends, Conflict Minerals: Understanding the SEC’s Final Rules 12–13 (Sept. 14, 2012) [hereinafter Memorandum], <http://www.gibsondunn.com/publications/documents/ConflictMinerals-UnderstandingFinalSECRules.pdf>.
  3. 800 F.3d 518, 523–24 (D.C. Cir. 2015) (determining that a portion of the regulations violates the First Amendment protections afforded to corporations).
  4. 60 Minutes, *How Gold Pays for Congo’s Deadly War*, CBS NEWS (Nov. 25, 2009), <http://www.cbsnews.com/news/how-gold-pays-for-congos-deadly-war>. An estimated 10,000 civilians die every month in the DRC as a result of this conflict. Esther Yu Hsi Lee, *The Paradox of Congo: How the World’s Wealthiest Country Became Home to the World’s Poorest People*, THINKPROGRESS (May 28, 2016), <https://thinkprogress.org/the-paradox-of-congo-how-the-worlds-wealthiest-country-became-home-to-the-world-s-poorest-people-d27cbdd1debd>.

ammunition for their troops.<sup>5</sup> The U.S. regulations under Dodd-Frank are meant to compel corporations to remove conflict minerals from their supply chains by showing the industry the difference between legal and illegal mining—particularly that “illegal mining . . . is built on brutality, extortion, and slave labor including the use of children.”<sup>6</sup> These regulations rely solely on reporting and have had little to no effect on the individuals being oppressed and harmed in the DRC. Further, the requirements imposed on corporations to “find and report” are ineffective as a mechanism to propel corporations to help end, or at least defund, the conflict in the DRC.<sup>7</sup>

The goal of defunding conflict and war in the DRC through the reduction of conflict mineral use is an international one. Regulations and guidelines have been implemented around the world, not just in the United States.<sup>8</sup> This note focuses on the U.S. regulations and proposes ways to fix them by looking at other conflict mineral reporting regulations. Part II focuses on the Dodd-Frank regulations. While exploring their identified goals and purposes, Part II discusses the regulations, how they work, and the recent First Amendment limits stemming from the *National Ass’n* case, whose holding harms the ability to raise public awareness of the conflict.<sup>9</sup> Part III discusses the EU’s regulatory approach, as well as the ICGLR’s and LBMA’s guidelines, and establishes the approaches, frameworks, and definitions used by these entities to help minimize human rights abuses and defund conflict. Part III then compares those regulations and guidelines to Dodd-Frank’s regulations. Part IV.A uses the international comparisons from Part III to suggest ways in which the United States should amend Dodd-Frank to better urge corporations to reduce and expel conflict minerals from their supply chains. Part IV.B discusses the Kimberley Process Certification Scheme (“Kimberley Process”), which the current Dodd-Frank regulations attempted to emulate (and many scholars believe should be more closely

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5. FIDEL BAFILEMBA & SASHA LEZHNEV, CONGO’S CONFLICT GOLD RUSH 1 (2015). Since the independence movement in the late 1950s, the country has been riddled with conflict as a result of its lack of self-governance. *Democratic Republic of Congo: Conflict Profile*, INSIGHT ON CONFLICT (Aug. 2009), <https://www.insightonconflict.org/conflicts/dr-congo/conflict-profile>. The region has a long history of conflict, and the continuous warfare has led to a war economy in the DRC where influential groups have an entrenched interest in the conflict and armed groups utilize the extraction of natural resources as a strategy for establishing themselves. *Id.* (“Flawed peace agreements have enabled former rebels to integrate into the national army while maintaining their lucrative illegal networks. Parallel chains of command have multiplied, seriously damaging the military’s cohesion and effectiveness in combat.”).
  6. *Understanding Conflict Minerals Provisions*, ENOUGH PROJECT, <http://www.enoughproject.org/special-topics/understanding-conflict-minerals-provisions> (last visited Apr. 6, 2017).
  7. The holding in *National Ass’n*, 800 F.3d at 526–27, supports this argument. See *infra* Part II.B.
  8. Two examples of guidelines are the ICGLR’s Mineral Certification Scheme for regulating countries of the African Great Lakes Region, and the LBMA’s guidance for regulating London’s market. See Int’l Conference of the Great Lakes Region [ICGLR], *ICGLR Regional Certification Mechanism (RCM)—Certification Manual*, at 2 [hereinafter ICGLR Manual], <http://www.oecd.org/investment/mne/49111368.pdf>; LBMA, A GUIDE TO THE LONDON BULLION MARKET ASSOCIATION (2015) [hereinafter LBMA GUIDE], [http://www.lbma.org.uk/assets/market/gdl/LBMA\\_Overview\\_Brochure.pdf](http://www.lbma.org.uk/assets/market/gdl/LBMA_Overview_Brochure.pdf). For further discussion, see *infra* Part II.
  9. See *Nat’l Ass’n*, 800 F.3d at 523–24, 530 (determining that a portion of the regulations violates the First Amendment protections afforded to corporations).

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followed)—and argues that alternative schemes, particularly those highlighted in Parts III and IV.A, are better suited as a model. This note concludes that the U.S. government must amend the current regulations for more robust requirements as seen in these international frameworks, or abandon the laws altogether, as they are ineffective in their current state.

### II. DODD-FRANK CONFLICT MINERAL REPORTING REQUIREMENT REGULATIONS

Dodd-Frank includes in its definition of “conflict minerals”: “any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country.”<sup>10</sup> While this definition can encompass many other minerals, the minerals identified as problematic internationally and in this note are specifically limited to tantalum, tin, tungsten, and gold (“3TG”).<sup>11</sup>

The regulations cover the DRC and its adjoining countries because the mining of these mineral derivatives in the DRC finances conflict and perpetuates gross violations of human rights.<sup>12</sup> The adjoining countries are identified because they share an internationally recognized border with the DRC,<sup>13</sup> and when the minerals cannot be sold out of the DRC, they are often smuggled over the border and sold there.<sup>14</sup> Uganda, for example, is a common place for gold nuggets to be smuggled from the DRC. In 2007, Uganda produced only \$500 worth of gold, yet it exported \$75 million in gold. Almost all the gold exported came from the war zone in the DRC.<sup>15</sup>

