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Human Rights Meets Securities Regulation

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INTRODUCTION

Recent domestic legislation is blurring the line between securities regulation and human rights law. Securities law has traditionally regulated corporate disclosure on financial information, such as income statements and

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investment risks. By contrast, human rights law has traditionally operated in the international sphere and focused on state obligations.

That all changed in 2010 with the adoption of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), which includes sections 1502 and 1504 on non-financial disclosure related to human rights and anti-corruption.[1] Section 1502 imposes a new reporting requirement on publicly traded companies that manufacture products using certain conflict minerals.[2] Companies must identify whether the sourcing of the minerals originated in the Democratic Republic of Congo (DRC) and bordering countries. If so, they must submit an independent private sector audit report on due diligence measures taken to determine whether those conflict minerals directly or indirectly financed or benefited armed groups in the covered countries.[3] Section 1504 requires natural resources companies to disclose certain payments made to governments for the commercial development of oil, natural gas, or minerals.[4] This provision reinforces the global standard outlined by the Extractive Industries Transparency Initiative, a multi-stakeholder coalition that promotes revenue transparency through government legislation.[5]

Sections 1502 and 1504 were highly contested at their adoption and remain controversial. Since August 2012, when the Securities and Exchange Commission (SEC) released new rules implementing these provisions, the U.S. Chamber of Commerce, Business Roundtable, and industry groups filed petitions in U.S. courts to modify or nullify the two rules.[6] While sec-

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1. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 911, 124 Stat. 1376 (2010).

2. *Id.* § 1502 (codified as amended at 15 U.S.C. § 78m(p) (2012)).

3. *Id.*

4. *Id.* § 1504 (codified as amended at 15 U.S.C. § 78m(q) (2012)).

5. For more information on the Extractive Industries Transparency Initiative, see EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/ (last visited Oct. 21, 2013). *See also* Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*, 29 HOUS. J. INT'L L. 327 (2007); Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37 (2008); Virginia Haufler, *Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World*, 10 GLOBAL ENVTL. POL. 53 (2010).

6. On October 10, 2012, the American Petroleum Institute, the U.S. Chamber of Commerce, the Independent Petroleum Association of America, and the National Foreign Trade Council filed lawsuits against the SEC over its resource extraction rule (1504) in the U.S. District Court for the District of Columbia (Am. Petroleum Inst. v. SEC, No. 12-1668, 2013 WL 3307114 (D.D.C. July 2, 2013)) and the U.S. Court of Appeals for the D.C. Circuit (Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013)). On October 19, 2012, another lawsuit was filed by the National Association of Manufacturers, the U.S. Chamber of Commerce, and Business Roundtable in the U.S. Court of Appeals for the D.C. Circuit requesting that the conflict minerals rule (1502) be modified or nullified. Brief of Petitioners, Nat'l Ass'n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. Jan. 16, 2013), *available at* http://www.nam.org/~/media/B5825277D7C144A48C2C4442054900D4/NAM_v_SEC_brief_only_01162013.pdf. After the Circuit Court ruled in the case involving section 1504 that jurisdiction

tion 1502 survived court challenge, the U.S. District Court of the District of Columbia vacated section 1504 on July 2, 2013.[7] The court held that Congress did not intend for extractive companies' annual reports of payments to foreign governments be publicly disclosed. Rather, the SEC had discretion to allow issuers to disclose payment information confidentially to the SEC, which could then make public a compilation of certain information. The court further found that the SEC's denial of an exemption from disclosing payments to those governments whose local laws prohibited such disclosure was arbitrary and capricious. Since the SEC has elected not to appeal this decision, it is now in the process of promulgating a revised rule that would take the court's decision into account.[8]

As part of this litigation, business groups have challenged the economic costs associated with sections 1502 and 1504, costs that have been acknowledged even by proponents of the provisions. But more importantly, opponents fear that the legislation forces the SEC to reach beyond its mandate to meet humanitarian goals. According to SEC Commissioner Daniel M. Gallagher:

