

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: +1-212-290-4700
Fax: +1-212-736-1300; 917-591-3452

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Director, Business and Human Rights Division
Human Rights Watch
April 5, 2017

Testimony to the Senate Foreign Affairs Committee, Subcommittee on African Affairs and Global Health Policy Regarding Dodd-Frank Section 1502

Chairman Flake, Ranking Member Booker and other members of the subcommittee,

Thank you very much for the opportunity to testify today on Dodd-Frank Section 1502 and its impact on addressing the trade in “Conflict Minerals.” Human Rights Watch has documented abuses in the Democratic Republic of Congo since the fall of Mobutu Sese Seko and throughout the country’s vicious civil war and the violence and abuses that continue.

Since 2005, we have documented the pernicious effect that the trade in gold has had on civilians in eastern Congo. Numerous armed groups, foreign-backed rebels, and at times the Congolese army have killed, raped, pillaged, and forcibly conscripted child soldiers as they sought to gain or maintain control of lucrative gold mines, which in turn helped finance their abusive movements. We’ve also documented how a major mining company paid a rebel group to explore for gold in its concession area in 2005.

It is for these reasons that Human Rights Watch supported and continues to support Dodd-Frank 1502. We never saw it as a panacea to stop the abuses or violence in Congo completely. Rather, we saw it as an important tool to help address a specific goal: stopping the flow of funds to abusive armed groups who were exploiting Congo’s lucrative mining resources through increased transparency and accountability.

Today, we are here because Dodd-Frank 1502 may be suspended or even revoked. We know legislation can sometimes be a blunt tool and that it can have unintended consequences. With that in mind, we welcome a discussion on how Section 1502 can fulfill its objectives more efficiently; however, we strongly believe that its suspension or revocation would be damaging for security, human rights, and for responsible companies. To be crystal clear: if the president suspends the law or if Congress revokes it, we believe that the repercussions would be very serious.

This hearing comes at a critical time in Congo. Over the past two years, government officials and security forces have carried out a brutal campaign of

repression against those opposed to President Joseph Kabila's efforts to stay in power beyond the December 19, 2016 end of his constitutionally mandated two-term limit. Scores of peaceful protesters have been killed, pro-democracy activists and opposition leaders have been imprisoned, and media outlets have been shuttered. After significant pressure from the international community—including targeted US sanctions against top officials and other strong measures backed by this Congress—President Kabila made some important concessions in an end-of-the year deal mediated by the Catholic Church.

This agreement calls for presidential elections to be held by the end of this year and says clearly that there will be no changes to the constitution or a referendum to allow Kabila to run for a third term. Yet implementation of the deal has stalled, as violence between militia groups and the Congolese security forces have escalated in many parts of the country, along with an alarming increase in human rights violations. Some of these situations are directly linked to Kabila staying in power beyond the end of his constitutional mandate. Kabila has agreed to hold elections and step down from power, and the prospects for stability likely hinge on whether he abides by that commitment. Continued US engagement and strong pressure on Kabila to do so is critical.

Last month, two members of the UN Group of Experts on Congo, Michael Sharp, an American, and Zaida Catalán, from Sweden, were killed while investigating large-scale human rights abuses in Congo's central Kasai region. It remains unclear who was responsible for the murders. The Group of Experts has been instrumental over the years in exposing the links between the trade in natural resources, armed groups, sanctions-busting, and the violence in Congo.

In this context, suspending or eliminating Dodd-Frank 1502 would make an already explosive situation in Congo worse. Abusive armed groups, factions of the security forces, and other opaque mafia-like networks allegedly linked to government officials could then easily return to the lucrative mines in eastern Congo to finance their activities. This could lead to new security problems throughout the volatile region—where some of Congo's nine neighboring countries have illegally benefitted from the country's vast mineral wealth. And it could also create direct security risks for the United States, which has a clear interest in promoting a more stable and peaceful central Africa region.

Suspending Dodd-Frank 1502 would also harm responsible American companies that have embraced the law and the principles that underpin it, including some of this country's most successful and well-known companies, such as Apple, Intel, and Tiffany. They and others would suddenly be placed at a competitive disadvantage against other companies that prefer to operate opaquely in a way that could fund armed groups. Eliminating the rule would punish responsible companies and reward irresponsible ones by creating a "race to the bottom," legalizing opaque sourcing of conflict minerals while disadvantaging companies that choose to keep their supply chains clean.