Dodd-Frank sets forth regulations with respect to conflict minerals in corporations’ supply chains, and involves a range of government actors.<sup>16</sup> Under Dodd-Frank, the

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10. 15 U.S.C. § 78m note (2012). The language of Dodd-Frank specifically identifies coltan, cassiterite, gold, and wolframite. *Id.* The specific derivatives from those minerals—3TG—are the focus of this note. The regulations allow the Secretary of State to broaden the defined minerals to any other mineral or its derivatives if it is found that they are also financing conflict in the DRC or adjoining countries. *Id.*
  11. See *Fact Sheet: Disclosing the Use of Conflict Minerals*, SEC (July 29, 2014), <https://www.sec.gov/News/Article/Detail/Article/1365171562058>.
  12. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240.13p-1, 249b.400 (2017)). What the SEC generally refers to in the Conflict Minerals Adopting Release as the “final rule” or “rule” is the new rule 13p-1 under the Securities Exchange Act of 1934 (“Exchange Act”) and the new Form SD.
  13. See § 78m note.
  14. 60 Minutes, *supra* note 4. The list of adjoining countries currently consists of Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia. Conflict Minerals, 77 Fed. Reg. at 56,274 n.7.
  15. 60 Minutes, *supra* note 4.
  16. See § 78m; *Understanding Conflict Minerals Provisions*, *supra* note 6.

In 2011, the Secretary of State, in consultation with [the United States Agency for International Development], developed a strategy to address the link between armed groups, conflict minerals, and human rights abuses. Both organizations were also tasked with providing guidance to commercial entities seeking to exercise due diligence on the source and chain of custody of activities involving such minerals to ensure they did not directly or indirectly finance or benefit armed groups in Congo. Lastly, the

SEC can require conflict mineral disclosures from public corporations,<sup>17</sup> which in turn must audit where their minerals come from. This effort furthers the goal of eliminating the use of conflict minerals from the DRC and adjoining countries.<sup>18</sup> Under these auditing practices, corporations must look at their supply chains and determine where their materials come from, in “an effort to curb exploitation and trade of conflict minerals by violent groups in the war-torn Congo.”<sup>19</sup> In practice, however, Dodd-Frank’s mandates for companies to trace their supply chains often prove cumbersome,<sup>20</sup> leading to many efforts by the industry to block the regulations imposed.<sup>21</sup>

### A. Conflict Mineral Regulation Purpose and Legislative History

Dodd-Frank contains corporate regulations aimed at stopping the financing of conflict in the DRC, particularly in the eastern regions of the country.<sup>22</sup> In these regions, armed groups control many of the mines and directly benefit from, and participate in, the exploitation and trade of specified minerals used to finance conflicts rife with extreme levels of violence and human rights abuses.<sup>23</sup> According to the SEC, “the exploitation and trade of conflict minerals by armed groups is helping to finance the conflict and . . . the emergency humanitarian crisis in the region warrants the disclosure requirements established by Exchange Act Section 13(p).”<sup>24</sup>

The 3TG minerals regulated under Dodd-Frank are used to manufacture many commonly used products: cellular phones, computers, digital cameras, MP3 players,

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Secretary of State developed a conflict minerals map that shows trade routes, mineral rich zones and areas under control of armed groups.

*Id.*

17. § 78m(p)(1)–(2). The SEC, as the enforcement agency of both Dodd-Frank and the Exchange Act, is the only agency able to bind issuers of securities (public corporations) to comply. *What We Do*, SEC, <https://www.sec.gov/about/whatwedo.shtml> (last visited Apr. 6, 2017). Non-security-issuing entities (private entities) are not bound to comply with any SEC regulations. *Id.*
18. Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 628 (2014); Damon Beres, *Here’s the Absolute Worst Way to Show Your Support for Cecil*, HUFFINGTON POST (Aug. 3, 2015, 12:38 PM), [http://www.huffingtonpost.com/entry/gold-phone-cecil-the-lion\\_55bf6939e4b0b23e3ce33514](http://www.huffingtonpost.com/entry/gold-phone-cecil-the-lion_55bf6939e4b0b23e3ce33514) (explaining that the Dodd-Frank regulations are working to take miners’ livelihoods into account).
19. Bloomberg News, *Intel Scores High on Conflict Minerals Tracking, but Most Others Struggle*, OREGONLIVE.COM (Aug. 5, 2015, 10:15 AM), [http://www.oregonlive.com/silicon-forest/index.ssf/2015/08/intel\\_scores\\_high\\_on\\_conflict.html](http://www.oregonlive.com/silicon-forest/index.ssf/2015/08/intel_scores_high_on_conflict.html); see Dhooge, *supra* note 18, at 628.
20. See Dhooge, *supra* note 18, at 629 & n.168 (discussing the *National Ass’n* petitioners’ argument that the breadth and cost of the disclosure requirements are unduly burdensome); Bloomberg News, *supra* note 19.
21. Shreema Mehta, *EU Votes for Strong Conflict Minerals Regulation*, EARTHWORKS (May 28, 2015), [https://www.earthworksaction.org/earthblog/detail/eu\\_votes\\_for\\_strong\\_conflict\\_minerals\\_regulation](https://www.earthworksaction.org/earthblog/detail/eu_votes_for_strong_conflict_minerals_regulation).
22. See § 78m; sources cited *supra* notes 4–5.
23. 60 Minutes, *supra* note 4.
24. Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 n.7 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240.13p-1, 249b.400 (2017)).

