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KURZGUTACHTEN ZUM STAND DES §1502 DODD-FRANK GESETZES USA

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I. FACTS AND QUESTION

Für einen Bericht des Bundesrates zur Umsetzung der UNO-Leitprinzipien für Wirtschaft und Menschenrecht sollte das Bundesamt für Justiz möglichst zuverlässige Informationen zum Stand des Dodd-Frank-Acts bzw. dessen Aufhebung, insbesondere der Bestimmungen zu den Konfliktmineralien (Section 1502) haben.

Das Bundesamt für Justiz wünscht deshalb bis am 26. April 2018 eine Kurzauskunft dazu.

II. REPORT

1. Legal Status of Dodd-Frank Act, § 1502

The provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) were unpopular among the Republicans in the United States Congress from the beginning. Passed as part of the broad-ranging legislative plan to increase regulation of the financial services industry, the Act also took aim at the financing of the civil war in Democratic Republic of the Congo: the provision §1502 was promulgated to help end the trade in so-called “conflict minerals” (tin, tantalum, and tungsten) from the Democratic Republic of the Congo (DRC) and its neighboring states) as a way to end the flows of financial resources funding the fighting in the DRC.

With the arrival of the Trump Administration in January 2017, the Executive Branch joined with the Republican majority in Congress to seek relief from the law’s provisions.

As full legislation, §1502 cannot be revoked without a Congressional repeal of the provision. Two bills have been introduced to try to repeal §1502, either specifically or as a part of the overall repeal of the Dodd-Frank legislation (see below, 2. and 3.). A third would not repeal §1502 or Dodd-Frank, but would cut off funding necessary for the former’s enforcement.

2. H.R. 10

One of the repeal-oriented bills is H.R. 10, the Financial Choice Act of 2017.¹ This Act is a broad piece of legislation aiming to dismantle much of the Dodd-Frank Act, including the stricter regulatory oversight of the banking and insurance industry put into place by the Obama Administration in the wake of the financial crisis.²

As only one of The Financial Choice Act of 2017 contains Section 862, which would repeal the requirement that the Securities and Exchange Commission require reporting on conflict minerals by companies listed on the stock exchange:

¹ Introduced by Representative Hensarling (R-Texas) on 26 April 2017.

² The first of the three Committee Reports begins with a statement of purpose, which is: “to create hope and opportunity for investors, consumers, and entrepreneurs by ending bailouts and Too Big to Fail, holding Washington and Wall Street accountable, eliminating red tape to increase access to capital and credit, and repealing the provisions of the Dodd-Frank Act that make America less prosperous, less stable, and less free, and for other purposes.” House of Representatives, Report 115-153, part 1, Book 1 (25 May 2017) (<https://www.congress.gov/congressional-report/115th-congress/house-report/153/1?q=%7B%22search%22%3A%5B%22conflict+mineral%22%5D%7D&r=48&overview=closed>).

--Repeals certain provisions of title XV of the Dodd-Frank Act. In particular, repeals sections directing the SEC to promulgate regulations regarding the following: disclosures relating to conflict minerals originating in the Democratic Republic of the Congo; disclosures regarding coal or other mine safety; disclosures of payments to foreign governments by resource extraction issuers. Also repeals sections mandating studies on the effectiveness of inspectors general and on core deposits and brokered deposits.³

After passing through ten House committees, the Financial Choice Act **was passed by the whole House of Representatives in June 2017** by a vote of 233:186. On 12 June 2017, the **bill went to the Senate**, where is currently in the Committee on Banking, Housing, and Urban Affairs. There were hearings held on 13 July 2017, but **no votes have been taken**.⁴

3. H.R. 4248

A second attempt to repeal §1502 of Dodd-Frank is the most recent action on the matter. This was the passage by the House of Representatives Committee on Financial Services of H.R. 4248. The bill, introduced by Representative Huizenga (Republican of Missouri), proposes a Congressional repeal directly in its first section.

H. R. 4248, section 1(b)(1) states:

“(b) Conforming amendments.—The Dodd-Frank Wall Street Reform and Consumer Protection Act ([12 U.S.C. 5301](#) et seq.) is amended—
(1) by striking section 1502.”⁵

As a matter affecting the financial services industry, H.R. 4248 first went to the House of Representatives’ Committee on Financial Services for hearings. The **Committee passed the proposal by a vote of 32:27 on 15 November 2017**.⁶ In February 2018, the bill was **put on the Union Calendar**, making it eligible for consideration by the whole House.⁷ There has been no further action taken since then.