In the absence of 1502, it is possible that civil society groups could end up pressing for targeted sanctions on the Congolese minerals sector if it becomes clear that abusive armed groups are profiting from this trade. Such targeted sanctions are typically the approach the international community has taken in recent years to address similar problems. While understandable, this is a much more draconian approach than the transparency and auditing procedures 1502 require. These are serious consequences for Congo, for major US companies, and for human rights.

Suspending 1502 Will Make It Easier to Fund Armed Groups Secretly

The fundamental purpose of Dodd-Frank 1502 is to keep money out of the hands of armed groups that trade in and profit from certain minerals. Human rights groups, responsible companies, and the US government have shared this goal for many years. It is important not to lose this aspect of the law: it is a rare instance where key institutions in and out of government agree on what the problems is, want to stop it, and have managed to put a law in place to help do it. That is something Congress and the administration should support.

Without the law, it would be easier for abusive armed groups to fund themselves secretly, which could help to further destabilize parts of Congo. In mid-March, Bloomberg news reported that the Congolese Minister of Mines, Martin Kabwelulu, wrote the US Securities and Exchange Commission, warning that eliminating 1502 would lead to an “escalation in the activities of non-state armed groups.” The US has sought for decades to help de-escalate these activities; removing a tool that can help do that undercuts longstanding US foreign policy objectives.

This problem could be exacerbated by the administration’s possible budget cuts for UN peacekeeping in Congo and by possible further cuts to other foreign assistance to Congo. The combination of suspending or eliminating 1502 while cutting support to peacekeeping and other foreign assistance could make it easier for abusive armed groups to make money from conflict minerals while simultaneously reducing funds to entities meant to curtail conflict and foster stability.

Considering Congress’ longstanding interest in Congo, the fragile situation on the ground, and the billions of dollars the US has spent on peacekeeping efforts in the country, this scenario would be extraordinarily counterproductive to US geopolitical and security interests.

While imperfect, Dodd Frank has already had some tangible positive effects for the people of eastern Congo and those seeking greater transparency. Since 2012, mining at the Kalimbi tin mine in Nyabibwe, South Kivu, for example, has had a functional traceability scheme, which allows for the continuous production of tin that benefits the local workers, and not the abusive armed groups or corrupt army or government officials.

Global Witness reported that in 2012, the Congolese government suspended the operations of two Chinese companies because they failed to carry out proper due diligence and suspected they may be sourcing from armed groups. But it is troubling that the same year, Global Witness reported that two Congolese army officers were caught trying to smuggle more than 1,000 pounds of minerals, including coltan. The government refused to press charges, but the officer who stopped them and tried to stop the smuggling was suspended from his post. At present, however, we have some indications that Congolese government officials are starting to take actions to prevent mineral wealth from illegally profiting armed groups or army officers.

It is also important to remember the types of groups that could be emboldened and enriched without the transparency and systems Dodd-Frank requires. Human Rights Watch and others have documented the abuses by several armed groups that benefited from this trade and the harm they have caused. This includes the armed group known as the Nduma Defense of Congo-Renové (NDC-R), one of the most abusive groups operating in eastern Congo that benefits greatly from the uncontrolled and illicit exploitation of gold there. Traceability efforts so far have had a much greater impact on tin, tantalum, and tungsten than on gold. The NDC-R has committed serious human rights violations, including the killings of dozens of civilians and recruitment of children over the past two years.

Last month, my colleagues were in eastern Congo's Walikale territory in North Kivu and met with several former child soldiers from NDC-R and miners. They told us how the group led by Guidon Shimiray Mwiswa is systemically taxing the lucrative gold trade in dozens of mining sites. By holding a monopoly on things like alcohol and cigarettes in the mining pits and illegally taxing those who work in or near the mines, Guidon is making over \$20,000 a month. According to some of his former cadres, he's also allegedly trading gold for weapons.

Suspending Dodd-Frank 1502 would make it easier for other abusive armed groups and corrupt officials to enrich themselves the way Guidon is by making the trade even more opaque and easier to do business with armed groups. This would make an already bad situation even worse.

Suspending or Eliminating Dodd-Frank 1502 Will Disadvantage Responsible US Companies

Suspending or revoking Dodd-Frank 1502 would hurt some of the United States' leading companies, such as Tiffany, Intel, and Apple. These firms have taken meaningful steps to keep their supply chains free from links to abuses in Congo and would be placed at a competitive disadvantage against companies inclined to operate less responsibly.

Responsible companies have worked hard to comply with the requirements of 1502. In March 2016, Apple announced that 100 percent of its conflict mineral supply chain had been audited to ensure compliance with Dodd-Frank 1502. That move was widely praised by human rights groups. While its supplies were not fully conflict-free, it has achieved the kind of oversight needed to eliminate conflict minerals from its supply chain. It took the company about six years of steady work on the ground and with its suppliers to meet this goal. But Apple is not just focusing on its legal requirements; it is also trying to clean up its cobalt supply chain after facing scrutiny over problems in it.