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video game consoles, aerospace equipment, automobiles, electronics, and jewelry.<sup>25</sup> Reporting of conflict minerals in corporate supply chains is meant to discontinue the involvement of, and benefit to, armed groups that cause violence and conflict in these regions.<sup>26</sup> Under the statute, once these groups can no longer benefit and cease to be directly involved, the president can terminate the provisions and regulations.<sup>27</sup>

“[T]he legislative history surrounding the Conflict Minerals Statutory Provision, and earlier legislation addressing the trade in conflict minerals, reflects Congress’s motivation to help end the human rights abuses in the DRC caused by the conflict.”<sup>28</sup> With this intent in mind, Congress chose the (now enacted) disclosure requirements to help end these conflict-caused human rights abuses occurring in the DRC.<sup>29</sup> Congress hopes that through the regulations, corporations will look to conflict-free supply chains, effectively reducing the sales for the conflict-ridden chains and putting the armed groups “out of business.”<sup>30</sup> Additionally, Congress anticipates that the regulations will bring public awareness to the problems of conflict-ridden regions and promote due diligence in corporations’ mineral supply chains.<sup>31</sup> To be, at least minimally, successful, the Dodd-Frank regulations need both public awareness and due diligence. However, the recent D.C. Circuit holding of *National Ass’n*, where a portion of Dodd-Frank’s regulations was determined a violation of a corporation’s First Amendment right, has severely impaired the availability of reported information necessary for public awareness.<sup>32</sup>

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25. Memorandum, *supra* note 2.

26. *See* § 78m(p); 17 C.F.R. § 240.13p-1. The U.S. government proposes that the best way to end the conflict is to help people recover from suffering and violence. Conflict Minerals, 77 Fed. Reg. at 56,275–76. “A critical aspect of this effort is severing the link between the minerals trade and the armed groups committing atrocities in Congo.” *Understanding Conflict Minerals Provisions*, *supra* note 6.

27. § 78m(p)(4) (“The [disclosure] requirements of [section 1502(b)(1)] shall terminate on the date on which the President determines and certifies to the appropriate congressional committees . . . that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.”).

28. Conflict Minerals, 77 Fed. Reg. at 56,275; *see* 22 U.S.C. § 2151 note (2012) (stating that the National Security Strategy of the United States determined that disease, war, and desperate poverty in Africa are a threat to both the United States’ core value of preserving human dignity and its mission to combat global terror).

29. Conflict Minerals, 77 Fed. Reg. at 56,275–76.

30. *Id.* at 56,275, 56,277.

31. 15 U.S.C. § 78m note (describing the legislation as “[a] plan to promote peace and security” in the covered countries); 156 CONG. REC. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold) (“I am pleased to be an original cosponsor of two amendments . . . that seek to ensure there is greater transparency around how international companies are addressing issues of foreign corruption and violent conflict that relate to their business. . . . [T]hese mechanisms . . . will help the United States and our allies more effectively deal with these complex problems [and will] help American consumers and investors make more informed decisions.”).

32. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

*B. National Ass'n of Manufacturers v. SEC and Its Effects*

The plaintiffs in *National Ass'n* argued that the disclosure requirements of public corporations regarding conflict minerals violated their First Amendment right to commercial speech.<sup>33</sup> Under the First Amendment jurisprudence for commercial speech, a deferential standard of review is applied to determine whether the state has a compelling purpose in requiring issuers of securities to make disclosures about their products.<sup>34</sup> However, the Dodd-Frank disclosure rules are unlike other SEC disclosure rules. The SEC stated that the Dodd-Frank disclosure rules appear to be focused on “achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers.”<sup>35</sup> It expressed that the Dodd-Frank disclosure rules are “quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve,”<sup>36</sup> and so the court evaluated the conflict mineral disclosure rules under a stricter standard.<sup>37</sup>

The disclosures at issue required companies to report whether or not they are “DRC conflict free” on their websites as well as in their SEC filings.<sup>38</sup> The court found that the label of “DRC conflict free” or “not DRC conflict free” is not a “factual and non-ideological” description,<sup>39</sup> and therefore, allowing this reporting requirement could permit the government to “skew public debate by forcing companies to use the government’s preferred language. For instance, companies could be compelled to state that their products are not ‘environmentally sustainable’ or ‘fair trade’ if the government provided ‘factual’ definitions of those slogans—even if the companies vehemently disagreed . . . .”<sup>40</sup> The D.C. Circuit held that the regulation requiring companies using conflict minerals to state that their products

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33. *Id.*

34. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). “The Supreme Court has stated that rational basis review applies to certain disclosures of ‘purely factual and uncontroversial information.’” *Nat’l Ass’n*, 800 F.3d at 554 (quoting *Zauderer*, 471 U.S. at 651).

35. Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240.13p-1, 249b.400 (2017)); *see also* Mary Jo White, Chair, SEC, 14th Annual A.A. Sommer, Jr. Lecture at Fordham Law School: The Importance of Independence (Oct. 3, 2013) (“Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the [DRC] are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC’s powers of mandatory disclosure to accomplish these goals.”).

36. Conflict Minerals, 77 Fed. Reg. at 56,335.

37. The court did not identify a particular level of scrutiny or test because the final rule did not survive *Central Hudson’s* intermediate standard requiring that “the government must show (1) a substantial government interest that is; (2) directly and materially advanced by the restriction; and (3) the restriction is narrowly tailored.” *Nat’l Ass’n*, 800 F.3d at 555 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–66 (1980)).

38. *Nat’l Ass’n*, 800 F.3d at 522, 529–30; *see* 15 U.S.C. § 78m(p) (2012).

39. *Nat’l Ass’n*, 800 F.3d at 530 (quoting *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014)).

40. *Id.* (citation omitted).



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were “not DRC conflict free” was a violation of the First Amendment and would require self-condemnation.<sup>41</sup>

Despite this ruling, the bulk of the provisions requiring corporate due diligence remain intact.<sup>42</sup> Corporations still must audit their supply chains and file SEC reports on their findings, but are no longer required to state, either in their reports *or* on their websites, whether or not their supply chains are free from DRC conflict minerals.<sup>43</sup> Additionally, with respect to the portions that have been declared unconstitutional, many corporations have backed the SEC in its disclosure requirement, using the language of their own volition.<sup>44</sup>

While the SEC may consider the remaining provisions under Dodd-Frank to be a victory, they do little to aid in the identified purpose of these statutes, particularly with respect to the regulations’ “public awareness” purpose. The requirement for public corporations to state whether they are “DRC conflict free” or “not DRC conflict free” was created with the express intention of increasing public awareness of conflict minerals and the human rights abuses that they fuel.

