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*Researchers, Consultants & Strategists*

Tel 646.430.8230

Email [info@ga-institute.com](mailto:info@ga-institute.com)

Web [www.ga-institute.com](http://www.ga-institute.com)

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## **ABOUT “CONFLICT” MINERALS: Used In Many Industries — What Are Companies Disclosing...Or Not? What Are The Requirements Now For Reporting?**

Issue 3.6

### **And What Negative Media Headlines May Possibly Appear With Central African Terrorist Activities Now In Focus...**

Prepared October 26, 2017

This is prepared as a backgrounder and heads-up brief for you about possible events that could draw public attention and in turn affect corporate reputation, share valuation, and perhaps even freedom-to-operate for a company. The headlines coming out of Central Africa today are about civil unrest and armed conflict, the recent death of U.S. military personnel, the rise of regional terrorism, and the involvement of Al-Qaeda and/or ISIS in all of this.

This is in some part about “Conflict Minerals” – and the possible involvement of U.S., European and other nation’s companies in these issues — that’s the future risk of media headlines.

You may know the names of certain valuable Earth minerals, or their derivative uses: They are, as identified by the U.S. Government, investors, companies, NGOs and others:



- Cassiterite (symbol “SnO<sub>2</sub>”) which is tin oxide, for manufacturing tin
- Columbite-tantalite (“coltan” in the local tongue), used for tantalum extraction
- Wolframite is an iron-manganese mineral used as source of tungsten
- Derivatives from these comprise the important three “T”s — Tungsten, Tantalum, Tin
- and another conflict mineral is gold (the more familiar symbol “Au”)



## And where may these minerals be used?

In such industries as:

- Electronics (computer hardware, semiconductors, consumer products such as cell phones)
- Automotive (OEM products and after-market parts supply)
- Aerospace & Defense
- Industrial machinery
- Jewelry
- Metal working – machine tools
- Energy (Oil & Gas, solar)
- Medical equipment
- Software
- Pharmaceuticals
- A variety of Consumer Products
- Ag/ Farm equipment
- Chemicals



And while these minerals may be found in many countries (including the USA and South America), what regions of the world do these originate in/and that are scenes of civil conflict?

The region most in focus right now is Central Africa, and these specific countries:

- Angola
- Burundi
- Central African Republic
- Congo
- Democratic Republic of the Congo
- Malawi



- Rwanda
- South Sudan
- Tanzania
- Uganda
- Zambia

## WHY ARE THESE MINERALS IDENTIFIED AS BEING “CONFLICT MINERALS”?

Leaders in the Federal government of the United States and other key stakeholders see exploitation of, use of funds generated in the trade of these minerals as possibly helping to finance the continuing civil / armed conflict in the Central African region by terrorist groups — and this contributes to the continuing humanitarian crisis in the region.

Some 5 million people have been killed in the conflict in the Congo.

The US government action is somewhat reminiscent of the positions taken by American investors and national, state and municipal governments in the effort to bring an end to the Apartheid system of governance in South Africa several decades ago.

### The 2010 Dodd-Frank Statutes

In an attempt to address the issue of both American and non-US companies contributing to the Central African crisis through trade of the identified minerals, the U.S. Congress in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, included:

**Section 1502, requiring all publicly-traded manufacturing companies to report each year on their use of “Conflict Materials” (the “3TGs” and gold) in their processes and products in mandated financial filings. The SEC Rule 13p-1, empowered under the 1934 Securities Exchange Act Section 18, is the mechanism for filing by publicly-traded companies.**

**If a company files reports with the SEC, under the original authority of the Exchange Act, it is required by the SEC Rule to report on “Conflict Minerals.” The rules apply equally to US and foreign issuers.**

One of the important objectives of the lawmakers in crafting the law was to limit the ability of terrorist groups using sale proceeds to buy weapons and continue the civil unrest and human rights abuses in the affected countries. This is now moving to front-and-center in the media coverage as the U.S. military’s presence in Central Africa comes into sharper view.