> Section 1502 is about curtailing violence in the DRC; it is not about investor protection, promoting fair and efficient markets, or capital formation. Warlords and armed criminals need to fund their nefarious operations. Their funding is their lifeline; it's a chokepoint that should be cut off. That is a perfectly reasonable foreign policy objective. But it's not an objective that fits anywhere within the SEC's threefold statutory mission.[9]

Commissioner Gallagher fears that securities regulation is being used to achieve foreign policy goals that are outside the SEC's mission of investor

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resided with the lower court (Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013)), the plaintiffs opposing rule 1502 requested transfer of the case to the District Court. Petitioner's Motion to Transfer, Nat'l Ass'n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. Apr. 30, 2013), *available at* http://www.conflictmineralslaw.com/files/2013/04/Motion-to-Transfer.pdf

7. With regard to section 1502, the U.S. District Court for the District of Columbia denied the plaintiffs' request for summary judgment and upheld the rule in its entirety. Nat'l Ass'n of Mfrs. v. SEC, No. 13-cv-635, 2013 WL 3803918 (D.D.C. July 23, 2013), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0635-37. With regard to section 1504, the District Court vacated the rule and remanded to the SEC for further proceedings. Am. Petroleum Inst. v. SEC, No. 12-1668, 2013 WL 3307114 (D.D.C. July 2, 2013), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1668-51.

8. *See* Sarah N. Lynch, *SEC Won't Appeal Ruling Vs Disclosing Payments Abroad*, REUTERS (Sept. 3, 2013, 6:40 PM), http://www.reuters.com/article/2013/09/03/us-sec-resource-extraction-idUSBRE9820Z820130903.

9. Daniel M. Gallagher, Comm'r, SEC, Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd–Frank Act — the "Conflict Minerals" Provision (Aug. 22, 2012), *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-minerals.htm.

protection, the promotion of fair and efficient markets, and capital formation.

In fact, the Dodd–Frank provisions are but one example of an emerging trend in international securities law. Over the past decade, an increasing number of governments and securities exchanges have passed mandatory regulations on corporate disclosure of social issues.[10] These laws have primarily required companies to issue corporate social responsibility (CSR) reports, which include qualitative information and quantitative indicators on companies' social and environmental performance. Yet the Dodd–Frank provisions go one step further by codifying a due diligence approach to human rights-related issues. Section 1502 is the first regulation to create binding rules on due diligence with regard to a company's supply chain. Section 1504 is an anti-corruption initiative that requires extractive companies to disclose payments to foreign governments. It represents an effort to enhance good governance and sustainable development through a more accountable system for the management of natural resource wealth.

Why have human rights advocates and policymakers targeted securities regulation and other corporate law to achieve corporate accountability? The primary reason is the lack of effectiveness of existing mechanisms, including international standards and litigation strategies. International, regional, and non-governmental organizations, such as the United Nations, the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD), and the International Organization for Standardization (ISO), have drafted standards and principles addressed to companies (e.g., the UN Global Compact and ISO 26000) and governments (e.g., OECD's Guidelines for Multinational Enterprises and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy).[11] These voluntary instruments, however, lack independent monitoring, implementation, and enforcement mechanisms; do not include performance metrics to assess compliance; and are not certifiable.[12] While the Alien Tort Claims Act has been an im-

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10. *See infra* Part I.A.

11. *See generally* UN Global Compact (2000), *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html; Int'l Labor Org. [ILO], *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf; Org. for Econ. Co-Operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf; Int'l Org. for Standardization [ISO], *ISO 26000: Guidance on Social Responsibility* (2010), *available at* http://www.iso.org/iso/catalogue_detail?csnumber=42546.

12. *See, e.g.*, David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Re-*

portant tool to hold companies liable for human rights violations, the U.S. Supreme Court recently limited the act's exterritorial application.[13] Advocates are seeking alternative domestic mechanisms that have more teeth and can facilitate the incorporation of human rights norms into company operations.

