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## NGO Study Outlines Best Practices for SEC Conflict Minerals Rule Compliance

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**On April 22, 2015, two human rights non-governmental organizations, Amnesty International and Global Witness, published a report analyzing compliance by US reporting companies with the US Securities and Exchange Commission's conflict minerals rules. The report, which reviewed the conflict minerals disclosures of 100 companies, provides helpful insights for identifying best practices for conflict minerals supply chain due diligence and reporting. For companies that are working towards preparing their conflict minerals disclosures for calendar year 2014, which must be filed by June 1, 2015, the report's recommendations for improving conflict minerals compliance will undoubtedly be relevant.**

On April 22, 2015, two human rights non-governmental organizations, Amnesty International and Global Witness, published a report, *Digging for Transparency* (the "Report"), analyzing compliance by US reporting companies with the US Securities and Exchange Commission's ("SEC") conflict minerals rules. The rules, which were adopted by the SEC in 2012 pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, implemented reporting requirements for SEC reporting issuers that use tin, tungsten, tantalum or gold ("conflict minerals") in their products. Calendar year 2013 was the first year for which compliance with the conflict minerals rules was required, and the first conflict minerals disclosures were required to be filed with the SEC by June 2, 2014.

The Report, which can be found [here](#), analyzed the conflict minerals disclosures of 100 companies and provides helpful insights for identifying best practices for conflict minerals supply chain due diligence and reporting. For companies that are working towards preparing their conflict minerals disclosures for calendar year 2014, which must be filed by June 1, 2015, the Report's recommendations for improving conflict minerals compliance will undoubtedly be relevant. The Report is also relevant to companies' compliance with the conflict minerals rules insofar as the SEC staff may be influenced by the Report's findings in issuing comment letters regarding companies' conflict minerals disclosures.

The Report found that nearly all companies in the sample complied with the threshold steps required by the conflict minerals rules—namely, determining whether they fall within the scope of the rules, conducting a reasonable country of origin inquiry and filing a conflict minerals report. If, based on a reasonable country of origin inquiry, a company determines, or has reason to believe, that conflict minerals necessary to the functionality or production of its products originated in the Democratic Republic of the Congo or an adjoining country (the “covered countries”) and are not from recycled or scrap sources, it must then exercise due diligence on the source and chain of custody of such conflict minerals. The due diligence must conform to a “nationally or internationally recognized due diligence framework,” and the *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* issued by the Organisation for Economic Co-operation and Development (the “OECD Guidance”), which can be found [here](#), is currently the only such recognized due diligence framework. The Report found that a significant percentage of companies fell short at this stage and failed to meet one or more of the five steps of the OECD Guidance.

### Reasonable Country of Origin Inquiry

The Report found that nearly all companies in the study reported having conducted a reasonable country of origin inquiry, with 94% of companies making use of the standardized Conflict Minerals Reporting Template developed by the Conflict-Free Sourcing Initiative. The Report recommends ways in which companies should consider going beyond just a basic supplier survey, for example, by tailoring the survey to ask suppliers specific questions about whether they have identified risk and, if so, the strategies they have employed to mitigate that risk. The Report noted that a number of companies also proactively engage in outreach initiatives with suppliers, such as by providing educational materials and training.

The Report identifies other measures taken by companies that can be regarded as developing best practices:

- disclose information on the number of suppliers surveyed and the supplier response rate;
- adopt a policy for following up with unresponsive or uncooperative suppliers; and
- build conflict minerals-related clauses into existing, new and/or renewed contracts with suppliers, requiring suppliers to comply with information requests about conflict minerals chain of custody or requiring compliance with the reporting company’s conflict minerals policy.

### Due Diligence in Accordance with the OECD Guidance

Companies that know, or have reason to believe, that their conflict minerals originated from the covered countries are required to prepare and file a conflict minerals report as part of Form SD, in which they must describe the measures taken to exercise due diligence on the source and chain of custody of those conflict minerals. The Report recommends that, as best practice, companies should organize the description of their due diligence according to the five steps of the OECD Guidance, explicitly outlining how the company adhered to each step. As part of demonstrating the actions a company has taken to meet each step of the OECD Guidance due diligence framework, the Report recommends that companies should:

- adopt a conflict minerals policy based on the model supply chain policy in Annex II of the OECD Guidance and implement internal controls to put the policy into practice;
- implement a grievance mechanism, or whistleblower policy, to improve risk awareness;
- seek to identify the specific smelters and refiners from which the conflict minerals in their supply chain were ultimately sourced or, if a company is unable to do so, describe in detail the company’s efforts to identify the smelters and refiners; and

- report on how they defined, identified, mitigated and managed risk in their supply chain with specific details and examples, and, in each reporting period, companies should demonstrate where they have made measurable improvements in terms of identification and management of risk in their conflict minerals supply chain.

### SEC Staff Observations on First Round of Conflict Minerals Reporting

In September 2014, at a meeting of the American Bar Association’s Business Law Section, Keith F. Higgins, the director of the SEC’s Division of Corporation Finance, provided three key observations based on the staff’s review of conflict minerals disclosures filed for calendar year 2013.<sup>1</sup> First, for companies that determine that their conflict minerals did not originate, or have no reason to believe that the conflict minerals may have originated, in the covered countries, and therefore are not required to file a conflict minerals report, such companies should provide in their Form SD report clear and specific language about the process that they used to reach the determination. Second, companies should take care not to imply that their products are “DRC conflict-free,” unless they explicitly voluntarily elect to describe a product as “DRC conflict-free,” which triggers the requirement to provide an independent private sector audit. Third, even if a company is unable to determine whether its conflict minerals originated from the covered countries, it still must disclose the smelter or refiner used to process the conflict minerals, if known. The Report found that 73% of companies in the study failed to provide a list of mineral processing facilities, of which around one-third also did not explicitly state that they were unable to identify their metal processors.

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As SEC reporting companies continue to improve their conflict minerals supply chain processes and controls and work to prepare their calendar year 2014 disclosures to be reported on Form SD, initiatives like the Report should be helpful in identifying best practices.

<sup>1</sup> Bloomberg BNA, “SEC Official Offers Three Pointers on Issuers’ Conflict Mineral Disclosures,” Yin Wilczek, September 15, 2014, available at: <http://www.bna.com/sec-official-offers-n17179895108/>.