BACK ON THE (SUPPLY) CHAIN GANG: WHETHER THE SEC FINAL RULE FOR SUPPLY CHAIN DISCLOSURE IS THE BEGINNING OF PURELY SOCIAL AND ENVIRONMENTAL DISCLOSURE

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INTRODUCTION

In July 2010, in reaction to the financial crisis that triggered the Great Recession, Congress passed, and the President signed, The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] Congress intended Dodd-Frank, "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[2] Much of the 848-page Act addresses financial institutions, instruments, and practices, and calls for further rulemaking by agencies including the U.S. Securities and Exchange Commission

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1. Regina F. Burch, *Financial Regulatory Reform Post-Financial Crisis: Unintended Consequences for Small Business*, 115 PENN ST. L. REV. 409, 431 (2010) (defining Great Recession: "The late spring of 2007 and the fall of 2008 . . . worldwide bank collapse, extreme volatility in the global financial markets, the bursting of the United States housing bubble, rapidly enacted and then abandoned regulatory solutions by state governments, international credit freezes, burgeoning unemployment, government bank takeovers and investments in formerly venerable Wall Street investment banks, below zero interest rates, a universal decline in stock market averages and billions in economic stimulus and bailouts"); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter Dodd-Frank, Pub. L. No. 111-203].

2. Dodd-Frank, Pub. L. No. 111-203.

("SEC").[3] Uniquely, § 1502, however, does not deal with financial matters.[4] For the first time, Congress granted the SEC authority over what appears to be purely humanitarian concerns.[5] Section 1502 addresses the importation of conflict minerals—such as tantalum, tin, gold, and tungsten—used in some electronics.[6] Many of these resources are mined in the Democratic Republic of Congo (DRC).[7] Section 1502 requires companies that may use conflict minerals as a necessary part of manufacturing to analyze their supply chain for the source, and report the results of their analysis to the SEC.[8] On August 27, 2012, the SEC issued its Final Rule (Final Rule) for such disclosure.[9] The Final Rule includes a due diligence process and third party certification of a company's disclosure.

Part I of this article is an overview of SEC disclosure at large. A general look at SEC disclosure requirements provides foundational knowledge of the SEC's purpose and practices. The SEC regulatory framework situates the requirements of § 1502 and the Final Rule into the disclosure regime already in place. An understanding of the SEC generally contextualizes how current and potential environmental disclosure requirements function as part of the whole. The framework for how the SEC regulates the capital market clarifies how regulation does and may require environmental and humanitarian disclosure.

Part II explores the SEC Final Rule for § 1502 by discussing what it requires for manufacturing companies in the United States that use conflict minerals as a necessary part of their production process. It explores the burdens for boards of directors and executive management in complying with the Final Rule.

Part III describes environmental and humanitarian disclosure both here in the United States and abroad. Part III.A explains environmental disclosure the SEC currently requires. Part III.B demonstrates the progression foreign jurisdictions made from financial disclosure to humanitarian and environmental disclosures, such as Great Britain, France, Japan, and Brazil. Finally this article concludes by analyzing the Final

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3. *Id.*

4. *Id.* § 1502. Sections 1503 and 1504 fit into this category, requiring mine safety and natural resource use disclosure. A proposed rule was promulgated by the SEC, but no final rule was released, therefore, this article only explores the final rules for § 1502.

5. *Id.*

6. 17 C.F.R. §§ 240.13p−1 & 249b.400 (2013); Securities Exchange Act of 1934, 15 U.S.C. § 78m(p) (2006).

7. *Conflict Minerals*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals (last visited Oct. 21, 2013).

8. 17 C.F.R. §§ 240.13p–1 & 249b.400.

9. Conflict Minerals, 77 Fed. Reg. 56,274, 56,274 (Sept. 12, 2012); 15 U.S.C. § 78m(q) (2006).

Rule's potential to be the beginning of purely social and environmental disclosure for U.S. companies.

I: SEC DISCLOSURE REQUIREMENTS

In response to the stock market crash in 1929, Congress passed and President Roosevelt signed the Securities Act of 1933 ("'33 Act"). Congress later passed the Securities Exchange Act of 1934 ("'34 Act"), which created the SEC to regulate capital markets.[10] The mission of the SEC is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[11] The '34 Act requires companies that offer securities that are publicly traded on a national exchange, or with over 2,000 non-employee shareholders and over $10 billion in assets, to adhere to a nexus of regulatory disclosures.[12] Professor Cynthia Williams states that these disclosure requirements "bring to bear public pressure to change the actions and attitudes of corporate managers, bankers, and other insiders," and "encourage corporate managers to exercise their power with a greater sense of fiduciary obligation, both toward shareholders and toward the public."[13] Chairman of the Securities and Exchange Commission, Mary Jo White, similarly characterized the disclosure requirements.[14] Chairman White said:

> [d]isclosure is indeed a key ingredient in the securities arena. It gives investors the information they need about their investments. It provides them with information about the operations, management and financial condition of the companies they invest in . . . [I]t allows informed investors to participate in a free and fair market.[15]

Or as Justice Brandeis so eloquently put it in his book, *Other People's Money and How Bankers Use It*, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of

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10. 15 U.S.C. § 78a (2006).

11. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital* Formation, U.S. SEC. & EXCH. COMM'N, *available at* http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 23, 2013).

12. 15 U.S.C. §§ 78m and 78*l*(g) (2006).

13. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211–12 (1999).

14. Mary Jo White, Chairman, Sec. Exch. Comm'n, Address at 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture at Fordham Law School: The Importance of Independence (Oct. 3, 2013).

15. *Id.*

disinfectants; electric light the most efficient policeman."[16] Essentially, the goal is to prevent fraud and allow investors of all types the informational opportunity to make financially sound decisions.[17]

The SEC requires four major forms of disclosure under its framework titled Regulation S-K.[18] Companies must register with the SEC when they wish to issue securities, and thus companies are referred to as "issuers."[19] A potential issuer registers through a prospectus document and registration statement.[20] SEC-registered companies must also disclose financial reports at the end of each fiscal quarter and at the close of their fiscal year in Forms 10-Q and 10-K, respectively.[21] Forms 10-Q and 10-K must be certified by an independent public accountant to ensure accuracy and honesty.[22] Companies must also report changes in the business that may materially affect investors using Form 8-K, which must be filed within a set number of days after the material change, depending on the situation.[23] Materiality is a term of art that issuers and regulators must consider on a case-by-case, factual basis of a total mix of quantitative and qualitative information that a reasonable investor might find important in making investment decisions.[24]

A company must disclose not only quantitative data, but must qualitatively explain the numbers.[25] The managers of a company must discuss and analyze "information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operation."[26] This portion of Form 10-K is appropriately named "Managers Discussion & Analysis" ("MD&A").[27] Within MD&A, managers must discuss potential market risk factors and forward-looking information that are reasonably based and made in good faith.[28] Forward-looking statements may contain

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16. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (1914).
17. Elizabeth Glass Geltman, *The Pendulum Swings Back: Why the SEC Should Rethink Its Policies on Disclosure of Environmental Liabilities*, 5 VILL. ENVTL. L.J. 323, 330 (1994).
18. 17 C.F.R. §§ 229.10 & 240.13a−1 (2013). The SEC requires other forms of disclosure. These four, however, are the most prevalent for the discussion of this Note.
19. *Id.* § 240.13a−1 (2013).
20. *See* Geltman, *supra* note 17 (explaining that a prospectus is a securities sales document which outlines the terms of an offering and explaining that not all securities require registration; exemptions exist).
21. 17 C.F.R. § 240.13a−14 (2013).
22. *Id.*
23. *Id.* § 240.13a–11 (2013).
24. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449−50 (1976); Basic v. Levinson, 485 U.S. 224, 232 (1988).
25. 17 C.F.R. § 229.303 (2013).
26. *Id.*
27. *Id.*
28. *Id.* § 230.175 (2013).