In this Article, I take a step back from these recent developments to analyze a critical question: Is securities regulation the appropriate mechanism for achieving human rights compliance? By doing so, I seek to open a dialogue between two disparate streams of scholarship in private and public law and propose policy recommendations for effectively furthering the movement towards corporate accountability. While existing literature on sections 1502 and 1504 addresses the history of the legislation and critiques its efficacy, the main contribution of the Article is to analyze the normative implications of the broader strategy of using securities regulation to hold companies accountable for human rights abuses.[14]

This Article will proceed as follows: Part I reviews comparative law to identify an emerging trend toward non-financial disclosure. In Part II, I analyze this trend by focusing on the debate over sections 1502 and 1504 in the Dodd–Frank Act. As I demonstrate, human rights advocates, companies, and investors disagree over the legislation as well as the broader question of whether securities law should regulate human rights compliance. In Part III, I argue that securities law is an innovative strategy that has the potential to significantly further the movement for corporate accountability, but only if framed appropriately. Mandatory disclosure rules can provide teeth to international human rights norms and operationalize them into the day-to-day decision-making of companies. I also establish that human rights risks are material for investors and that there are long-term costs to companies of not reporting, including reputational damage that can affect a company's share price and the denial of a social license to operate by host governments. Yet because of compliance costs and the

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sponsibilities for Corporations at International Law, 44 VA. J. INT'L L. 931 (2004); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

13. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). The Alien Tort Claims Act allows U.S. district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations . . . ." 28 U.S.C. § 1350 (1789).

14. For a detailed analysis and critique of section 1502, see Christiana Ochoa & Patrick Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129 (2011); Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, HARV. BUS. L. REV. ONLINE 105 (2012); Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012). For a discussion on section 1504, see Brandon Carl Berns, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd–Frank Act? Can They Afford Not To?*, 2011 COLUM. BUS. L. REV. 758 (2011); Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd–Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1043 (2010).

high bar set by courts for economic analysis in rulemaking, section 1502 is not a good model for more expanded human rights disclosure at the SEC. The agency should instead issue interpretive guidance to clarify companies' existing obligations to disclose human rights-related material risks. In the conclusion, I recommend international regulatory convergence to relieve possible damage to a company's competitive advantage due to increased costs associated with social disclosure.

I. NON-FINANCIAL DISCLOSURE IN COMPARATIVE LAW

One of the main goals of securities law is to ensure that investors have accurate information about companies and that prospective purchasers can make reasoned decisions about the value of securities under consideration.[15] Regulations outline which information publicly traded companies must regularly provide to the public. Traditionally, such information has been strictly financial: through the disclosure of balance sheets, income statements, and cash flows, investors can determine sales, operating income, total assets, or other indicators of financial performance.[16] Yet there has been an emerging trend in securities law to incorporate disclosure of non-financial information, including human rights.

A. Mandatory Regulations on Corporate Sustainability Reporting

Over the past decade, an increasing number of governments have passed mandatory regulations on corporate disclosure of sustainability performance, including social issues. These laws typically require reporting based on social and environmental indicators, the most prominent of which are produced by the Global Reporting Initiative (GRI).[17] According to a 2010 report, there were 142 country standards that include a sustainability-related reporting requirement or guidance.[18] Two-thirds of those regulations are mandatory, and a number of them explicitly cite GRI guidelines.[19] According to a recent study using data from fifty-eight coun-

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15. *See* Securities Act of 1933, 15 U.S.C. §§ 77a–aa (2006); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–nn (2006).

16. *See* Securities Exchange Act of 1934, 15 U.S.C. § 77m (2006).

17. The Global Reporting Initiative is a private regulatory body that has produced the leading standard for corporate sustainability reporting. Created in 1997, the GRI guidelines include seventy-nine indicators on which corporations report on their social, environmental, and economic performance. *See* Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT'L L. 575 (2013).

18. U.N. ENVIRONMENT PROGRAMME ET AL., CARROTS AND STICKS — PROMOTING TRANSPARENCY AND SUSTAINABILITY: AN UPDATE ON TRENDS IN VOLUNTARY AND MANDATORY APPROACHES TO SUSTAINABILITY REPORTING 4 (2010).