Intel began to examine conflict minerals in 2008 and has reported that its microprocessors have been conflict free since 2013. The company has said that it was on track to make its entire product base conflict-free. It took several years for the company to get control over its supply chains and build the capacity to source from properly audited mines.

Also, Intel commissioned an important study on Millennials' attitudes towards conflict minerals. The survey provides useful insights into the minds of key consumers. 97 percent of those surveyed believed that companies should "act in a way that benefits society." Almost 70 percent would avoid companies that they think are not socially responsible. About 70 percent cared about conflict minerals once they learned about them, and a similar percentage said that how a company dealt with conflict minerals would influence whether they bought its products. Dodd-Frank 1502 gives consumers the information they need to make decisions, helps companies meet those expectations, and isolates companies that do not.

Tiffany & Co., one of the world's most recognizable and prestigious jewelry companies, has also invested a considerable amount of time and resources to ensure that it monitors its supply chain to exclude conflict minerals. It conducts detailed reviews of its global supply chains. It works, like other companies, with programs to support conflict-free smelters and other initiatives. The company has made the investment to ensure its products are conflict-free.

Each of these companies is an American icon and a leader in their industries. And each of them does not want Dodd-Frank 1502 or comparable regulation to go away.

When it became apparent that 1502 might be suspended, Tiffany issued a statement noting “we firmly believe that the continued existence of Federal regulation that addresses the sourcing of conflict minerals provides an important framework for industry, laying the foundation for protection of human rights and responsible sourcing efforts in Congo and beyond. We urge Congress to support legislation that effectively promotes due diligence and transparency for the sourcing of all conflict metals and gemstones.”

Richline Group, a jeweler owned by Warren Buffet’s Berkshire Hathaway, has also come out in support of 1502 and noted that “Section 1502 has proven to be an important and effective first step in the effort to create a conflict-free mining industry in Congo that benefits legitimate business rather than extortion and violence” and said “we fully support the continued implementation of Section 1502.”

From personal experience, I know that the CEO of one of these companies had strong reservations against Dodd-Frank 1502 when it first became law, but ultimately saw that it was something the company could and would implement it in part because it was far less costly and laborious than he originally expected and because it was the right thing for the company to do.

The support from major companies highlights a perverse consequence that suspending or repealing Dodd-Frank would cause: it would create an uneven playing field placing major US companies at a competitive disadvantage relative to companies that did not want to disclose their supply chains, or worse still, do not care whether their activities led to the secret funding of armed groups in Congo. In this sense repealing 1502 would create a perverse incentive to behave less responsibly, and would harm the efforts of responsible companies. Tiffany, Apple, Intel, and Richline have said they believe keeping conflict minerals out of their supply chain is the right thing to do and that they will continue to do it. But without regulation, they will bear a steep cost for being responsible. Dodd-Frank levels the playing field and makes sure responsible companies are not penalized for doing the right thing while requiring others to meet minimum standards.

Additionally, 129 investors with assets worth approximately \$5 trillion under management have also urged the US government to keep the law in place and to ensure its continued implementation and enforcement.

The US should maintain the same path it has successfully pursued over decades: be the first country to enact a strong law ensuring that companies act responsibly and then work diligently to make sure others do the same. This is what the US did with the Foreign Corrupt Practices Act. It passed the law in 1977, worked to get other countries to pass similar statutes, and now there is an important global anti-corruption regime that includes many countries with strong anti-corruption laws of their own. Multilateral institutions like the Organization for Economic Cooperation and Development (OECD) and the UN have also developed their own standards. The US played a leading role in these efforts—in part because it led by example.

This approach has also been true with 1502. US adoption of 1502 led the EU and OECD, for example, to start developing their own standards on conflict minerals that will, at least in the case of the EU, apply to a broad swath of companies beyond US jurisdiction. Just this March, the European Parliament approved new conflict minerals regulations. That approach creates a race to the top where US companies lead, versus suspending 1502 and creating a race to the bottom where US companies are hurt.

Five years after the rules went into force, there is progress. There are more than 200 conflict-free smelters and major companies, as noted previously, are working towards full

compliance and do not want the rule to end. And other jurisdictions are developing their own, similar, rules.