> a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items; [a] statement of management's plans and objectives for future operations; [a] statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations. [29]

Market risk factors tend to outline potential scenarios, including environmental risk factors that would negatively impact a company's financial standing should they occur.[30]

Section 10b of the '34 Act protects against fraudulent or misleading statements or omissions.[31] SEC Rule 10b-5 is the corresponding regulation.[32] Rule 10b-5 makes it illegal:

> (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[33]

The SEC or private individuals who have purchased or sold shares based on fraudulent information have standing under 10b-5 and may bring a suit.[34]

The '34 Act has been amended over the years, most recently with the Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act)[35], Dodd-Frank[36], and the Jumpstart Our Business Startups ("JOBS") Act of 2012.[37] These acts contain many provisions, some of which create new sections of the '34 Act, others of which amend sections that already exist.[38] In doing the former, Dodd-Frank granted the SEC the authority to promulgate the Final Rule for conflict mineral supply chain disclosure.[39]

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29. *Id.* § 240.3b−6(c)(1) through (4) (2013).
30. *Id.* § 229.10(b)(1) (2013).
31. 15 U.S.C. § 78j (2006).
32. 17 C.F.R. § 240.10b–5 (2013).
33. *Id.*
34. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975).
35. 15 U.S.C. § 7201(a) (2006).
36. Dodd-Frank, Pub. L. No. 111-203.
37. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat 306 (2012).
38. *Id.*
39. Dodd-Frank, Pub. L. No. 111-203, § 1502.

II. DODD-FRANK § 1502

Section 1502 of Dodd-Frank amended the '34 Act to include section 13(p), "Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of the Congo."[40] As previously mentioned, SEC disclosure is intended to allow the public to invest on an informed basis and, through public and market pressure, sway how companies behave.[41] Dodd-Frank, therefore, regulates capital market disclosure in an attempt to affect social and public policy.[42] Section 1502 gave the SEC 270 days to create a rule for conflict mineral supply chain disclosure.[43] The SEC issued its initial proposed rule on December 15, 2010.[44] The proposed rule included a three-part process for conflict mineral disclosure.[45] It required comment on the rule by March 2, 2011.[46]

Conflict minerals are elements that are essential to the production of many electronics used every day in the U.S., such as cellular phones.[47] Generally, elements that qualify as conflict minerals are tin, tungsten, and tantalum ("the three 'T's'") and gold. These minerals exist in great quantity in the eastern part of the DRC.[48] For purposes of §13(p), conflict minerals include "cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the [DRC]."[49] The word "conflict" is ascribed to these minerals because militant groups mine, tax, and sell them on the black market in order to fund the enslavement of the local population.[50] Many people are familiar with this concept in the context of "blood diamonds."[51] Blood diamonds, similarly, resourced civil

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40. *Id.*
41. Williams, *supra* note 13.
42. David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues,* 6 J. BUS. & TECH. L. 327, 330 (2011).
43. 15 U.S.C. § 78m(p)(1)(A) (2006).
44. *SEC Proposed Rules Archive: 2010*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/proposed/proposedarchive/proposed2010.shtml (last visited Oct. 20, 2013).
45. Conflict Minerals, 77 Fed. Reg. at 56,279.
46. *Id.* at 56,277. The SEC originally set a deadline of January 31, 2011. It extended the deadline after public requests for extension.
47. Harry D. Gobrecht, Note, *Technically Correct: Using Technology to Supplement Due Diligence Standards in Eastern D.R. Congo Conflict Minerals,* 2011 U. ILL. J.L. TECH. & POL'Y 413, 415 (2011).
48. *Id.*
49. Conflict Minerals, 77 Fed. Reg. at 56,283.
50. Gobrecht, *supra* note 47; *Conflict Minerals 101*, YOUTUBE.COM, http://www.youtube.com/watch?v=aF-sJgcoY20 (last visited Oct. 27, 2013).
51. *Conflict Diamonds: Did Someone Die for that Diamond,* AMNESTY INT'L U.S.A., http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/conflict-diamonds (last visited Oct. 27, 2013).

wars throughout Africa and, most infamously, the apartheid system in South Africa.[52] The goal of the Final Rule would be to elicit public pressure on companies to ensure that their products are "conflict free."[53] Doing so would curb the international cash flow to brutal regimes of eastern DRC, and thus diminish the oppression of the Congolese people.[54]

The first part of the proposed process required a company to determine if the new rule applies to them.[55] Applicability may be determined by whether a company is a "registrant that files reports with the Commission under [Exchange Act Sections 13(a) or 15(d)]" and for which "conflict minerals…are necessary to the functionality or production of a product manufactured or contracted to **. . .** be manufactured" by such issuer.[56]

The second part of the proposed process required any such company to perform a "reasonable country of origin [for conflict minerals] inquiry."[57] If, through the inquiry, an issuer determined that no conflict minerals used came from the DRC, the company would disclose that information and the process by which it was determined in their annual filing of Form 10-K and on the company's website.[58] If a company determined that conflict minerals used were, in fact, from the DRC, or if the company was unable to determine their origin, it would have included this information in its annual Form 10-K and on its website.[59]

The third part of the proposed process required those companies using conflict minerals from the DRC or undeterminable origin to complete a Conflict Minerals Report ("CMR"). The CMR would include the due diligence measures taken to discover "the source and chain of custody of its conflict minerals" for each product manufactured or contracted for manufacture for which it could not determine.[60] The proposed rule required an independent, private sector auditor to certify the CMR.[61] In the CMR, an issuer would include due diligence measures to ensure that any scrap or recycled conflict minerals were truly from scrap or recycled sources.[62] Issuers would attach the CMR as an exhibit to the annual form 10-K and

52. *Id.*
53. Gobrecht, *supra* note 47, at 419; Conflict Minerals, 77 Fed. Reg. at 56,286.
54. Gobrecht, *supra* note 47, at 420.
55. 17 C.F.R. § 240.13q–1 (2013).
56. *Id.* § 240.13p–1.
57. Conflict Minerals, 77 Fed. Reg. at 56,299.
58. *Id.* A company would have to include in Form 10K that this information is available on its website and the web address for that information.
59. *Id.* As above, a company would have to include in Form 10-K that this information and is available on its website and the web address for that information.
60. Conflict Minerals, 77 Fed. Reg. at 56,313.
61. 17 C.F.R. § 240.10A–2 (2013).
62. Conflict Minerals, 77 Fed. Reg. at 56,313.

make it available on their website.[63] The proposed rule also required issuers to maintain business records that are related to their reasonable country of origin inquiry.[64]