19. *Id.*

tries, mandatory disclosure of sustainability information has significant consequences on socially responsible managerial practices.[20]

European countries, in particular, are at the forefront of the movement for corporate disclosure on social and environmental performance. France's 2001 New Economic Regulations Act requires all listed companies to report on forty social and environmental criteria in their annual reports.[21] The Swedish government requires state-owned enterprises to issue sustainability reports in accordance with GRI's guidelines and subject to external assurance.[22] Spain similarly enacted legislation that requires state-owned companies and businesses with over 1000 employees to produce sustainability reports beginning in 2012.[23] As of 2009, Denmark requires disclosure of CSR activities in financial statements by both state-owned companies and companies with total assets of more than 19 million euros, revenues more than 38 million euros, and more than 250 employees — totaling about 1100 companies.[24] In addition, Denmark's mandate extends to institutional investors, investment associations, and other listed financial businesses.[25] The guidance notes to Denmark's amended Financial Statements Act encourage the use of GRI guidelines to fulfill the reporting requirement.[26]

Many other EU countries have adopted similar voluntary guidelines to implement the EU Modernization Directive on corporate disclosure of non-financial information. Existing EU law mandates private companies to include non-financial key performance indicators in their annual reports "where appropriate" and "[t]o the extent necessary for an understanding of the company's development, performance or position."[27] The European Commission is considering improvements to this policy because the

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20. *See, e.g.*, Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* (Harvard Bus. Sch., Working Paper No. 11-100, 2011), *available at* http://ssrn.com/abstract=1799589.

21. *See* CODE DE COMMERCE [C. COM] art. L225-102-1 (Fr.).

22. Regeringskansliet, Ministry of Enterprise, Energy, & Communications, *Guidelines for External Reporting by State-Owned Companies* (2007) (Swed.), *available at* http://www.government.se/content/1/c6/09/41/25/56b7ebd4.pdf.

23. Sustainable Economy Law (B.O.E. 2011, 2).

24. Danish Financial Statements Act, § 99a (2008) (Den.). The Danish law follows a principle of "report or explain," which requires companies to either disclose their CSR activities or give reasons for not having any.

25. *Id.*

26. DANISH COMMERCE AND COMPANIES AGENCY, REPORTING ON CORPORATE SOCIAL RESPONSIBILITY — AN INTRODUCTION FOR SUPERVISORY AND EXECUTIVE BOARDS 15 (2009).

27. Council Directive 2003/51/EC, of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the Annual and Consolidated Accounts of Certain Types of Companies, Banks and Other Financial Institutions and Insurance Undertakings, art. 1(14), 2003 O.J. (L 178) 16.

requirements for disclosure are unclear and EU member states can choose to exempt small and medium-sized enterprises.[28]

Sustainability reporting is becoming increasingly mandatory in Asian countries as well. For instance, in 2011, India's Securities and Exchange Board mandated listed companies to submit Business Responsibility Reports, which describe measures taken along the key principles enunciated in the "National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business."[29] This requirement is initially only applicable to the top 100 companies in terms of market capitalization, and will later be phased in to apply to the remaining companies. China has recently mandated similar guidelines for state-owned enterprises, requiring such entities to file CSR reports as of 2012.[30] In 2007, Japan released its Environmental Reporting Guidelines, which cite GRI guidelines and require environmental reporting for specified corporations.[31]

Stock exchanges are another important driving force behind non-financial corporate disclosure. Companies listed on the London Stock Exchange must disclose in their annual reports any non-financial information relevant to their business, although they do not have to file a full-length CSR report.[32] In Australia, companies listed on the national exchange must disclose the extent to which they have followed the Corporate Governance Principles and Recommendations, which include sustainability issues.[33] Emerging market countries are also promoting voluntary standards in CSR reporting through the involvement of local stock exchanges. All companies listed on the Johannesburg Stock Exchange are required to follow the King Report on Corporate Governance, which mandates integrated re-

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28. *See, e.g.*, *European Workshops on Disclosure of Environmental, Social and Governance Information: Summary of Discussions*, at 16 (Feb. 25, 2010), *available at* http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/files/summaries/6-final_workshop_en.pdf.

29. Press Release, Sec. & Exch. Bd. of India, SEBI Board Meeting, PR No. 145/2011 (Nov. 24, 2011), http://www.sebi.gov.in/sebiweb/home/detail/22104/yes/PR-SEBI-Board-meeting.