**The SEC Rule adopted (as required by the law) in 2012 is about “Affected Company Disclosure” — any business enterprise that knows / or learns that it is using Conflict Minerals are required under the Rule to report on these activities, using Form SD and exhibits, to be filed with the SEC to discuss among other things the issuer’s potential liability. The company must also post the information on its web site.**



## IMPORTANT NOTES

During consideration of the Rule there was a flow of public comments (pro and con) to SEC and after the Rule was adopted, litigation was filed to prevent enforcement of the Rule. The U.S. Appellate Court in Washington, D.C. ruled (April 2017) that portions should not be enforced or other action taken if corporations do not comply with certain sections and that SEC should (1) further address the issues raised in the public comments received before the Rule was finalized and (2) should then decide the next steps for requiring disclosure/or not requiring.

The Division of Corporations of the agency then advised the commissioners that enforcement should not be taken until there was clarification. To complicate things, after the November 2017 election, with the new Administration in place, SEC commissioners and key staff members have turned over. There is now confusion about the future of Conflict Minerals reporting.

## CHAIN OF CUSTODY

The statutes and the Rule was about companies managing (or not) the global and often widespread “chain of custody” — for example, does the company know where the minerals used in manufacture come from? Are the minerals that are acquired determined to be “DRC Conflict-Free”? That’s another consideration (the issuer may state that it determined the minerals acquired **did not** finance armed groups. (This requires an independent private sector audit.)

There is also a “temporarily undeterminable” provision that could be used by a company. A manufacturing company may deem a mineral to be “necessary to the functionality” of a product that it manufactures / or, contracts with others to manufacture. And if used in manufacture, do other firms in the issuers supply chain use the mineral.

Since adoption of the Rule, and the need to publicly report, companies have been busy in identifying the materials used in certain of their manufacturing activities (and therefore the minerals or derivatives that might end up in products). This could be triggered by a company acquiring or merging with another company that uses Conflict Minerals — and therefore the reporting would be necessary.



It is important to note that the Rule as adopted has special rules for companies in tracing origin if the materials came from scrap or recycling (reclaimed materials – there are Due Diligence requirements that apply). This is part of what was challenged by litigants.



After the Rule was in place, US companies began to survey their supplier base to see whether their products contain such minerals. And, they began to explore the possibility of reduction of use of Conflict Minerals or substitutes to eliminate such use.

“Smelting” and “Refining” were/are important considerations for an issuer in determining country-of-origin; where did the materials originate before they made their way to a smelter or refiner?

Stakeholders point out that there are other minerals that could be considered as contributing to violence through illicit use, for such items as petroleum products, timber/forestry, precious gems, and certain agricultural products. These were not included to be part of the reporting process.

Every year the companies using Conflict Minerals (the industries are listed above) are required to report — we are now in the fifth year of the requirement.

We’ve based on analysis on publicly-available information to prepare this brief. The SEC actions after the Appellate Court decision are not yet clear due to turnover at the commission, the status of the “no enforcement” recommendations of the former staff of the Agency, the need to further review the public comments before the Rule was adopted, the court order for further analysis of the Rule, and other factors. Legal Counsel should be consulted. We’ve included some professional analyses of all of this (post-court decision) in this brief — see the links provided.

## THE 2016 REPORT CARD ON CORPORATE CONFLICT MINERALS REPORTING

With the Central African continent nations experiencing rising and more dangerous civil and armed unrest...how did U.S. and western nations’ companies do in the fourth year of required reporting?

Some information for us comes from the analysis by **Responsible Sourcing Network (RSN)**, an initiative of the **As You Sow Foundation**.

As You Sow focuses investor attention on human rights abuses and forced labor issues and builds coalitions to address these issues. It also monitors and reports on human rights abuses and forced labor issues in Conflict Minerals and cotton growing in such countries as **Uzbekistan** and **Turkmenistan** — cotton that may end up in some Western nations’ apparel.