On October 18, 2011, after interested parties submitted public comments on the proposed rule, the SEC held a public round table of "investors, affected issuers, human rights organizations, and other stakeholders."[65] The SEC reports that a majority of commentators supported the proposed rule, or at least the human rights motivation of the statutory provision.[66] The SEC also reported only one commentator outright opposed the provision and rule.[67] Other commentators expressed concerns for potential economic decline due to boycotts and embargos of non-conflict-free products, adverse effects on U.S. employment, and first amendment violations in the form of compelled speech.[68]

The SEC adopted the three-step process as proposed with changes to the mechanisms of implementation.[69] Through these changes, the SEC sought to reduce the cost of compliance.[70] The first step for identifying whether a company is subject to the rule remains essentially intact.[71] Companies for which "conflict minerals are necessary to the functionality or production of a product manufactured by such person" are considered a "person described" in § 13(p).[72] The Final Rule includes guidance to determine whether they have a qualifying "contract to manufacture" based on the degree of influence an issuer has over another party's operations.[73] A company is considered to have adequate influence for purpose of the first step if it does any more than:

> (1) [specify] or [negotiate] contractual terms with a manufacturer that do not directly relate to the manufacturing of the product (unless it specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the

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63. *Id.* at 56,314. A company would also be required to include in form 10-K that the CMR was attached as an exhibit, the name of the independent auditor in the body, that the CMR was available on their website, and the web address for the CMR.

64. *Id.*

65. *Id.* at 56,277.

66. *Id.* at 56,278.

67. *Id.*

68. *Id.* at 56,278–79.

69. *Id.* at 56,279.

70. *Id.* at 56,345.

71. *Id.* at 56,279.

72. *Id.*; 15 U.S.C. § 78m(p)(2)(A) (2006).

73. Conflict Minerals, 77 Fed. Reg. at 56,279. Operations such as materials, parts, ingredients or components are included in "manufacture."

> manufacturing of the product); (2) the [company] affixes its brand, marks, logo, or label to a generic product manufactured by a third party; or (3) the [company] services, maintains, or repairs a product manufactured by a third party.[74]

The Final Rule also clarifies what it means for a conflict mineral to be "necessary to the functionality" or "necessary to the production."[75] Conflict minerals are considered necessary to the *functionality* if:

> (1) the conflict mineral is intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (2) the conflict mineral is necessary to the product's generally expected function, use, or purpose; and (3) [the] conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.[76]

Conflict minerals are considered necessary to *production* if:

> (1) the conflict mineral is intentionally included in the product's production process, other than if it is included in a tool, machine, or equipment used to produce the product (such as computers or power lines); (2) the conflict mineral is included in the product; and (3) the conflict mineral is necessary to produce the product . . . [T]he mineral must be both contained in the product and necessary to the product's production. [It is not considered] "necessary to the production" of a product if the conflict mineral is used as a catalyst, or in a similar manner in another process, that is necessary to produce the product but is not contained in that product.[77]

The Final Rule also narrows the scope of required compliance by excluding companies that mine conflict minerals.[78] It also allows a company a one-year reporting grace period if it "acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals."[79] The Final Rule creates a new reporting form, Form SD, in lieu of including conflict mineral supply

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 56,279–80.
78. *Id.* at 56,280.
79. *Id.* at 56,301.

certification as part of Form 10-K.[80] Issuers will include the CMR as an exhibit to this specialized disclosure form.[81] Therefore, the form is subject to '34 Act liability.[82] Civil liability under the '34 Act often results in money damages for impacted investors.[83]

The second step of the rule requires a reasonable country-of-origin inquiry for conflict minerals.[84] The Final Rule allows an issuer to conduct an inquiry that is unique to its facts and circumstances.[85] The Final Rule includes a good faith requirement.[86] It maintains that if an issuer, through its reasonable country of origin inquiry, discovers that conflict minerals used are not from one of the "covered countries," then the issuer must disclose the finding and process for its reasonable country of origin inquiry in Form SD.[87]

The trigger for whether an issuer proceeds to the third step of the rule changed when the SEC handed down the Final Rule.[88] The third step under the proposed rule required issuers, whether they could or could not determine whether necessary conflict minerals originated in one of the covered countries, to conduct due diligence on the source and chain of custody of its conflict minerals and provide a CMR.[89] The Final Rule narrows the scope of step three slightly.[90] It requires issuers to conduct due diligence and file a CMR only if they know or reasonably believe that necessary conflict minerals originated in a covered country and do not come from recycled or scrap sources.[91] The Final Rule creates a waiver from filing a CMR if, in the course of conducting due diligence, the issuer discovers that necessary conflict minerals do not originate in a covered country nor are from recycled or scrap sources.[92] The issuer, however, is still required to file Form SD.[93]

The Final Rule includes some instruction for the due diligence process.[94] Unlike the proposed rule, the Final Rule requires that issuers follow a nationally or internationally recognized framework for each

80. *Id.* at 56,281.
81. *Id.* at 56,302.
82. *Id.* at 56,280.
83. *Id.* at 56,303.
84. *Id.* at 56,311.
85. *Id.*
86. *Id.* at 56,312.
87. *Id.*
88. *Id.* at 56,280.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 56,281.

conflict mineral in question, assuming one exists.[95] The SEC claims that this will enhance quality, allow for comparability, and ensure more accurate auditing of due diligence processes taken.[96] The SEC further suggests that this will "make the rule more workable and less costly than if no framework was specified."[97] The SEC concedes, however, that only one due diligence framework exists and thereby incorporates it by reference.[98]

The single due diligence framework that currently exists is disseminated by the Organisation for Economic Co-operation and Development ("OECD").[99] The OECD promotes policies that will improve the economic and social well-being of people around the world.[100] The framework provides guidance for detailed due diligence as a basis for responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold.[101] The framework is a "result of a collaborative initiative among governments, international organizations, industry and civil society to promote accountability and transparency in supply chain of minerals from conflict affected and high-risk areas."[102] The three goals of the framework are to:

> identify the factual circumstances involved in the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing or selling of products that contain minerals originating from conflict-affected and high-risk areas; identify and assess any actual or potential risks by evaluating the factual circumstances against standards set out in the company's supply chain policy (see the Model Supply Chain Policy, Annex II); [and] prevent or mitigate the identified risks by adopting and implementing a risk management plan. These may result in a decision to continue trade throughout the course of risk mitigation efforts, temporarily suspend trade while pursuing ongoing risk mitigation, or disengage with a supplier either after failed attempts

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. ORG. FOR ECON. CO-OPERATION AND DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2012), http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf [hereinafter, DUE DILIGENCE FRAMEWORK].
100. *About the OECD*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/ (last visited Oct. 20, 2013).
101. DUE DILIGENCE FRAMEWORK, *supra* note 99, at 12. The framework for gold was released as a supplement in 2011.
102. *Id.*

at mitigation or where the company deems mitigation not feasible or the risks unacceptable.[103]

The framework contains five steps, each step with its respective sub-parts.[104] The first step is for companies to "[e]stablish strong company management systems," so an entire enterprise works together to ensure accuracy in a reasonable country of origin inquiry.[105] Step two is to examine the supply chain and identify risk areas and points where conflict minerals may be entering the supply chain.[106] The third step is to "[d]esign and implement a strategy to respond to identified risks."[107] The fourth step is to acquire a third-party, independent auditor to ratify the due diligence taken by the issuer.[108] The fifth and final step is to report the results of supply chain due diligence.[109] The framework provides general guidance for due diligence; however, separate supplements exist instructing how to implement the framework when dealing with either the "three T's" or gold.[110]