30. State-owned Assets Supervision & Admin. Comm'n of the State Council (SASAC), *Guidelines to the State-owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities* (2011) (China), *available at* http://www.sasac.gov.cn/n2963340/n13933222/14125651.html.

31. Government of Japan Ministry of the Environment, *Environmental Reporting Guidelines: Towards a Sustainable Society* (Provisional Translation) 112 (2007) (Japan), *available at* http://www.env.go.jp/en/policy/economy/erg2007.pdf; Law Concerning the Promotion of Business Activities with Environmental Consideration by Specified Corporations, etc., by Facilitating Access to Environmental Information, and Other Measures (Provisional Translation), Law No. 77 of 2004 (Japan), *available at* http://www.env.go.jp/en/laws/policy/business.pdf.

32. Companies Act, 2006, c. 46, § 417 (U.K.).

33. Australian Sec. Exch. Corporate Governance Council, *Corporate Governance Principles and Recommendations* 5, 33–34 (2d ed. 2007). Disclosure under these recommendations is on an "if not, why" basis.

porting that incorporates financial and non-financial information.[34] China's Shanghai Stock Exchange encourages companies to file annual CSR reports and develop a CSR strategy, and provides incentives for doing so, such as priority election into the prestigious Shanghai Corporate Governance Sector.[35]

B. Human Rights-Related Corporate Due Diligence Requirements

As an alternative to stand-alone sustainability reporting, which remains voluntary in many countries including the United States, a human rights due diligence approach is evolving. John Ruggie, former UN Special Representative on Business and Human Rights, has promoted the use of due diligence by companies as part of their responsibility to respect human rights.[36] Ruggie's framework, which was unanimously endorsed by the UN Human Rights Council, calls on states to require human rights due diligence and outlines the steps that this process entails: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[37] Ruggie further notes that due diligence "should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."[38] By treating human

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34. Inst. of Dirs. S. Afr., *King Code of Governance for South Africa* 10 (2009). For further information about integrated reporting, see ROBERT G. ECCLES & MICHAEL P. KRZUS, ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY (2010). The GRI recently joined a group of professional accounting bodies, auditing firms, international organizations, companies, and non-governmental organizations to form the International Integrated Reporting Committee, whose aim is to promote the adoption of a global standard for integrated reporting among companies worldwide. *See GRI and IIRC Deepen Cooperation to Shape the Future of Corporate Reporting*, INTEGRATED REPORTING, http://www.theiirc.org/2013/03/01/gri-and-iirc-deepen-cooperation-to-shape-the-future-of-corporate-reporting (last visited June 23, 2013).

35. GUIDELINES ON ENVIRONMENTAL INFORMATION DISCLOSURE BY COMPANIES LISTED ON THE SHANGHAI STOCK EXCHANGE, 2008 (China). This policy has resulted in a twenty-one percent increase in the number of listed companies disclosing their sustainability performance. *See, e.g.*, Press Release, Global Reporting Initiative, Investing in a Sustainable Future: The Role of the Shanghai Stock Exchange in the Uptake of Sustainability Reporting Initiatives in China (Sept. 5, 2012), https://www.globalreporting.org/information/news-and-press-center/Pages/Investing-in-a-sustainable-future-The-role-of-the-Shanghai-Stock-Exchange-in-the-uptake-of-sustainability-reporting-initiat.aspx.

36. *See, e.g.*, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Human Rights, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles on Business and Human Rights*].

37. *Id.* ¶ 17.

38. *Id.*

rights as business risks, the due diligence approach attempts to operationalize these norms into a company's decision-making process.

The justification behind a due diligence approach is that companies are already accustomed to applying this process to their other business activities. For instance, due diligence is required as part of a company's assessment of risks under the Foreign Corrupt Practices Act.[39] This process involves a company identifying actual or potential risks associated with its activities and relationships, and taking steps to mitigate those risks. Incorporating human rights into the due diligence process places the burden of proof on companies rather than victims of abuse.[40] Critics have argued, however, that this approach limits human rights disclosure to material impacts — that is, those impacts that may cause legal, reputational, or other business risks — and that reporting may not lead to changes in corporate behavior.[41] Furthermore, there is still uncertainty as to what a due diligence process entails in the context of human rights.