Each year for the past four years (since the requirement was put in place) RSN has reported on company reporting compliance.

## ABOUT THE FINDINGS OF THE RSN 2016 DISCLOSURE & REPORTING ACTIVITIES REPORT

As of July 2017, some **1,153** companies have filed a **Form SD** (“Special Disclosure”) with US SEC including those for Conflict Minerals. The RSN examined **206** of the reports, covering **26** industry groups.

The resulting report is titled, “**Guide for Investors**” and covers year 2016 Report Highlights:







## First, the Negative Findings

Examining results from 2016 and 2017, the researchers found a troubling trend, spread among companies and industries; a majority of companies now appear to them to be “losing momentum” in their efforts to improve the quality of their disclosures. There is a decrease by companies to provide strong supply chain due diligence regarding use of conflict materials.

The authors cite this is likely due to the change in Administrations (Obama to Trump). Fewer companies are filing reports now. And the quality of reporting is lower in 2017. More companies are in the “compliance-only” mode.

In February 2017, news media were reporting that President Trump was considering suspending the reporting rule for two years based on “national security” concerns.

After the US Congress passed Dodd-Frank in 2010, the European Union did take up the issue and adopted a somewhat similar law. While the EU law some more “teeth” in some cases, the SEC through its Division of Corporate Finance in the new political environment here in the United States signaled a weakening of the Conflict Minerals Rule reporting enforcement after the April 2017 Appellate Court decision. This, says the Responsible Sourcing Network, is probably a factor in the decline in momentum among U.S. companies that the organization is seeing.

**No matter the change in administration and corporate attitudes, RSN notes that investors remain focused on Conflict Minerals risk; investors with almost US\$5 trillion in AUM are in support of the SEC Rule.**

## Now For the Positive Side

The report authors note that High-performing companies have kept pushing for more transparency to mitigate risks in their global supply chain and remained committed to pursue the application of the rule — regardless of future political decisions. They are, we could say, keepin’ on keepin’ on.

Innovative companies winning high ranking especially include those in the **Technology Sector**.

Corporate laggards include companies in the **Aerospace, Oil & Gas, and Building Materials Sectors**. These, the report authors tell us, focus on “compliance-only” reporting vs. proactive, due-diligence-based strategies.

For examples of the latter, look to: **Intel; Microsoft; Qualcomm; Apple and Royal Philips**.

These companies typically also participate in multi-stakeholder forums. The companies go beyond “compliance-only” and do more thorough investigations of their supply chains.

- **Intel** publicizes the importance of artisanal mining in local communities.
- **Alphabet** supports multiple “on-the-ground” initiatives, including “Solutions for Hope’s Gold Project.”
- **Apple** developed the Risk Readiness Assessment — and then donated this tool to **the Electronic Industry Citizenship Coalition**



(EICC).

- **Hewlett Packard Enterprise** and **Intel** provide web sites to provide information to the public and investors.

**A new industry in 2017 — Solar — began reporting — and winning high scores.**

## RISK MANAGEMENT APPROACHES

The assessments by RSN are organized this way — and these are excellent approaches for companies to adopt for their internal programs:

- Establish strong management systems internally.
- Identify & assess inherent supply chain risks.
- Design & implement strategies to address risk.
- Audit supply chain partners.
- And then report on the company's supply chain due diligence efforts (results!).

## WHO ARE THE LEADERSHIP COMPANIES?

Of these, in the 2017 rankings by RSN, the Industry Groups ranking top “5 highest and bottom 5” were:

Top 5 Industry Groups	Bottom 5 Industry Groups
Semiconductors	Consumer Package Goods
Communications Equipment	Building Materials
Computer Hardware	Business Services
Farm & Construction Equipment	Steel
Application Software	Oil & Gas - Integrated