### *C. Effectiveness and Applicable Enforcement Mechanisms*

The SEC filing requirements subject issuers to liability under section 18 of the Exchange Act for fraudulent or false reporting on conflict minerals.<sup>45</sup> Issuers can be sued for making false or misleading statements by any individual or entity that relied on that filed information to purchase or sell a security.<sup>46</sup> An issuer filing a Conflict Minerals Report must use the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains,

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41. *Id.*

42. Nick Heath, *Court Rules Against Conflict Mineral Disclosure Law*, TECHREPUBLIC (Aug. 20, 2015, 2:33 AM PST), <http://www.techrepublic.com/article/court-rules-against-conflict-mineral-disclosure-rule>.

43. *Id.* Not only is this ruling a setback for all parties who are interested in helping to stop the funding of conflicts through the mining of metals in conflict-ridden areas of Africa, but it is also likely to be relied on by judges and legislators on issues of corporate transparency and First Amendment rights. *See Nat’l Ass’n*, 800 F.3d 518.

44. Heath, *supra* note 42.

45. 15 U.S.C. § 78r (2012). Section 18(a) provides:

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder . . . , which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading.

*Id.*

46. *Id.*

which has guidance supplements on 3TG.<sup>47</sup> The Dodd-Frank regulations are also modeled after the Kimberley Process,<sup>48</sup> which while hailed for helping to “clean up” the diamond industry, still has many faults.<sup>49</sup>

Dodd-Frank generally operates on the idea to “name and shame” corporations that need conflict minerals for their manufacturers to function.<sup>50</sup>

The regulation, however, does not require that companies cease, or even attempt to cease, their use of conflict minerals. That is, the efficacy of the provision turns on the public consciousness and reaction to learning that certain corporations have products that contain conflict minerals. This, of course, assumes that not only investors, but the public at large will review the companies’ websites or SEC disclosures to learn whether a particular company has made a conflict mineral disclosure.<sup>51</sup>

The Dodd-Frank provisions seek increased corporate due diligence in regulating supply chains as well as increased public awareness of where products come from and how the products affect the communities from which the minerals are extracted.<sup>52</sup>

The naming and shaming enforcement mechanism is even less effective after *National Ass’n*, because the regulation does not effectively raise public awareness of the problems in the DRC and companies’ perpetuation of these problems through use of 3TG in their products.<sup>53</sup> All the regulations seem to be doing is wasting corporate money, as it is extraordinarily expensive to fulfill the due diligence requirements and file the necessary reports with the SEC.

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47. Melvin Ayogu & Zenia Lewis, *Conflict Minerals: An Assessment of the Dodd-Frank Act*, BROOKINGS INST. (Oct. 3, 2011), <http://www.brookings.edu/research/opinions/2011/10/03-conflict-minerals-ayogu>. The OECD due diligence framework contains many guidelines and depending on the type of supply chain or corporation being evaluated, different guidelines need to be followed. Dodd-Frank does not specifically require compliance with the OECD framework, which is one of the only frameworks internationally recognized with respect to conflict mineral due diligence. ERNST & YOUNG, *CONFLICT MINERALS* 5 (2012).

48. *Id.*

49. *See infra* Part IV.B.

50. Karen E. Woody, *Conflict Minerals Legislation: The SEC’s New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315, 1344 (2012). The Dodd-Frank provisions have led to *some* small improvements in the “transparency” of corporate supply chains and reduced conflict mines in the DRC for tin, tantalum, and tungsten—gold, however, remains a problem, “as it is easily smuggled and highly valuable in small quantities.” Beres, *supra* note 18.

51. Woody, *supra* note 50, at 1344.

52. *See* 15 U.S.C. § 78m (2012); *id.* § 78m note (“to promote peace and security” in the covered countries); *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 543 (D.C. Cir. 2015) (Srinivasan, J., dissenting); 156 *CONG. REC.* S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold).

53. For more on the inefficiencies of the “naming and shaming” operation, see Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis*, 25 *REGENT U. L. REV.* 351 (2013).

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In 2014, to comply with regulations to disclose conflict minerals, “US companies shelled out roughly \$709 million and 6 million staff hours.”<sup>54</sup> The SEC anticipated that 4,500 companies would file reports, but only 1,012 companies did.<sup>55</sup> Studies have shown that supply chains are not transparent, and it is difficult for smaller corporations to gather the information or try to effect change within their supply chains if there are conflict minerals within them.<sup>56</sup> For example, when corporations such as IBM, Apple, and Microsoft<sup>57</sup> fill out a 1502 reporting form<sup>58</sup> and want something changed within their supply chains—it will likely happen. However, the associated costs and necessary leverage are problematic, and costly, for smaller corporations.<sup>59</sup>

Not only are the due diligence requirements expensive, but they are also difficult to comply with. In 2014, almost eighty per cent of public companies analyzed by human rights groups did not sufficiently comply with Dodd-Frank’s requirements to check and disclose whether their products contain conflict minerals from Central Africa.<sup>60</sup> Therefore, while the Dodd-Frank regulations seek improved due diligence in corporations’ supply chains as well as increased public awareness of where products come from and how they affect the communities from which the minerals are extracted,<sup>61</sup> this is unlikely to happen without a third-party certification requirement.<sup>62</sup>

The lack of “public awareness” coming from these regulations, the difficulty in properly executing due diligence, and the sheer cost in searching and reporting on

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54. Jeff Yoders, *Assent/Tulane Study Illustrates Difficulty of Conflict Minerals Compliance . . . Even for Mylar Balloons*, METALMINER (Aug. 6, 2015), <https://agmetalmminer.com/2015/08/06/conflict-minerals-compliance>.

55. EY CTR. FOR BD. MATTERS, LET’S TALK: GOVERNANCE: FIRST-YEAR CONFLICT MINERAL REPORTING REVEALS INSIGHTS AND SURPRISES 1–2 (2014).

56. See Yoders, *supra* note 54.

57. These corporations are probably engaging in foreign direct investment. Therefore, they have a lot more bargaining power than corporations that are not. For more information on foreign direct investment, particularly with natural resources, see Elizabeth Asiedu & Donald Lien, *Democracy, Foreign Direct Investment and Natural Resources*, 84 J. INT’L ECON. 99 (2011).