Human rights-related due diligence was codified into legislation for the first time through the adoption of section 1502 of the Dodd–Frank Act, which promotes supply chain transparency.[42] Section 1502 requires public companies that manufacture (or contract to manufacture) certain conflict minerals to disclose whether their minerals originate from the Democratic Republic of Congo (DRC) or any one of nine adjoining countries.[43] Issuers must conduct a "reasonable country of origin inquiry" and publicly disclose if their minerals originate in the DRC or adjoining countries.[44]

39. *See* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1977). This act extends extraterritorial jurisdiction to U.S. courts to enforce bribery charges, setting a precedent which has been followed in other countries such as the United Kingdom. *See* Bribery Act, 2010, c. 23, § 6 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

40. *See* Mark B. Taylor, Senior Researcher, Fafo Institute for Applied International Studies, Defining Compliance: Why Recent Developments in Law and Policy Should Matter to the Corporate Accountability Movement, Guest Remarks at the International Coalition Accountability Roundtable (Sept. 8–9, 2011), *available at* http://accountabilityroundtable.org/analysis-and-updates/defining-compliance-why-recent-developments-in-law-and-policy-should-matter-to-the-corporate-accountability-movement/.

41. *See, e.g.*, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Summary Report, Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights*, Corporate Law Tools Project 10 (Nov. 5–6, 2009), *available at* http://www.valoresociale.it/detail.asp?c=1&p=0&id=316.

42. *See infra* Part II.

43. *See, e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 2218 (2010). The provision defines "conflict minerals" as cassiterite (tin ore), columbite-tantalite (tantalum ore), wolframite (tungsten ore) and gold, and the nine adjoining countries include Rwanda, Burundi, Uganda, South Sudan, Central African Republic, Congo Brazzaville, Angola, Zambia, and Tanzania. *Id.* § 1502(e)(4).

44. Conflict Minerals, 77 Fed. Reg. 56,273 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249, 249b) [hereinafter Conflict Minerals], *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-09-

The rule requires disclosure on a new form to be filed with the SEC (Form SD for specialized disclosure) as well as on their websites. If the minerals do originate in the covered countries, companies must exercise due diligence on the source and chain of custody of their conflict minerals and file a Conflict Minerals Report as an exhibit to Form SD. Companies must also obtain an independent private sector audit of the Conflict Minerals Report.[45]

Not only are about 6000 publicly listed companies affected by section 1502, but private companies that are suppliers to public companies may also be affected. What is particularly notable about the rule is that it encourages the use of an emerging international standard for supply chain due diligence — the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[46] Moreover, in 2011, California passed a law to incentivize compliance with section 1502.[47] The bill prohibits companies in violation of the disclosure requirements to contract with California's state agencies.

Another provision of Dodd–Frank, section 1504, similarly addresses human rights-related issues.[48] Section 1504 requires all listed oil, gas, and mining companies to disclose project-level payments to foreign governments for the commercial development of natural resources.[49] This rule enhances transparency and accountability on a critical human rights issue in developing countries: corruption. By depleting resources available for public spending, corruption disables a state from meeting its obligations to respect and protect the human rights of its citizens. Section 1504 aims to

12/pdf/2012-21153.pdf. According to the rule, the reasonable country of origin inquiry "does not require an issuer to determine to a certainty that all its conflict minerals did not originate in the Covered Countries because the standard required is a reasonable inquiry, and requiring a certainty in this setting would not be reasonable and may impose undue costs." *Id.* at 56,312–13.

45. *Id.*

46. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2d ed. 2013), *available at* http://dx.doi.org/10.1787/9789264185050-en; *see* Conflict Minerals, 77 Fed. Reg. at 56,281–82.