## LEADERSHIP NOTED: THE RSN COMPANIES / RANKINGS #1 IN CATEGORIES



- 
- Semiconductors: Intel
- 
- Computer Hardware: Apple
- 
- Application Software: Microsoft
- 
- Communications Equipment: Qualcomm
- 
- Communications Services: Vodafone Group
- 
- Farm & Construction Equipment: Caterpillar
- 
- Manufacturing - Apparel & Furniture: VF
- 
- Auto Manufacturing: Ford Motor
- 
- Auto Parts: Johnson Controls
- 
- Medical Devices: Stryker
- 
- Drug Manufacturers: Johnson & Johnson
- 
- Retail - Apparel & Speciality: Bed Bath & Beyond
- 
- Solar: SunPower
- 
- Industrial Products: Royal Philips
- 
- Oil & Gas, Services: Baker Hughes
- 
- Oil & Gas, Integrated: Eni
- 
- Packaging & Containers: Sealed Air
- 
- Chemicals: PPG Industries
- 
- Travel & Leisure: Hasbro
- 
- Aerospace & Defense: Boeing
- 
- Business Services: Cintas
- 
- Consumer Packaged Goods: Masco

Overall, rankings were grouped in such categories as: Superior (one company: Intel); Leading (4 firms); Strong (4 firms); Good (22); Adequate (48); Minimal (54); Weak (81).

The advice of the RSN Report authors for investors (asset owners and managers):

- Require quality due diligence for conflict-free supply chains.
- Ask companies to put in place more comprehensive, proactive, improvement-based policies.
- Ask company managements to integrate conflict minerals reporting in all of their communications channels to reach stakeholders.
- Encourage competition for conflict-free supply chains.







- Support increased focus on human rights reporting by issuers.

And advice for the corporate sector:

- Improve risk-based due diligence.
- Address human rights risk posed by conflict minerals.

\* \* \*

## FOR COMPANIES - BEST PRACTICES SHARED IN TOOL KIT FOR AFFECTED COMPANIES

One resource we looked at and recommend for your inspection is from Assent Compliance (Ottawa, Canada), with contributions from the Ropes & Gray law firm. Assent makes available a “tool kit” to help companies required to report.

The authors explain that while the first stop for compliance might [logically] be the compliance staff, the “largest exercise for compliance is the RCOI (the “reasonable country of origin inquiry”) obtained from the supply chain managers.

And so, the compliance and supply chain / sourcing staff should more closely work together. And, advises Assent, it would be good to have the involvement of engineering, accounting, IT and legal departments involved as well.

# # #

Update: There is progress to report in the Congo region; a Bilateral German Congolese Cooperation Project has been developing a Certified Trading Chain initiative. As year 2017 began, there was expectation that as much as 20 percent of mines (and 60% of production) will be certified through governments and third party auditors. There are other certification organizations working on the issues.

## OUR HEADS UP FOR CORPORATE LEADERS

We are sharing some thoughts here about the potential risk for companies that do/do not report on Conflict Minerals — from the G&A Institute team in thinking about the media focus on Central Africa.

- Four brave **U.S. Army Green Berets** recently died in the nation of **Niger**. They and their brothers- and sisters-in-arms were helping that nation pursue terrorists affiliated with the global **ISIS and/or Al-Qaeda networks**. There are 800 to 1,000 U.S. military members in Niger and **Cameroon**, according to media reports. Some 17% of the USA’s special forces troops are now deployed to Central Africa — they media is now on to this story. (ISIS is considered an offshoot of Al-Qaeda, appearing first in Syria and Iraq, and now more widely-dispersed.)
- These are countries are bordering the countries named up top as included in required reporting on **Conflict Minerals**. Next door to the seven nations covered by the SEC Rule: African nations that border on or are close neighbors to the seven designated nations: **Chad; Libya; Algeria; Sudan; Niger; Cameroon**.



We have to think about the possible threat to the North American Continent, or European nations, posed by terror groups operating out of the seven Conflict Mineral nations or nearby nations...and the possibility of illicit funds being made available directly or inadvertently to these outlaw groups by the flow of revenues from developed nations' purchase of Central African minerals — if traceable to that extent.