58. Under section 1502 of Dodd-Frank, companies are required to fill out a specialized disclosure form if 3TG minerals are “necessary to the functionality or production” of the company’s products. *Fact Sheet: Disclosing the Use of Conflict Minerals*, *supra* note 11. Further, if the company believes there is a possibility the 3TG minerals originated from the DRC or a covered country it must provide a Conflict Minerals Report as an addendum to the Specialized Disclosure Form. *Id.*

59. See Yoders, *supra* note 54; *supra* note 57 and accompanying text (expanding this assertion).

60. AMNESTY INT’L & GLOB. WITNESS, DIGGING FOR TRANSPARENCY: HOW U.S. COMPANIES ARE ONLY SCRATCHING THE SURFACE OF CONFLICT MINERALS REPORTING 5 (2015). The *Digging for Transparency* report noted findings about why the companies failed to adequately map out the supply chains for purchased minerals, including as evidence of inadequate compliance that a small percentage attempted to contact the facilities that process the minerals, and that more than half the companies did not take appropriate measures when a risk in their supply chain was found. *Id.*

61. See 15 U.S.C. § 78m (2012); *id.* § 78m note (“to promote peace and security” in the covered countries); Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 543 (D.C. Cir. 2015) (Srinivasan, J., dissenting); 156 CONG. REC. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold).

62. See *infra* Parts III and IV.A.

supply chains all contribute to rendering the regulations ineffective. Additionally, their narrow scope, which is limited to the DRC and adjoining countries, ignores a significant number of conflict-affected areas, in Africa and around the world.<sup>63</sup>

#### D. OECD Guidance on Due Diligence

The OECD Guidance on Due Diligence for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provides recommendations “to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices.”<sup>64</sup> The guidance was produced with the intent to “cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector.”<sup>65</sup> “With its Supplements on [3TG], the OECD Guidance provides companies with a complete package to source minerals responsibly in order for trade in those minerals to support peace and development and not conflict.”<sup>66</sup>

The OECD sets out a five-step framework for companies to follow in risk-assessment due diligence in the mineral supply chain: (1) establish strong company management systems; (2) identify and assess risks 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; and (5) report on supply chain due diligence.<sup>67</sup> The “due diligence is structured around the steps that companies should take to: identify the factual circumstances involved in the extraction, . . . identify and assess any actual or potential risks . . . set out in the company’s supply chain policy[, and] prevent or mitigate the identified risks . . . .”<sup>68</sup>

While Dodd-Frank requires corporations to follow the OECD due diligence guidelines, it does not follow all the ideas and definitions laid out by the OECD, such as what constitutes a “conflict-affected” area. The OECD identifies “conflict-affected” and “high-risk areas”<sup>69</sup> “by the presence of armed conflict, widespread

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63. Additionally, the reports simply identify the due diligence findings, but the First Amendment restrictions on the requirement for corporations to state whether or not they are “DRC conflict free” means that an individual or entity must look at the filing, understand it, and distill the information to come to a conclusion about the existence of conflict minerals in the supply chains. This is something that even a sophisticated investor might not do. Therefore, the reports have little to no effect, and fail to comply with the purpose of these regulations in general.

64. OECD, *OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS* 3 (3d ed. 2016).

65. *Id.*

66. *Id.*

67. *Id.* at 17–19.

68. *Id.* at 14.

69. *Id.* at 13. “High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.” *Id.* (emphasis omitted).

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violence or other risks of harm to people.”<sup>70</sup> This definition is much broader than Dodd-Frank’s—which only includes the DRC and adjoining countries—because the OECD does not identify areas with named regions as the Dodd-Frank regulations do, but instead with qualifying acts and factors. These qualifying acts and factors of violence, armed conflict, and risks of harm led the DRC and other similar areas to be labeled in the OECD guidance, without defining specific places.<sup>71</sup> The OECD’s definition of conflict focuses on remedying the human rights issues around the world and not just in the narrow region of the DRC and adjoining countries.<sup>72</sup>

### III. DODD-FRANK VERSUS INTERNATIONAL APPROACHES: A COMPARATIVE ANALYSIS

If Dodd-Frank truly wants to make a difference by reducing conflict from mining 3TG, the regulations must include more robust requirements. The Dodd-Frank regulations narrowly define conflict-affected areas, do not provide guidance for auditors regarding diligence, and do not regulate the third parties required under the regulations. They simply require that securities-issuing corporations complete due diligence on the conflict mineral supply chains—loosely following the OECD guidance.<sup>73</sup> By looking at other governments and international organizations, the SEC can amend the current regulations to more robustly monitor and regulate the use of conflict minerals in American-made products.

Different regulations and guidance reports have come about as a result of the U.N. Security Council identifying “the linkage between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of Africa.”<sup>74</sup> This section focuses on the EU’s approach, as well as the ICGLR’s and LBMA’s guidance and definitions, and how these approaches can be used to remedy the inefficiencies of Dodd-Frank.

#### A. European Union

In 2013, the European Commission was called upon “to pass a strong law to prevent European businesses fuelling conflict and human rights abuses through their purchases of natural resources, such as tin, gold and diamonds.”<sup>75</sup> In response, the EU conducted a public consultation, multiple in-depth consultations, and an impact

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70. *Id.* “Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc[etera].” *Id.*

71. *See id.*

72. *Id.* at 13–14.

73. Ayogu & Lewis, *supra* note 47.

74. S.C. Res. 2078, at 1–2 (Nov. 28, 2012).

75. Press Release, Glob. Witness, New EU Law Could Help Stop Nat. Res. Trade Fuelling Conflict (Sept. 16, 2013), <https://www.globalwitness.org/en/archive/new-eu-law-could-help-stop-natural-resource-trade-fuelling-conflict>.

assessment on how a regulation would affect conflict minerals.<sup>76</sup> In early 2014, the European Parliament's development committee voted in favor of the report created from the EU's consultation and studies. The report

[s]tresses that an EU regulation requiring companies using and trading minerals . . . should . . . create a legally binding obligation for all upstream . . . and all downstream companies . . . to undertake supply chain due diligence to identify and mitigate the risk of conflict financing and human rights abuse.<sup>77</sup>