The first step of the framework includes five sub-parts to establish a strong system of management.[111] Sub-part A instructs companies to "[a]dopt, and clearly communicate to suppliers and the public, a company policy for the supply chain of minerals originating from conflict-affected and high-risk areas."[112] Sub-part B requires structuring internal management to support supply chain due diligence.[113] Sub-part C is intended to "[e]stablish a system of controls and transparency over the mineral supply chain."[114] In order to do this, a company needs to create a system through which it traces the chain-of-custody or to identify "upstream actors."[115] An "upstream actor" includes "miners (artisanal and small-scale or large-scale producers), local traders or exporters from the country of mineral origin, international concentrate traders, mineral re-processors and smelters/refiners."[116] Sub-part D instructs companies to

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103. *Id.* at 14.
104. *Id.* at 17.
105. *Id.*
106. *Id.* at 18.
107. *Id.*
108. *Id.* at 19.
109. *Id.*
110. *Id.* at 12, 31.
111. *Id.* at 17.
112. *Id.* The framework includes standards for such a policy. *Id.* at 20.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 32. The framework distinguishes artisanal small-scale minors as "producing enterprises, rather than individuals or informal working groups of artisanal miners." *Id.*

incorporate their supply chain policies "into contracts and/or agreements with suppliers," and "assist suppliers [where possible] in building capacities . . . to [improve] due diligence performance."[117] Sub-part E requires "a company-level, or industry-wide, grievance mechanism as an early-warning risk-awareness system."[118]

The second step of the framework—to identify and assess risk in the supply chain—is relatively simple and self-explanatory.[119] It reads that "[c]ompanies should: A) [i]dentify risks in their supply chain as recommended in the Supplements; [and] B) [a]ssess risks of adverse impacts in light of the standards of their supply chain policy consistent with [the framework] and the due diligence recommendations in this Guidance."[120]

The third step, designing and implementing a strategy to respond to identified risks, contains four sub-parts.[121] Sub-Part A simply requires that a company report findings of a supply chain risk assessment to particular members of its senior management.[122] Sub-part B, adopting a risk management plan, is a bit more complicated, and requires companies to formulate a plan for reducing the risk of conflict minerals entering the supply chain.[123] The framework suggests that companies may accomplish this in one of three ways, by: "i) continuing trade throughout the course of measurable risk mitigation efforts; ii) temporarily suspending trade while pursuing ongoing measurable risk mitigation; or iii) disengaging with a supplier after failed attempts at mitigation or where a company deems risk mitigation not feasible or unacceptable."[124] The framework urges companies to exert influence and leverage over their suppliers, stakeholders, governments, and non-governmental organizations to reduce the quantity of conflict minerals in the supply chain.[125]

Sub-part C includes implementing, monitoring, and tracking performance of the risk management plan and reporting results to designated senior management.[126] The framework suggests that this sub-part may be accomplished independently by the company or in conjunction with local, state, federal or foreign governments, non-governmental

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117. *Id.* at 17.
118. *Id.*
119. *Id.* at 18.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

organizations, suppliers, or affected third parties.[127] Sub-part D simply requires that companies take any additional measures in assessing the supply chain and risk factors, mitigating circumstances, and adapting to changing circumstances.[128]

Step three appears to require more than due diligence in assessing the supply chain, but also suggests steps for companies to change their supply chains.[129] This step of the process extends beyond disclosure to discontinuing the use of conflict minerals entirely.[130] As the only due diligence framework available, and as a required portion of the Final Rule, it appears § 1502 and the Final Rule go beyond applying market pressure to reduce the use of conflict minerals, and skips directly to curbing the use of conflict materials through the due diligence framework. As Congress expands the SEC's power to regulate social and environmental concerns, the SEC, through final rules, might dictate issuers' behavior directly rather than through market forces.

Steps four and five of the framework, which require companies to audit and disclose the due diligence process, are both required as part of the Final Rule.[131] Neither of the final two steps has sub-parts nor provides much guidance.[132] Step four simply reads, "[c]ompanies at identified points (as indicated in the Supplements) in the supply chain should have their due diligence practices audited by independent third parties. Such audits may be verified by an independent institutionalized mechanism."[133] Likewise, step five contains no sub-parts and plainly states that, "[c]ompanies should publicly report on their supply chain due diligence policies and practices and may do so by expanding the scope of their sustainability, corporate social responsibility or annual reports to cover additional information on mineral supply chain due diligence."[134] A company satisfies this requirement with Form SD and by publishing its reasonable country of origin inquiry.[135]

There is consensus among commentators that the Final Rule would impact an estimated 5,994 issuers.[136] There is not, however, consensus

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. Conflict Minerals, 77 Fed. Reg. at 56,303.
132. DUE DILIGENCE FRAMEWORK, *supra* note 99, at 19.
133. *Id.*
134. *Id.*
135. *See* Conflict Minerals, 77 Fed. Reg. at 56,333 (stating that the company must briefly describe the reasonable country of origin in the Form SD).
136. *Id.* at 56,336.

around how much it will cost issuers to implement the Final Rule.[137] The National Association of Manufacturers ("NAM") estimated that the cost to issuers of implementing risk-based programs with control processes to verify the credibility of information suppliers are providing would be $300 million.[138] NAM also estimated performing due diligence would cost $1.2 billion.[139] NAM approximated that it would cost $6 billion to develop new information technology systems.[140] Lastly, NAM calculated that an independent, private sector audit would range from $25,000−$100,000, depending on the size of the company and the complexity of its supply chain.[141]

Tulane University, as part of a group of universities ("University Group"), submitted an estimate of the costs of the Final Rule for issuers as well.[142] The University Group estimated that strengthening governance systems would equate the largest cost to issuers.[143] Under the University Group's model, issuers would pay an aggregate cost of $26 million.[144] The University Group estimated the aggregate cost of updating technology to facilitate the Final Rule at $2.56 billion.[145] The estimated cost of acquiring an independent, private sector audit would cost $207 million.[146]

Claigan Environmental Inc. predicted the lowest cost of compliance.[147] Claigan predicted issuers would spend an average of $1 billion per year.[148] Claigan estimated the corporate governance costs: where organizational adjustments, consultants, and CMR writing would cost $60,000; implementation of a senior management program would cost $75,000; and an independent, private sector audit would cost $30,000; totaling

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137. *Id.*

138. *Id.* at 56,337. NAM is the preeminent US manufacturer's association as well as the nation's largest industrial trade association, "representing small and large manufacturers in every industrial sector and in all 50 states." *About NAM*, NAT'L ASS'N OF MANUFACTURERS, http://www.nam.org/About-Us/About-the-NAM/US-Manufacturers-Association.aspx (last visited Oct. 20, 2013).

139. Conflict Minerals, 77 Fed. Reg. at 56,337.

140. *Id.*

141. *Id.*

142. *See id.* at 56,338 n.756 (stating "the staff of Senator Richard J. Durbin, one of the co-sponsors of the Conflict Minerals Statutory Provision, contacted this commentator 'with a specific request for help in providing a detailed estimate of what it would cost companies to implement the Congo Conflict Mineral Act' ").