Internationally, the London Bullion Market Association and the Dubai Multi-Commodities Center are putting policies into place to deal with illicit funds derived from minerals. In Congo, the International Tin Supply Chain Initiative is also working to support company due diligence. These are relatively new initiatives and their efficacy is not yet known, but they are examples of the momentum 1502 is creating and what could be lost if it is eliminated.

On the ground, significant parts of Congolese civil society generally support the law. As Dr. Denis Mukwege wrote in the *New York Times* in 2015, “A conflict-free minerals industry would greatly benefit the people of Congo and contribute to ending the unspeakable violence they have endured for years. The legislative tools to help make this a reality are available to international policy makers, but they must be enacted and enforced.” Those views are echoed by a number of civil society groups.

Challenges with Dodd-Frank 1502

There are very compelling reasons to keep 1502, but we do not want to downplay the fact that this law has had its challenges, claim that implementation of the law has been perfect, or suggest that it is the sole answer to conflict and abuse in eastern Congo.

During the period after Dodd Frank became law in 2010 and before its implementing rules were finalized in 2012, uncertainty, misinformation, and other factors led to adverse consequences on the ground. That uncertainty before the final rules were issued led to a de facto boycott as companies avoided sourcing from Congo. There is also evidence that mineral-related violence during that time did not subside.

However, those problems are not solely due to Dodd-Frank 1502. The Kabila government exacerbated the negative economic impacts when it ordered a six-month halt to all mining in the Kivus in 2010. Between 2010 and 2012, the period between enactment of 1502 and implementation of its final rules, companies chose to boycott Congo since nothing in the law required that companies stop doing business with Congo. These measures, coupled with the uncertainty over Dodd-Frank’s final rules, created problems.

There are still reports of problems facing artisanal miners ranging from low prices affecting artisanal coltan miners.

Another key issue is that US companies are still slow to comply with the law. In 2015, Global Witness and Amnesty International reported that as much as 80 percent of covered companies were not properly disclosing and auditing their conflict minerals supply chain. This is an important area for growth and development—as it could help strengthen the positive impact of the law and enable a more level playing field for all companies down the road.

The Way Forward

We support constructive proposals to ensure Dodd-Frank 1502 is more efficient and effective. Suspending or scrapping the law will not do this and will instead disadvantage responsible companies, while likely creating more instability in parts of Congo and making it easier for abusive armed groups to pay for their activities.

If industry groups or companies have specific ideas on how to make 1502 more efficient or effective, you should make sure they are sharing them. There are already indications that costs

of implementing 1502 are decreasing significantly as new tools are developed to make it easier to comply. ELM Sustainability Partners did an assessment of the law and found that the total industry costs are about 15-26 percent of the original costs that the SEC reported. Meanwhile, eastern Congo reported record highs for conflict-free exports of tin and tantalum in 2016.

You should also request a study—perhaps from the GAO—on how to promote conflict-free minerals on the ground, and stronger incentives to promote and reward responsible companies.

Unfortunately, the main industry critics, namely the National Association of Manufacturers, have not put forward specific proposals that would tweak 1502 to make it more effective. Many organizations are regularly discussing implementation with key companies and have listened closely to their concerns and challenges.

As a general principal, we believe that responsible companies in any sector should be rewarded for safeguarding human rights in their operations and others should be incentivized to do the same. Broadly, the cost of capital should be lower for responsible compliant companies than noncompliant ones and the opportunities for responsible companies should be greater.

In that context, we would encourage you to support proposals that have been made by industry associations to advantage 1502 compliant companies in government procurement and efforts by responsible investors to favor and support those companies over others. And while we are not experts on tax policy, it is worth Congress and others examining how to use tax credits or comparable incentives to help support 1502 implementation because it could help lower the costs of implementation for companies.

Finally, we suggest Congress encourage efforts to support and promote conflict-free smelters on the ground. The principal way to do this is to make sure more companies are complying and sourcing from responsible mining and smelting sources. Given that the US is still the largest donor to the World Bank, it would be worth examining how that institution can help the Congolese government and industry grow a conflict-free market.

Conclusion

The situation in Congo is complex. But it is highly likely that suspending Dodd-Frank 1502 or eliminating it will contribute to greater instability, create a competitive disadvantage for responsible companies, and it could create a troubling paradox where, as US aid to Congo and UN peacekeeping may decline, the opportunity for abusive armed groups to make money off from conflict minerals will increase. The US would also fall behind its peers on an issue where it set the global example—this is not what Congress should seek to encourage or support.

Instead, we hope the administration and Congress will seek to refine 1502, support responsible companies, and look at holistic approaches to keeping conflict mineral revenues out of the hands of abusive armed groups, whether they be militias, rebels, mafias, or government.