Under the EU requirements, not only are mineral importers, smelters, and refiners required to ensure that revenues from minerals are not funding conflicts, but also manufacturers of consumer products—including mobile phones, tablets, and washing machines—are subject to similar requirements.<sup>78</sup> The bill is focused on Africa—particularly the Great Lakes region of the DRC—where mineral production is twenty-four per cent of the gross national product<sup>79</sup>—but recognizes that conflict fueled by mining implicates no fewer than twenty-seven separate conflicts on the continent of Africa.<sup>80</sup>

The EU regulations call for mandatory reporting with third-party certification to the government that the sourced minerals from European businesses do not fuel violent conflicts and human rights abuses.<sup>81</sup> These regulations are more robust than the U.S. Dodd-Frank regulations because the latter do not have a third-party certification requirement.<sup>82</sup> The EU regulations seek to break the link between mineral extraction and conflict financing, and to avoid risks linked to trade diversion,

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76. See KATIE BÖHME ET AL., EUROPEAN COMM'N, ASSESSMENT OF DUE DILIGENCE COMPLIANCE COST, BENEFIT AND RELATED EFFECTS ON SELECTED OPERATORS IN RELATION TO THE RESPONSIBLE SOURCING OF SELECTED MINERALS (2013).

77. Judith Sargentini, *Report on Promoting Development Through Responsible Business Practices, Including the Role of Extractive Industries in Developing Countries*, Euro. Parl. Comm. on Dev., Doc. No. A7-0132/2014, ¶ 46 (Feb. 19, 2014).

78. *European Parliament Votes for Tougher Measures on Conflict Minerals*, GUARDIAN (May 21, 2015, 8:32 AM), <http://www.theguardian.com/global-development/2015/may/21/european-parliament-tougher-measures-conflict-minerals>. These regulations encompass more parties than Dodd-Frank's do. Additionally, their reach is not limited to corporations that issue securities as under Dodd-Frank and rather extends to any companies that use or trade minerals or both. Jay Saling, *European Union Passes Conflict Minerals Legislation*, SOURCE INTELLIGENCE (June 16, 2016), <https://www.sourceintelligence.com/european-union-passes-conflict-minerals-legislation>.

79. *European Parliament Votes for Tougher Measures on Conflict Minerals*, *supra* note 78.

80. *Id.* The EU regulations note that the conflict area is broader than the DRC and adjoining countries, thus broader in scope than the Dodd-Frank regulations from the United States. FLEUR SCHEELE & GISELA TEN KATE, SOMO, THERE IS MORE THAN 3TG: THE NEED FOR THE INCLUSION OF ALL MINERALS IN EU REGULATION FOR CONFLICT DUE DILIGENCE 3 (2015).

81. Mehta, *supra* note 21.

82. *Id.* The regulations still must go through a series of talks between the European Parliament and the EU participating nations, but if passed can aid in further drying up conflict in the DRC. *Id.* Once the EU law has been fully implemented, companies will be required to report to the public whether they have purchased conflict minerals. *Id.*

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disengagement from conflict areas, and surges in smuggling or illegal trade.<sup>83</sup> Now the challenge is ensuring that the EU regulations are efficient and workable.<sup>84</sup>

The EU regulations, like the Dodd-Frank regulations, are based on the OECD due diligence guidelines for conflict sourcing.<sup>85</sup> However, in addition to the reporting requirements, the EU regulations require companies to develop a plan to remove conflict minerals from their supply chains.<sup>86</sup> These regulations are stronger and clearer than the Dodd-Frank regulations. In addition, they are more capable of accommodating the OECD's due diligence framework, which explains how best to report conflict mineral supplies and how to act to minimize or get rid of them.<sup>87</sup>

Importantly, the EU regulations note what occurs *after* entities complete due diligence and report on their supply chains, in the aim of requiring corporations to reduce, and eventually to remove, conflict minerals from their supply chains entirely.<sup>88</sup> The Dodd-Frank regulations instead merely aim to reduce the trade of these minerals in the DRC and adjoining countries that fuel conflict.<sup>89</sup> As discussed above, many corporations under Dodd-Frank fail to adequately report because of various difficulties in identifying minerals; implementing a third-party certification requirement would reduce these deficiencies.<sup>90</sup> Requiring corporations to use certified due diligence, like the EU regulations, aids in ensuring that supply chains are properly examined as well as properly reported on.

### B. *The ICGLR*

The ICGLR's Mineral Tracking and Certification Scheme recognizes that the 3TG trade in the Great Lakes region of Africa is a serious concern, both regionally and internationally, as it can be directly linked to the illicit armed conflict, illegal armed activities, and the resulting human rights abuses.<sup>91</sup>

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83. Iuliu Winkler, *New EU Rules on Conflict Minerals Will Help Local Communities*, PARLIAMENT MAG. (May 19, 2015), <https://www.theparliamentmagazine.eu/articles/opinion/new-eu-rules-conflict-minerals-will-help-local-communities>.

84. *Id.* The requirements must have a "strong and clear review clause, capable of accommodating any developments in the OECD due diligence framework regarding additional minerals beyond 3TG." *Id.*

85. *See* Mehta, *supra* note 21.

86. *Id.*

87. *See* Winkler, *supra* note 83.

88. *Id.*

89. 15 U.S.C. § 78m note (2012) ("The [disclosure] requirements of [section 1502(b)(1)] shall terminate on the date on which the President determines and certifies to the appropriate congressional committees . . . that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.").

90. *See supra* Part II.

91. ICGLR Manual, *supra* note 8.

The ICGLR has created a Mineral Tracking and Certification Scheme,<sup>92</sup> which works to both “track[] and certif[y] . . . designated minerals, based on national laws and practices and meeting regionally agreed upon norms and standards, overseen by regionally accredited independent auditors.”<sup>93</sup> Recently, the ICGLR met and recommended that member states should harmonize their regimes governing minerals and create an environment for the formalization of regional strategies working to solidify the regional initiative in fighting against the illegal exploitation of natural resources.<sup>94</sup> The ICGLR views conflicts and human rights abuses as

(i) “any forms of torture, cruel, inhuman and degrading treatment”; (ii) “any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily”; (iii) “the worst forms of child labour”; (iv) “other gross human rights violations and abuses such as widespread sexual violence”; and, (v) “war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.”<sup>95</sup>