4. ENFORCEMENT BLOCKAGE

The **quality of §1502 as valid law is one aspect, the enforcement of §1502 is another**. Unlike much of the rest of the Dodd-Frank Act, §1502 does not directly oblige companies to act. Rather, it requires the SEC to promulgate rules to implement a reporting requirement for companies within its jurisdictional reach (essentially those listed on the stock exchange).⁸

³ H.R. 10, Section 862 (Repeal).

⁴ See <https://www.congress.gov/bill/115th-congress/house-bill/10/all-actions?overview=closed#tabs>.

⁵ <https://www.congress.gov/bill/115th-congress/house-bill/4248/text>

⁶ House of Representatives, Report 115-570 TO AMEND THE SECURITIES EXCHANGE ACT OF 1934 TO REPEAL CERTAIN DISCLOSURE REQUIREMENTS RELATED TO CONFLICT MINERALS, AND FOR OTHER PURPOSES (<https://www.congress.gov/115/crpt/hrpt570/CRPT-115hrpt570.pdf>).

⁷ <https://www.congress.gov/bill/115th-congress/house-bill/4248/all-actions?q=%7B%22search%22%3A%5B%22conflict+mineral%22%5D%7D&r=1&overview=closed#tabs>, Note that placing a bill on a Congressional calendar does not provide a firm date on which a bill will be further considered. See Christopher M. Davis, Calendars of the House of Representatives 1 (Congressional Research Service, 2 March 2017).

⁸ Dodd-Frank Act, §152(b):

While the SEC did promulgate a rule in August 2012⁹, that rule was challenged and in 2014 one provision was struck as unconstitutional (contrary to the first amendment rights of companies) by the Court of Appeals for the District of Columbia.¹⁰ The SEC has yet to promulgate another rule, meaning that there is **no rule in place to implement** the desired reporting requirement of **§1502**.

Moreover, a third **bill in Congress would halt funding for SEC enforcement** of the conflict minerals rule. H.R. 3354 contains a provision (amendment 441, as proffered by Representative Huizinga, the same as the proposer of H.R. 4248) to prohibit the use of funds to enforce the conflict minerals provisions of the Dodd-Frank Act.¹¹ **Passed by the House of Representatives on 14 September 2017 by a vote of 211:198, H.R. 3354 is now in the Senate**, where it has been placed **on the calendar in September 2017**.¹²

Regardless of the outcome of that proposal, there are strong indications that the Trump administration-led SEC is not eager to promulgate any rules to replace the one held unconstitutional. On 7 April 2017, (then-) Acting Chairman of the SEC Michael Piowar¹³ verbally stated that the reporting requirements **will not be enforced** against those companies who do not report on their supply chains.¹⁴

III. CONCLUSIONS

Because there has not been action in both the House of Representatives and the Senate to repeal §1502 of the Dodd-Frank Act, **the conflict minerals reporting provision is still valid law**.

However, because §1502 obliges the SEC to enact rules to require listed companies to report on their suppliers, **the lack of a valid SEC rules prevents there from being any law in place against which a non-reporting company could be found to have acted wrongfully**. As a result, the legal validity of the law is currently unconnected to the question of compliance with reporting requirements, because such requirements do not exist.

“Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually [...] whether conflict minerals that are necessary [...] in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country [...]”

⁹ See <https://www.sec.gov/spotlight/dodd-frank-section.shtml#1502>.

¹⁰ *Nat'l Ass'n of Mfrs., et al. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

¹¹ H.Amdt. 441 to H.R. (<https://www.congress.gov/amendment/115th-congress/house-amendment/441>).

¹² The bill was received in the Senate on 25 September 2017, and read for the second time and placed on the calendar on 27 September 2017 (<https://www.congress.gov/bill/115th-congress/house-bill/3354/all-actions?q=%7B%22search%22%3A%5B%22hr+3354%22%5D%7D&overview=closed#tabs>).

¹³ Pinowar has subsequently been confirmed as Commissioner of the SEC.

¹⁴ Statement of Acting Chairman Piowar on the Court of Appeals Decision on the Conflict Minerals Rule 7 April 2017 (<https://www.sec.gov/news/public-statement/piowar-statement-court-decision-conflict-minerals-rule>).