143. *Id.* at 56,338.

144. *Id.*

145. *Id.*

146. *Id.*

147. Letter from Claigan Environmental Inc. to Mary L. Shapiro, Chairwoman of the Securities and Exchange Comm. (Oct. 28, 2011) (on file at sec.org). "Claigan is one of the top companies in the field of environmental compliance of professional products." *About,* CLAIGAN ENVTL., INC., http://www.claigan.com/about.php (last visited Oct. 20, 2013).

148. Letter from Claigan Environmental Inc., *supra* note 147.

$165,000.[149] Claigan estimated the data-gathering costs: where the cost of gathering data is $100 per supplier;[150] that a given issuer would require data from half of its suppliers, an average of 1,000 suppliers per issuer, totaling $100,000.[151] Finally, Claigan estimated that the cost of upgrading technology systems would range from $30,000 to $150,000, averaging $40,000.[152] The technology systems would require $10,000 in IT support, sub-totaling an average of $50,000 per year for software system upgrades and maintenance.[153]

The SEC estimates, based on comments received, "that the initial cost of compliance is approximately $3 billion to $4 billion, while the annual cost of ongoing compliance will be between $207 million and $609 million."[154] This is based on a range of $387.65 million to $16 billion.[155] Regardless of the metric, issuers and their boards of directors will spend time, money, and manpower complying with the Final Rule. The expenditures outlined above may only account for a portion of an issuer's annual assets and liabilities. One can only assume, however, that similar expenditures would accumulate as the SEC requires other varying types of social and environmental disclosure.

Industry did not receive the Final Rule well when the SEC released it on August 22, 2012.[156] On October 22, 2012, NAM, the U.S. Chamber of Commerce, and the Business Roundtable ("Industry Group") filed an amended petition for review of the Final Rule in the U.S. Court of Appeals of the D.C. Circuit.[157] The Industry Group requested "that this rule be modified or set aside in whole or in part," on the grounds that the Final Rule was arbitrary and capricious under the Administrative Procedure Act, and that the Final Rule disclosure requirements violate the First

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149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Conflict Minerals, 77 Fed. Reg. at 56,351.
155. *Id.* at 56,336.
156. *Id.* at 56,365.
157. Amended Petition for Review, National Association of Manufacturers, Chamber of Commerce of the United States, Business Roundtable v. S.E.C., No. 12-1422 (D.C. Cir. Oct. 22, 2012). "The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations." *About the U.S. Chamber of Commerce,* U.S. CHAMBER OF COM., http://www.uschamber.com/about (last visited Oct. 20, 2013). "Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $7.3 trillion in annual revenues and nearly 16 million employees." *About Us,* BUS. ROUNDTABLE, http://businessroundtable.org/about-us/ (last visited Oct. 20, 2013).

Amendment.[158] The District Court for the D.C. Circuit dismissed NAM's motion for summary judgment, and granted the SEC's cross-motion for summary judgment.[159] The Industry Group filed an Appeal in September of 2013. The D.C. Circuit Court of Appeals granted expedited scheduling since effected issuers will be filing their first Form SD around May 2014.[160] Oral Argument is set for February 20, 2014.

Scholars spoke out about the SEC's involvement in humanitarian, rather than financial, issues as well.[161] The Final Rule's requirements create additional governance and financial burdens for issuers that use conflict minerals as a necessary part of their manufacturing.[162] Scholars believe these burdens will negatively impact commerce "without demonstrating market-based reasons for doing so."[163]

The burden lies in the timeline for implementation of the Final Rule. Issuers were expected to comply with the Final Rule for the fiscal year of 2013.[164] Such a timeline granted an issuer five months to implement new governance procedures, account for the fiscal cost of implementation, install or upgrade technology systems, and begin to gather data from suppliers.[165] The financial cost is undetermined.[166] Financial estimates by various parties leave issuers with no basis for business planning. The SEC estimates a cost of $71.2 million, while the University Group estimate totals $7.93 billion.[167] The University Group claims that the discrepancy results from the SEC underestimating "the implementation cost, in part because it

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158. Nat'l Ass'n of Mfrs. v. U.S. Sec. and Exch. Comm'n, No. 13-cv-635 (RLW), slip op. at 2 (D.D.C. July 23, 2013) [hereinafter *NAM v. SEC*].

159. *NAM v. SEC*, No. 13cv-635 (RLW), slip op., at 2.

160. Public Calendar from 09/09/2013 through 03/17/2014, USCOURTS.GOV, available at http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000 (last visited Jan. 16, 2014).

161. Laura E. Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* 4 (Ctr. for Global Dev. Working Paper No. 284), http://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf (last visited Nov. 4, 2013); *See also* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption is not Part of the SEC'S Mission,* 73 OHIO ST. L.J. 1093 (2012) (focusing on the SEC's involvement in global corruption abatement); Paul A. Griffin, David H. Long, & Yuan Sun, Supply Chain Sustainability: Evidence on Conflict Minerals, 28−29 (Oct. 28, 2012) (unpublished manuscript) (on file with UC Davis) (focusing on the SEC's involvement in conflict minerals disclosure).

162. *See generally* Conflict Minerals, 77 Fed. Reg. at 56,279−82 (recognizing that these burdens of compliance are all too apparent).

163. Seay, *supra* note 161, at 11.

164. Conflict Minerals, 77 Fed. Reg. at 56,305.

165. *Id.* at 56,274.

166. *Id.* at 56,336.

167. *Id.* at 56,338; Seay, *supra* note 161, at 12.

does not take into account the range of actors affected by the statutory law."[168]

One major flaw in § 1502 and the Final Rule is a governmentally sanctioned private solution to a foreign problem.[169] That is, the United States Congress is requiring private sector manufacturers to disclose supply chains for conflict minerals in order to mitigate the corruption in the DRC.[170] As the Information Technology Industry Council[171] stated, "the terrible conflict [in the DRC] is rooted in the wholesale absence of basic governance, security and accountability in the DRC, which allows age-old ethnic tensions and conflicts over land rights to rage unabated."[172] Surely, the private sector in the U.S. cannot solve an age-old conflict. In fact, the passage of § 1502 caused further militarization of the mining industry in the DRC.[173] As a result of § 1502, the Malaysian Smelting Corporation ("MSC") refuses to purchase Congolese tin.[174] This deleteriously affects Congolese artisanal miners and, by proxy, their families.[175] Miners work under poor conditions for a pittance of pay.[176] Mining jobs, however, are often the only paid jobs available in the Eastern regions of the DRC.[177] These workers are left with few options as a result of the MSC de facto boycott of Congolese tin.[178] Options for most Congolese are: attempt surviving on subsistence farming; join the militia; or shift to mining gold, which is easier to smuggle than other conflict minerals.[179] Section 1502 and the Final Rule forced an estimated 5−12 million Congolese civilians into dire economic straits.[180] Parents cannot afford school for their children and the sick cannot afford their medical bills.[181] Furthermore, while limiting tin mining in the DRC, gold smuggling continued or increased.[182] Though the Final Rule has yet to be implemented, it appears to have had an adverse

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168. Seay, *supra* note 161, at 13.
169. *Id.* at 12.
170. *Id.*
171. "The Information Technology Industry Council is the premier advocacy and policy organization for the world's leading innovation companies." *ITIC Background*, INFO. TECH. INDUS. COUNCIL, http://www.itic.org/about/ (last visited Oct. 20, 2013).
172. Seay, *supra* note 161, at 12.
173. *Id.* at 13.
174. *Id.* at 14. "The MSC Group is currently one of the world's leading integrated producers of tin metal and tin based products and a global leader in custom tin smelting since 1887." *About Us,* MALAYSIA SMELTING CORP. BERHAD, http://www.msmelt.com/abt_cp.htm (last visited June 20, 2013).
175. Seay, *supra* note 161, at 12−16.
176. *Id.* at 14.
177. *Id*.
178. *Id.* at 15.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

effect. In passing § 1502 and the Final Rule, Congress and the SEC undoubtedly intended to improve the lives of Congolese people; however, it has yet to have a positive effect. Could other forms of social and environmental disclosure have similarly counterproductive economic impacts?