47. S.B. 861, 2011–12 Reg. Sess. (Cal. 2011).

48. Section 1504 was co-authored by U.S. Senators Richard Lugar and Ben Cardin. The issue of revenue transparency in the extractive industry sector was first proposed in 2008 by Representative Barney Frank through H.R. 6066, the Extractive Industries Transparency in Disclosure Act. Extractive Industries Transparency in Disclosure Act, H.R. 6066, 110th Cong. (2008). Senator Charles Schumer introduced companion legislation, S. 3389, the Extractive Industries Transparency Disclosure Act, in the Senate. Extractive Industries Transparency Disclosure Act, S. 3389, 110th Cong. (2008). In 2009, Senators Lugar and Cardin introduced S. 1700, the Energy Security Through Transparency Act, in the Senate. S. 1700, 111th Cong. (2009). The movement for revenue transparency has been spearheaded by a coalition of organizations, including Revenue Watch and Publish What You Pay.

49. Non-de minimis payments (ones that equal or exceed $100,000) are to be annually disclosed to the SEC in a new form called Form SD. Disclosure must be made no later than 150 days after the end of the fiscal year.

address the gap between a country's substantial natural resource wealth and the extreme poverty among most of its citizens. By requiring transparency in the financial dealings between governments and companies, section 1504 enables enhanced public oversight and the reduction of corruption. Furthermore, it complements the Extractive Industries Transparency Initiative (EITI), a voluntary stakeholder initiative that the United States has recently committed to implement.[50] EITI compares what extractive companies pay governments with what governments say they receive. Section 1504 builds on this framework by providing detailed information on countries that are not implementing EITI. In fact, Congress specifically referenced the EITI in its definition of "payment" under section 1504.[51]

The promotion of supply chain due diligence and revenue transparency is not confined to the United States. Sections 1502 and 1504 are driving global norms on corporate accountability and serving as a guide for comparable legislation in other countries. In February 2012, the DRC passed a law requiring all mining and mineral trading companies operating in the country to undertake due diligence on all levels of their supply chain according to the OECD standard.[52] In Canada, a conflict minerals act was introduced in the House of Commons in March 2013 that would require Canadian companies to follow the OECD guidelines.[53] The European Commission is also considering legislation that mirrors section 1502 and has recently launched a public consultation regarding a potential EU initiative for responsible sourcing of minerals from conflict-affected areas.[54] Following the model of section 1504, the European Union issued a draft directive in 2011 requiring disclosure of payments by oil, gas, and mining companies, including large private companies as well as companies listed on EU stock exchanges.[55] In addition, in 2010, the Hong Kong Stock Ex-

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50. *See* sources cited *supra* note 5.

51. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,376 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249).

52. *See, e.g.*, Press Release, Global Witness, Congo Government Enforces Law to Curb Conflict Mineral Trade (May 21, 2012), *available at* http://www.globalwitness.org/sites/default/files/library/Congo_government_enforces_law_to_curb_conflict_minerals_trade.pdf.

53. Conflict Minerals Act, H.C. C-486, 41st Parl. (2013) (Can.), *available at* http://www.parl.gc.ca/housepublications/publication.aspx?language=e&mode=1&docid=6062040&file=4.

54. *See Public Consultation on a Possible EU Initiative on Responsible Sourcing of Minerals Originating from Conflict-Affected and High-Risk Areas*, EUROPEAN COMM'N, http://trade.ec.europa.eu/consultations/?consul_id=174 (last visited Aug. 4, 2013); European Parliament Resolution of 15 December 2010 on the Future of the EU-Africa Strategic Partnership Following the 3rd EU-Africa Summit, 2012 O.J. (C 169) 45; European Parliament Resolution of 7 July 2011 on the Democratic Republic of Congo and the Mass Rapes in the Province of South Kivu, 2013 O.J. (C 33) 198, 201.

55. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive*

change began requiring extractive companies to disclose payments to foreign governments; but unlike section 1504, disclosure is on a country-by-country rather than project-level basis.[56] Finally, the Canadian Parliament's Standing Committee on Foreign Affairs and International Development is considering regulations mandating disclosure of oil, gas, and mineral companies' payments to the government.[57]

II. THE DEBATE OVER DODD–FRANK SECTIONS 1502 AND 1504

When evaluating the international regulatory developments on human rights disclosure and the potential of sections 1502 and 1504 to serve as models for future rulemaking, we need to take a step back and analyze the debate over these laws. This debate illustrates divisions between and among stakeholders — including human rights advocates, companies, and investors — and provides lessons for whether, and how, securities law should regulate human rights compliance.