The ICGLR’s Mineral Tracking and Certification Scheme was designed to stop conflict and human rights abuses, which the ICGLR define much more broadly than do any other guidelines or regulations.<sup>96</sup> This allows for a party under the ICGLR scheme to identify conflict minerals under a wider range of human rights abuses and conflicts occurring in the area.<sup>97</sup>

While the ICGLR is merely a scheme created to entice member states to develop and implement standards through regulation, it better identifies the problems and possible solutions for the use of conflict minerals.<sup>98</sup>

### C. *The LBMA*

The LBMA is an international trade association of gold and silver bullion on the London market—a market with a global client base.<sup>99</sup> The LBMA addresses areas within the gold and silver market, which include refining standards, trading

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92. *Id.* at 3. The scheme was “developed in consultation with concerned stake holders, including Member States, regional producers, traders and exporters, regional civil society, international industry and international civil society.” *Id.*

93. *Id.*

94. Coverage of Extraordinary Meeting, ICGLR (Nov. 27, 2015), <http://www.icglr.org/index.php/en/homepage/135-laast-news/665-end-peer-laarning-rcm-kigali-nov-2015>.

95. ICGLR Manual, *supra* note 8, at 9 (citation omitted).

96. *See id.* at 2–9.

97. *Id.*

98. The ICGLR guidance encourages the conflict-ridden and adjoining states to be proactive about the problem. *Id.*

99. *About Us: The Competent Authority for the World Bullion Market*, LBMA, <http://www.lbma.org.uk/about-us> (last visited Apr. 6, 2017).



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documentation, and the development of good trading practices.<sup>100</sup> The LBMA has created the Responsible Gold Guidance to ensure that all its metals going through refinery are conflict-free.<sup>101</sup> In tandem with this guidance, the LBMA created third-party audit guidance for all auditors in the process to comply with in conducting Responsible Gold Audits.<sup>102</sup> The LBMA's guidance provides transparency and consistency throughout the audit process, and mandates that all refiners use LBMA-approved auditors,<sup>103</sup> who must self-certify every year that they have the requisite expertise under the LBMA guidance to audit.<sup>104</sup>

The LBMA guidance took the OECD Gold Supplement for refiners, put it into operation, and extended it, by installing “anti-money laundering”<sup>105</sup> and “know your customer”<sup>106</sup> management systems as well as auditing practices on every type of system.<sup>107</sup> In addition, the LBMA guidance makes what was once a voluntary system, mandatory for any party wishing to sell within the London Bullion Market. By mandating compliance, the LBMA aims to “assure investors and consumers that all London gold stocks are conflict-free.”<sup>108</sup>

Under the LBMA, reporting for any and all parties wishing to sell within the London Bullion Market is mandatory and enforceable.<sup>109</sup> Compliance is compulsory, and all third-party auditing is to come from certified and approved auditors.<sup>110</sup> As a global marketplace for minerals, this is a good sign for human rights issues—it shows that a world leader heavily engaged in the trade of minerals has full-bodied requirements concerning conflict minerals. Dodd-Frank, in comparison, looks like a weakling.

### IV. DODD-FRANK AND OTHER ENTITIES: ANALYZING A COMBINATION

The Dodd-Frank regulations are insufficient for effecting any changes regarding the human rights abuses in the DRC and other conflict-ridden areas, especially since *National Ass'n* has quashed the requirement for public corporations to state whether or not they are “DRC conflict free.”

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100. *Id.*

101. LBMA GUIDE, *supra* note 8.

102. *Id.*

103. Also known as Approved Service Providers under the LBMA. *Id.*

104. *Id.*

105. For more information on anti-money laundering guidelines, see FIN. ACTION TASK FORCE, THE FORTY RECOMMENDATIONS (2003).

106. For more information on “know-your-customer” management systems, see *Know Your Customer: Quick Reference Guide*, PwC (Jan. 2013), <https://www.pwc.com/gx/en/financial-services/assets/pwc-kyc-anti-money-laundering-guide-2013.pdf>.

107. LBMA GUIDE, *supra* note 8.

108. *Id.*

109. *Id.*

110. *Id.* Parties who fail to comply are prohibited from trading within the London Bullion Market. *Id.*

*A. How International Regulations and Guidelines Can Remedy Dodd-Frank's Ineffectiveness*

The Dodd-Frank regulations need to be amended to be broader in scope and require third-party certification schemes and auditor guidance. Additionally, Dodd-Frank should explore ways to increase public awareness post-*National Ass'n*. The current regulations are too narrowly defined—particularly for what constitutes “conflict-affected.” Dodd-Frank should emulate the OECD and ICGLR’s more expansive definitions to include areas of conflict through characteristics because the regulations would be broader reaching and better able to serve their purpose of ending violent conflict and furthering humanitarian goals.<sup>111</sup> The narrow definitions lead to an ineffectiveness of overall purpose.

The lack of third-party certification schemes and guidelines for auditors impedes the completion of due diligence and reporting, leading many corporations to misfile their reports and unintentionally misrepresent themselves and their supply chains.<sup>112</sup> The EU regulations’ third-party certifications are a good starting point,<sup>113</sup> but for more effective and tougher regulations, Dodd-Frank should emulate the auditor and third-party requirements enforced by the LBMA.<sup>114</sup> The LBMA’s third-party audit guidance, as well as its certification process that requires all auditors to be approved under the LBMA’s guidelines, ensures that filings and due diligence reports are being created and completed to a specific standard, leading to less misfiling—a problem that Dodd-Frank and the SEC have been experiencing in the implementation of the conflict mineral reporting requirements.<sup>115</sup>

Dodd-Frank should include third-party requirements and provide guidance on how to fill out the reports better by requiring third parties who audit or complete due diligence to certify with the SEC or a similar regulatory body. Additionally, Dodd-Frank should broaden its definition of “conflict area” to encompass characteristics that would lead to a country or region being included, rather than limiting the definition specifically to the DRC and adjoining countries. This may be accomplished with wording that refers to areas with “significant violence,” “armed conflict,” and “risks of harm to civilians,” for example.

*B. The Kimberley Process, Blood Diamonds, and Continuing Regulatory Problems*

As a well-known issue in international trade—as well as the title of a popular movie and box-office hit<sup>116</sup>—blood diamonds have received their fair share of press and

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111. See 15 U.S.C. § 78m note (2012).