III. ENVIRONMENTAL AND SOCIAL DISCLOSURE AT HOME AND ABROAD

A. SEC Required Environmental Disclosure

The SEC required no specific environmental disclosure until the 1970s.[183] This was primarily due to a general lack of broad public interest or pressure to address environmental issues and concerns.[184] Congress implemented environmentally minded regulation, and required registered issuers to disclose environmental information as relates to environmental litigation liabilities and regulatory compliance and how each materially affects finances.[185] Professor Mark Latham, a former environmental litigator, explains in his article, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change Related Risks*, how environmental law and regulation evolved to require environmental disclosure to the SEC.[186]

> The combination of new federal environmental legislation, greater state responsibility for environmental protection, and heightened public awareness resulted in the need for businesses subject to the federal securities laws now to consider potential liabilities arising from the new body of federal and state environmental protection programs in the information included in required disclosures to the SEC and investors.[187]

On May 9, 1973 the SEC published a Federal Register notice to comply with the National Environmental Policy Act ("NEPA").[188] NEPA amended Forms S-1, S-7, S-9, 10-K, and 8-K.[189] The SEC acknowledged "future

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183. Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change Related Risks*, 39 ENVTL. L. 647, 677 (2009).

184. *Id.*

185. *Id.* at 677−78.

186. *Id.* at 647.

187. *Id.* at 679.

188. Disclosure With Respect to Compliance With Environmental Requirements, 38 Fed. Reg. 12,100−1 (May 9, 1973).

189. *Id.*

environmental compliance may have a material effect on the issuer's expenditures, earnings or competitive position in the industry."[190] It went on to require that "[e]xpenditures solely attributed to compliance with environmental provisions should be disclosed if material."[191] Item 101 of Regulation S-K, promulgated in 2002, gave guidance for following the aforementioned disclosure requirements.[192]

Item 103 of Regulation S-K requires issuers to disclose "any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject."[193] Item 103 contains five guiding instructions.[194] The fifth instruction requires that any proceeding:

> arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if: (A) [s]uch proceeding is material to the business or financial condition of the registrant; (B) [s]uch proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10% of the current assets of the registrant and its subsidiaries on a consolidated basis; or (C) [a] governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.[195]

The SEC interpreted Item 103 of regulation S-K to specifically require disclosure of environmental liabilities as a part of MD&A.[196]

Perhaps Item 103 was the opening salvo of the SEC's socially-minded disclosure. Item 103 requires issuers to consider environmental litigation

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190. *Id.*

191. Latham, *supra* note 183, at 681; Disclosure With Respect to Compliance With Environmental Requirements 38 Fed. Reg. at 12,100.

192. 17 C.F.R. § 229.101 (2013).

193. *Id.* § 229.103 (2013).

194. *Id.*

195. *Id.*

196. Latham, *supra* note 183, at 684−85.

and regulation compliance costs in its financial disclosure. [197] The inclusion of these environmental factors, however, seems to align with the SEC's purpose of protecting investors; maintaining fair, orderly and efficient markets, and facilitating capital formation.[198] Issuers must also obtain an independent, certified accountant to audit financial statements issuers report registering securities and filing quarterly and annual statements. [199] Litigating environmental liability and complying with environmental regulation may have material financial risk and, therefore, are logically included as part of the SEC's regulatory scheme. This, however, has had effects beyond the SEC.[200] Accounting practices regulation obligates public companies to disclose environmental information. [201] The Financial Accounting Standards Board and the American Institute for Certified Public Accountants require accountants to audit the environmental liability and compliance costs securities issuers must disclose in financial statements for annual and quarterly reports under items 101 and 103 of Regulation S-K.[202] Currently, the SEC requires environmental disclosure only in the traditional context of financial materiality, which means environmental disclosure is part of protecting the financial interests of investors. Congress expanded the scope of the SEC's purely financial and investor related regulatory authority: Section 1502 of Dodd-Frank directs the SEC to regulate an international humanitarian concern. Perhaps environmental concerns are next.

B. Social and Environmental Requirements in Foreign Jurisdictions

If international trends serve as clues of whether the SEC will ask for non-financial environmental information as part of its disclosure regime, the answer may reasonably be yes. Expansion of regulatory disclosure

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197. *Id.* at 685.

198. *About the SEC,* U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 20, 2013).

199. Latham, *supra* note 183, at 686.

200. *Id.* at 687.

201. *Id.*

202. *Id.* at 685–97. "The Financial Accounting Standards Board (FASB) has been the designated organization in the private sector for establishing standards of financial accounting that govern the preparation of financial reports by nongovernmental entities." *Facts About FASB,* FIN. ACCT. STANDARDS BD., http://www.fasb.org/facts/ (last visited Oct. 20, 2013). "The AICPA is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries and a 126-year heritage of serving the public interest." *About the AICPA*, AM. INST. FOR CERTIFIED PUB. ACCTS., http://www.aicpa.org/About/Pages/About.aspx (last visited Oct. 20, 2013); 17 C.F.R. § 229.101, 229.103.

beyond the financial boundaries is not new.[203] Regulatory bodies in foreign jurisdictions began requiring social and environmental disclosure in 1977.[204] Since that time several nations have followed in the same course.[205] Currently, France, the United Kingdom, Sweden, Australia, Denmark, Brazil, Malaysia, China, South Africa, and Argentina all require companies to disclose information about social and environmental matters.[206] These requirements vary, but, nonetheless, indicate a growing trend for increased social and environmental disclosure.[207]

France is a leader in social disclosure. In 1977, France began to require social disclosure—the bilan social—in which companies report on 134 labor and employment related indicators.[208] In 2001, companies trading on the French stock exchange began providing social and environmental information in annual reports.[209] In 2002, the French government began to require sustainability reporting.[210] The 2002 law also created liability for companies.[211] Shareholders have standing if they have been injured by inaccurate or incomplete environmental disclosure.[212] Unfortunately, these disclosure requirements are not well defined, so companies satisfy the requirements to varied extents.[213] Additionally, "the French Government requires employees' savings funds and public pension funds to define and disclose the social, ethical, and environmental criteria they use when investing."[214] The French Government certainly expanded the scope of the social and environmental disclosure it requires.