We are learning from ABC News, The Washington Post, The New York Times and The Atlantic magazine such facts as:

- The Niger incident put the spotlight on the American security build-up in Africa. As of 2016, 17 percent of U.S. Special Forces are deployed to Africa, according to the [Washington Post](#).
- The jihadist takeover of northern Mali in 2012 led to the deployment of new Western forces, particularly from France.
- The Trump administration is apparently moving ahead with plans for more military involvement in the region. Senator Lindsey Graham has said. "You're going to see more aggression by the United States toward our enemies, not less."

###

### What Managers Can Do:

Here are some steps that you can take:

Examine your company's supply chain to see where potential risks may be, depending on geography, conditions in the region, nature of supplier, headlines that may have come out of the country/region.

Develop (if one does not already exist) a policy statement on sourcing as relates to Conflict Minerals and your company's effort in policing your sourcing activities (risk prevention – mitigation – resolution).

Enhance existing engagements (policies, activities) with supply chain partners to demonstrate to them your company's concerns. If engagement is not a current activity it's a good time to start.

###

## ADDITIONAL INFORMATION / RESOURCES

This brief should not be construed as offering legal advice. The content is based on our analysis of publicly-available information. Perspectives shared about possible risks is based on our experience as issues and crisis managers over the past decades.

The Baker Bott Law Firm advised that Proponents contend that the Appellate Court decision only invalidated "one, specific, severable" component of the SEC Rule. The Due Diligence process is still valid as to reporting requirements. The firm's review is below.



Given the confusion about the future of reporting, a number of law firm and accounting firm updates have been issued to share perspectives on the status of the reporting Rule. Here are some for your reference:

- Ropes & Gray: <https://www.ropesgray.com/newsroom/alerts/2016/January/Musings-on-Conflict-Minerals-Compliance-The-Year-That-Was-the-Year-That-May-Be-and-What.aspx>
- Baker Botts: <http://www.bakerbotts.com/ideas/publications/2017/04/sec-will-not-fully-enforce>
- Squire Patton Boggs: <https://www.conflictmineralslaw.com/2017/05/11/conflict-minerals-rule-will-it-stay-or-will-it-go/>
- PWC: <https://www.pwc.com/us/en/audit-assurance-services/conflict-minerals-faqs.html>
- Beveridge & Diamond: <http://www.bdlaw.com/news-1637.html>

## And...

- To download the RSN report: <http://www.sourcingnetwork.org/mining-the-disclosures>
- For information on RSN / As You Sow: <https://www.sourcingnetwork.org>
- The Securities & Exchange Commission has an existing Fact Sheet that is useful — we referenced this information in preparing this brief: <https://www.sec.gov/opa/Article/2012-2012-163htm—related-materials.html> Note that this was prepared before the April 2017 court decision and we can expect this to be changed/updated in the future.
- Important: This is the thinking of the Acting Chair of SEC in January 2017 about the future of the Rule: <https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html>
- The OECD Due Diligence resources are explained here (including Guidance): <http://www.oecd.org/corporate/mne/mining.htm>
- The automotive industry approaches are explained here by the AIAG: [https://www.aiag.org/docs/default-source/corporate-responsibility/conflict-minerals/cm-approaches-by-automakers-amp-suppliers-case-study-final-8-2-13pm-\(not-secure\).pdf](https://www.aiag.org/docs/default-source/corporate-responsibility/conflict-minerals/cm-approaches-by-automakers-amp-suppliers-case-study-final-8-2-13pm-(not-secure).pdf)
- The electronics industry approaches are explained here by the Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative: <http://www.responsiblebusiness.org/media/docs/publications/CFSI%20White%20Paper-Conflict%20Minerals%20Disclosure-Feb%202015.pdf>
- The Assent firm serves such clients as Honeywell, Textron, Pentair and Kimberly-Clark. We suggest looking at the Assent “tool kit” for companies: <http://assentcompliance-1.hs-sites.com/conflict-mineral-compliance-toolkit-download>