112. See Yoders, *supra* note 54.

113. See *supra* Part III.A.

114. See *supra* Part III.C.

115. EY CTR. FOR BD. MATTERS, *supra* note 55.

116. BLOOD DIAMOND (Warner Bros. 2006).

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notoriety in the recent past.<sup>117</sup> Diamonds are regulated by the World Diamond Council, which played a role in advocating for the Kimberley Process's creation.<sup>118</sup> The Kimberley Process did not come into effect until November 2002—two years after the United Nations General Assembly passed a resolution supporting its creation.<sup>119</sup>

The Kimberley Process attempts to hinder the flow of conflict diamonds, stabilize fragile countries, and support those same countries in development.<sup>120</sup> It has deterred crime in the diamond trade.<sup>121</sup> Additionally, the Kimberley Process has brought large volumes of diamonds that were previously being sold illegally to fund conflicts into the legal marketplace.<sup>122</sup> It has helped to address developmental challenges in fragile countries and to increase economic revenues in such countries.<sup>123</sup> As a result of the Kimberley Process, legal diamond sales in Sierra Leone went from virtually nothing to \$154 million in 2015.<sup>124</sup> Because there are some corrupt government officials in these prominent diamond-producing countries, there is often bribery in certifying diamonds under the Kimberley Process.<sup>125</sup>

While the Kimberley Process has aided in more legal diamond mining and sales, there is no guarantee that diamonds involved are actually “DRC conflict free.” As stated earlier, the Dodd-Frank regulations are modeled loosely after the Kimberley Process; many argue for the need to follow the Kimberley Process even more closely

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117. See, e.g., Tim Lister, *'Blood Diamonds' Arrest Sheds Light Over Grim African Trade*, CNN (Aug. 31, 2015, 6:27 AM), <http://www.cnn.com/2015/08/31/europe/blood-diamonds>. Blood diamonds, also known as conflict diamonds, are rough diamonds that are mined in areas controlled by militant forces that use the proceeds from the diamonds to fund antigovernment conflict. Melissa McNamara, *Facts About Blood Diamonds*, CBS NEWS (Dec. 11, 2006, 1:28 PM), <http://www.cbsnews.com/news/facts-about-blood-diamonds>.
  118. *Mission Statement*, WORLD DIAMOND COUNCIL, <https://www.worlddiamondcouncil.org/about-wdc/mission-statement> (last visited Apr. 6, 2017).
  119. *About: KP Basics*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/about> (last visited Apr. 6, 2017). The role of diamonds in fueling conflict is in breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts. G.A. Res. 56/263 (Feb. 6, 2002).
  120. G.A. Res. 56/263, *supra* note 119.
  121. See Audrie Howard, Note, *Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe*, 15 WASH. U. GLOBAL STUD. L. REV. 137, 152–58 (2016) (discussing the pros and cons of the Kimberley Process over time, focusing on three member countries).
  122. Eli G. Burton, Comment, *Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa*, 28 EMORY INT'L L. REV. 425, 433–34 (2014).
  123. *FAQ: What Areas of the World Are Affected by Conflict Diamonds*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/faq> (last visited Apr. 6, 2017).
  124. See *Sierra Leone*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/210#2015> (last visited Apr. 6, 2017).
  125. See Jack Jolis, Opinion, *Naomi Campbell and the 'Blood Diamond' Hoax*, WALL STREET J. (Aug. 10, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703589404575417460834079500>; Theo Leggett, *Global Witness Leaves Kimberley Process Diamond Scheme*, BBC NEWS (Dec. 5, 2011), <http://www.bbc.com/news/business-16027011>; Kieron E. Ryan, *Blood Diamonds Farce*, LEWROCKWELL.COM (Aug. 11, 2010), <https://www.lewrockwell.com/1970/01/kieron-e-ryan/blood-diamonds-farce>.

to increase the effectiveness of the regulations.<sup>126</sup> This is problematic because, as a significant body of literature shows, the Kimberley Process has not been as effective as it might seem, largely because of corruption.<sup>127</sup>

## V. CONCLUSION

Currently, there is no consensus on whether the disclosure laws have been successful in conflict-ridden areas. However, the United Nations Group of Experts on the DRC has found that the law has reduced the proportion of conflict-fueling metals being mined. With this, the number of “legitimate” mines has increased,<sup>128</sup> but there are arguments that these types of regulations compel Congolese people into poverty by unintentionally boycotting their economy.<sup>129</sup>

The Dodd-Frank regulations requiring issuers of securities to engage in due diligence and to report on that due diligence are ineffective for a number of reasons. The regulations hinge on the necessity of two working pieces to be successful: (1) due diligence, and (2) public awareness. The regulations do not put forth requirements to make either of those two pieces work. Per *National Ass’n*, the regulations no longer require a corporation to explicitly state whether or not it is “DRC conflict free,” meaning there is no forum for public awareness. Potential investors and the general public are less likely to obtain the filings with this information, and if they do they would have to make the conclusion themselves based on their reading and interpretation of the SEC filing.

While the SEC still requires due diligence under the OECD guidelines, there is no third-party certification or auditor guidance under Dodd-Frank, and many corporations are having immense difficulty in completing their due diligence, identifying supply chains and conflict minerals within them, and adhering to the complex and muddled Dodd-Frank requirements when filing reports. Therefore, the regulations do not really have a working due diligence piece either.

The conflict mineral reporting regulations are ineffective. To have laws as such is a waste, and as George Washington said to James Madison at the inception of this country, “[l]aws or ordinances unobserved, or partially attended to, had better never have been made . . . .”<sup>130</sup> If the regulations are not doing what they are supposed to with the intended due diligence and public awareness frameworks then the United States is neither observing nor properly attending to the regulations. If the regulations are not remedied with the more effective and significant regulations and guidelines that have been highlighted and proposed in this note, the regulations are better off not existing at all.

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126. See *supra* Part II.

127. See James Melik, *Diamonds: Does the Kimberley Process Work?*, BBC NEWS (June 28, 2010), <http://www.bbc.com/news/10307046>.

128. Mehta, *supra* note 21.

129. Narine, *supra* note 53, at 352.

130. Letter, *supra* note 1.

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