Similarly, Sweden established an environmental impact requirement in the annual reports for companies of a certain size in the 1999 Accountants Act.[215] Under the Public Pension Funds Act of 2000, Sweden requires "national pension funds to draw up annual business plans that describe how environmental and ethical issues are considered in their investment decision making."[216]

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203. Steve Lydenberg & Katie Grace, *Innovations in Social and Environmental Disclosure Outside the United States,* 3−5 (Nov. 2008) (unpublished manuscript) (on file with Domini Social Investments).
204. *Id.* at 3.
205. *Id.* at 3–5.
206. *Id.*
207. *Id.*
208. *Id.* at 15.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 16.
215. *Id.* at 29.
216. *Id.*

Australia's Corporations Act of 2001 "requires some disclosure by listed companies in their annual reports of violations of environmental legislation."[217] Since 1996, Denmark requires "companies with significant environmental impacts to publish green accounts."[218] In 2007, Indonesia passed "Article 74 of Indonesia's Limited Liability Company Law [mandating] the companies involved in or affecting natural resources create and implement corporate social responsibilities programs."[219] Indonesian companies that do not implement social and environmental programs are subject to government sanctions.[220] In 2004, Japan began requiring certain companies to report environmental indicators, such as "amount of greenhouse gas emissions, amount of release and transfer of chemical substances, and total amount of waste generation."[221]

Since 1999, The Netherlands requires companies to publish annual environmental reports outlining a company's environmental performance, environmental management system, and quantitative data on all relevant pollutants of 170 specified substances emitted.[222] Norway passed the Accounting Act in 1998, which requires Boards of Directors to report on "the external environment, the working environment and gender equality."[223] In 2007, Norway's government went a step farther and required "the type and quantity of raw materials and energy used, type and quantity of polluting emissions, type and quantity of waste generated, and environmental degradation due to transportation" as a part of the Norwegian Accounting Standards.[224] The United Kingdom passed the British Companies Act of 2006, which mandates environmental disclosure in the annual Business Review report "to the extent that they are important to understanding the company's business."[225] The United Kingdom's form of disclosure resembles that of the United States most, as it requires environmental information merely as it pertains to financial materiality.[226]

Foreign jurisdictions require varying types and quantities of information.[227] Foreign governments gradually waded into financial

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217. *Id.* at 32.
218. *Id.* at 33 (internal quotations omitted).
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 34.
223. *Id.*
224. *Id.*
225. *Id.* (internal quotations omitted).
226. *Id.*; Latham, *supra* note 183, at 684.
227. *See generally* Lydenberg & Grace, *supra* note 203 (analogizing to case studies from Brazil, France, Malaysia, South Africa and Sweden).

regulatory waters casting social and environmental nets.[228] France began the trend with employment and work-place regulation and expanded the scope of social and environmental disclosure.[229] The United States similarly required environmental disclosure in a single area of securities regulation—environmental disclosure as it relates to finances. Section 1502 of Dodd-Frank moved the SEC completely outside the bounds of capital markets and thereby, Congress expanded the SEC's purview and empowered the SEC to regulate the humanitarian concerns of conflict minerals.[230]

CONCLUSION

Section 1502 and the Final Rule are not the SEC's first foray into social matters.[231] The Foreign Corrupt Practices Act ("FCPA") addressed social and ethical issues of business dealings with foreign government officials.[232] Essentially, the FCPA prohibits an issuer from bribing foreign officials to procure benefits or receive preferential treatment.[233] The distinction between the FCPA and § 1502, however, lies in that the FCPA adheres to the SEC's mission of ensuring fair markets.[234] The FCPA pertains to this mission because a market in which an amoral issuer can gain advantage by paying off a foreign government is not fair, while other issuers conduct their business ethically.[235] Section 1502 and the Final Rule however, fall entirely outside the bounds of the SEC's investor-protecting mission.[236] Former SEC Chairperson Schapiro "freely admitted that the subject matter is outside the SEC's expertise."[237]

Support for supply chain disclosure in the context of conflict minerals and beyond also exists.[238] One supporter of § 1502 and the Final Rule, David Schatsky, Founder of Green Research, states that "the conflict minerals provisions [are] an example of a trend that is affecting all

228. *Id.* at 3.
229. *Id.*
230. 15 U.S.C. § 78m(p) (2006).
231. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (2006).
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*; Black, *supra* note 161, at 1094. Black argues that the FCPA is outside the mission, though acknowledges the perspective that it is linked.
236. Black, *supra* note 161, at 1119.
237. *Id.*
238. Griffin et al., *supra* note 161, at 1; Conflict Minerals, 77 Fed. Reg. at 56,278; *see generally* Letter from David Schatsky, Founder, Green Research to Mary L. Shapiro, Chairwoman of the Sec. and Exch. Comm'n. (October 29, 2011) (outlining the case for stakeholders and policy makers to embrace supply chain disclosure for conflict minerals) (on file at sec.gov) [hereinafter Letter from Schatsky].

industries, not just those that rely on the so-called conflict minerals: that is, the obligation of companies to take responsibility for their supply chains."[239] He goes on to discuss the importance of environmental disclosure in this model.[240] Mr. Schatsky's comment regarding the Final Rule and conflict mineral disclosure begs the question of whether Congress will further expand the SEC's ability to require disclosure beyond financial indicators. The question remains whether Congress will influence capital markets through the environmental considerations and concerns of investors.

Many foreign jurisdictions require varying levels of environmental disclosure.[241] The United Kingdom most resembles the United States, in that it requires inclusion of environmental information in annual reports "to the extent that they are important to understanding the company's business."[242] Congress passed Dodd-Frank, pushing the SEC past its original regulatory mission.[243] Section 1502 plants the seed for a humanitarian based legal nexus, forcing the private sector to address international humanitarian issues.[244] Similarly, Schatsky's letter suggests that Congress should continue to grow the SEC beyond the realm of fiscal responsibility.[245] Schatsky recommends that the U.S. should begin to follow the example of foreign jurisdictions that require environmental impact disclosure.[246]

Schatsky is not alone; the General Accounting Office (GAO) released a report in 2004, which suggested the SEC require greater environmental disclosure.[247] The GAO reports environmental disclosure strictly as a matter of fiscal materiality and liability limits environmental transparency and accountability.[248] The issue lies in determining "whether a low level of disclosure means that a company does not have existing or potential

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239. Letter from Schatsky, *supra* note 238. "Green Research is a research, advisory and consulting firm focusing on clean tech, alternative energy and corporate sustainability." *About,* GREEN RES., http://greenresearch.com/about/ (last visited Oct. 29, 2013).

240. Letter from Schatsky, *supra* note 236.

241. *See generally* Lydenberg & Grace, *supra* note 203 (highlighting examples of other countries that require forms of environmental disclosure).

242. Lydenberg & Grace, *supra* note 203, at 34 (internal quotations omitted); Latham, *supra* note 182, at 684.

243. Black, *supra* note 161, at 1119.

244. 15 U.S.C. § 78m (2006).

245. *See* Letter from Schatsky *supra* note 238 (arguing for policy makers to embrace the benefits of disclosure in meeting environmental and social goals).

246. Lydenberg & Grace, *supra* note 203; Schatsky, *supra* note 238.

247. GENERAL ACCOUNTING OFFICE, HIGHLIGHTS OF GAO-04-808, A REPORT TO CONGRESSIONAL REQUESTERS, ENVIRONMENTAL DISCLOSURE, SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION (2004).

248. *Id.* at 2.

environmental liabilities, has determined that such liabilities are not material, or is not adequately complying with disclosure requirements."[249] A web-based survey of thirty organizations that use disclosure information and companies that file with the SEC suggests the SEC should increase required environmental disclosure.[250] Three areas of opportunity appeared to be most prevalent: "modifying disclosure requirements and guidance, increasing oversight and enforcement, and adopting non-regulatory approaches to improving disclosure."[251] Ultimately, Congress would have to appropriate additional SEC funds to strengthen its informational and oversight efforts.[252] Such costs to tax payers would be in addition to the cost for issuers to comply with any heightened environmental disclosure.

One third of the experts surveyed stated that non-regulatory means for environmental disclosure are most appropriate for informing environmentally minded investors.[253] Voluntary disclosure benefits companies who selectively release information about environmental impacts.[254] The problem with voluntary environmental disclosure is that there is nothing that requires issuers to disclose all information—positive or negative.

Congress could empower the SEC to require environmental metrics and remove issuer discretion from the equation, as several foreign jurisdictions do.[255] Japan, for example, requires disclosure of one's total emission of greenhouse gas, amount of release and transfer of chemical substances, and total amount of waste generated.[256] Japan's metrics, however, are not all-inclusive. Other jurisdictions incorporate environmental governance measures, raw material use, and types of waste into reporting requirements.[257] Japan's metrics do provide a uniform set of standards.[258] Congress empowered no agency to require a more concrete set of disclosure requirements, as it does with balance sheets.[259] If it did, stakeholders would

249. *Id.*
250. *Id.* at 27.
251. *Id.* at 23.
252. *Id.* at 27.
253. *Id.* at 24.
254. Christopher Marquis & Michael W. Toffel, *When do Firms Greenwash? Corporate Visibility, Civil Society Scrutiny, and Environmental Disclosure* 1−2, Harvard Bus. Sch., Working Paper 11-115, 2012.
255. *See generally* Lydenberg & Grace, *supra* note 203 (providing examples of other countries that require forms of environmental disclosure).
256. *Id.* at 33.
257. *Id.*
258. *Id.*; Joseph B. Reid, *Japanese Metric Changeover*, U.S. METRIC ASS'N http://lamar.colostate.edu/~hillger/international.html (last visited November 1, 2013); Marquis & Toffel, *supra* note 253 at 1−2.
259. 15 U.S.C. § 78j (2006).

then be able to more objectively assess and compare companies based on their environmental performance, as opposed to the current statutory or disclosure regimes.[260]

Governance, compliance issues for boards of directors, and cost to taxpayers aside, the question remains whether the SEC ought to regulate environmental or social matters. The SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." [261] It remains to be seen whether purely social and environmental disclosure can help protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

Congress might consider empowering the Environmental Protection Agency (EPA) with the power to require such disclosure, especially given the EPA's mission: "to protect human health and the environment."[262] The EPA does not have the power to require disclosure.[263] In 2001, the EPA started to influence public companies to disclose more environmental information, pursuant to Item 103, and to provide the SEC and companies with information about environmental compliance and liabilities.[264] If the EPA has this information at the ready, efficiency might suggest the EPA is the correct agency for disclosure.[265]

On the other hand, efficiency might suggest that filing all disclosures with the SEC creates a central place for individual investors to find

260. Marquis & Toffel, *supra* note 254, at 1–2.

261. *What We Do*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 29, 2013); Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program,* 13 FORDHAM J. CORP. & FIN. L. 367, 368 (2008).

262. *About EPA*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Oct. 29, 2013) (stating:

> EPA's purpose is to ensure that: all Americans are protected from significant risks to human health and the environment where they live, learn and work; national efforts to reduce environmental risk are based on the best available scientific information; federal laws protecting human health and the environment are enforced fairly and effectively; environmental protection is an integral consideration in U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy; all parts of society—communities, individuals, businesses, and state, local and tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks; environmental protection contributes to making our communities and ecosystems diverse, sustainable and economically productive; and the United States plays a leadership role in working with other nations to protect the global environment).

263. Latham, *supra* note 183, at 697.

264. *Id.*

265. *Id.*

information they deem relevant. The SEC already has an online filing system called EDGAR.[266]

The Final Rule, however, distinguishes between financial and social reporting.[267] Under the SEC's traditional disclosure regime, financial information is disclosed in forms 10-Q and 10-K.[268] The Final Rule creates Form SD—a separate form with which companies may disclose their conflict mineral supply chains.[269] The SEC distinguishes between types of information in particular the types of filings; it seems to follow that issuers could readily report different information to different agencies. Over fifty filing forms exist that the SEC may require of companies, not including Form SD.[270] Investors must cull through these forms to obtain the information they need (though the EDGAR system allows searching).[271] If the SEC continues to add disclosure forms for every category of non-financial disclosure, or builds on the information required in Forms 10-K and 10-Q, it may become difficult for investors to pinpoint the information that is important to them. Furthermore, not only the quantity of the information, but the quality of information would likely change. If Congress prompts the SEC to expand what it requires in terms of purely social and environmental disclosure, this could fundamentally change the MD&A portion of annual and quarterly reports by changing what type of risk companies must assess. Currently, managers and directors must consider financial risk.[272] Once the SEC's disclosure purview includes social and environmental considerations, managers and directors will likely have to comment on the qualitative impact and risks of quantitative social and environmental impacts. Business executives may not be qualified or the appropriate people to comment on social and environmental matters.

It may help investors if Congress empowered agencies to require the disclosure matching their respective subject matters. Requiring companies to disclose all information—financial, environmental, and social—to the

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266. *How Do I Use EDGAR,* U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/edgar/quickedgar.htm (last visited Oct. 29, 2013); "The SEC's EDGAR database provides free public access to corporate information." *Research Public Companies Through EDGAR,* U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/investor/pubs/edgarguide.htm (last visited Oct. 29, 2013).

267. *See* Conflict Minerals, 77 Fed. Reg. at 56,301 (pointing out that the reporting processes are different).

268. 15 U.S.C. § 78m (2006).

269. Conflict Minerals, 77 Fed. Reg. at 56,280.

270. *Securities and Exchange Commission Forms List,* U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/forms/secforms.htm (last visited Oct. 29, 2013).

271. *Search the Next-Generation EDGAR System*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Oct. 29, 2013).

272. *See* 17 C.F.R. § 229.10(b)(1) (2013) (explaining how management can assess future performance).

SEC deviates from the SEC's mission to protect investors.[273] There is great potential for investors to be overwhelmed by the quantity of information flowing into the EDGAR system. Investors may lose sight of their own financial interests in the mix of environmental and social disclosure. As Chairperson of the SEC White points out:

> [w]hen disclosure gets to be too much or strays from its core purposes, it can lead to 'information overload' – a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making as investors in our financial markets.[274]

This would negate the SEC's mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation.[275] After all, as Frederick II famously said, "He who defends everything defends nothing."[276]

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273. *What We Do*, U.S. SEC. & EXCH. COMM'N, *supra* note 261.
274. White, *supra* note 14.
275. *Id.*
276. BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/f/fredericki140989.html (last visited Oct. 29, 2013).