A. Perspective of Human Rights Advocates

I begin with human rights advocates, who were among the primary actors who petitioned for the adoption of the Dodd–Frank provisions. Human rights NGOs, including Oxfam, Global Witness, and Revenue Watch, have recently targeted securities regulation to achieve corporate accountability. This is part of an international movement, which now focuses on lobbying the European Union, the United Kingdom, and Canada to pass similar legislation. The primary reason for using securities law is the ineffectiveness of existing mechanisms for corporate accountability, including international standards and litigation under the Alien Tort Claims Act. International instruments are voluntary and lack monitoring and enforcement mechanisms, while the U.S. Supreme Court recently limited the Alien Tort Statute's extraterritorial application.[58]

2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities are Admitted to Trading on a Regulated Market and Commission Directive 2007/14/EC, COM (2011) 683 final (Oct. 25, 2011).

56. HONG KONG STOCK EXCHANGE, AMENDMENTS TO THE RULES GOVERNING THE LISTING OF SECURITIES ON THE STOCK EXCHANGE OF HONG KONG LIMITED 10 (2010), *available at* http://www.hkex.com.hk/eng/rulesreg/listrules/mbrulesup/Documents/mb96_miner.pdf.

57. *See Standing Committee on Foreign Affairs and International Development*, 41st Parl., 1st Sess. (Feb. 27, 2012) (Can.), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5403234&File=0. In 2010, the Canadian Parliament tabled Bill C-571 on trade in conflict minerals. *See* Trade in Conflict Minerals Act, H.C. C-571, 40th Parl. (2010), *available at* http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C571&Parl=40&Ses=3.

58. *See* Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659, 1659 (2013).

Advocates are seeking alternative domestic mechanisms that have more teeth and are tied to corporate law. The benefits of using securities law are numerous: it raises the profile of human rights-related issues, establishes their link with a company's financial performance, and facilitates more efficient compliance. According to its supporters, section 1502 can shape corporate behavior by requiring companies to monitor their supply chain for the financing of conflict that helps fuel human rights abuses. By curbing the illegitimate exploitation of natural resources by state and non-state armed groups, it will also indirectly hinder financing of the ongoing conflicts in the eastern Democratic Republic of Congo. Section 1504 represents an effort to enhance good governance, anti-corruption, and sustainable development through a more accountable system for the management of natural resource wealth. In addition, civil society groups could potentially use the information disclosed under section 1504 to reveal company payments to governments and state security forces that commit human rights abuses. They can then pressure their governments for fairer spending on public development.

Yet, in the case of section 1502, there are possible unintended consequences on communities, given the extensive requirements placed on companies and the idealistic goals that the legislation aims to achieve.[59] While the Congolese government has publicly expressed its support for section 1502 in a letter to the SEC, some critics (including local NGOs) have feared that the legislation will lead to an embargo of the region which would "push[ ] people towards conflict rather than leading them towards peace."[60] Disengagement by corporate actors may then leave the regional mineral trade in the hands of less responsible "black-market" operators. This situation suggests that section 1502 may go too far in trying to resolve a humanitarian crisis while "imped[ing] issuers' ability to conduct business in the DRC region."[61] Given that the rule has only recently been released, it is still unclear what the long-term consequences will be on the Congolese economy.[62] For the purpose of this paper, I will assume that

59. *See* Ochoa & Keenan, *supra* note 14, at 147.

60. Dominic Johnson, *Killing the Economy in the Name of Peace? The New US "Conflict Minerals" Legislation for the DRC*, POLE INSTITUTE (July 19, 2010), http://pole-institute.net/index.php/archive/144-killing-the-economy-in-the-name-of-peace-the-new-us-conflict-minerals-legislation-for-the-drc; *see also* Amy Tsui, *Dodd–Frank Conflict Minerals Rule Said Tantamount to Embargo on D.R. Congo*, 43 SEC. REG. & L. REP. 916 (2011). I should note that there are also Congolese civil society groups that have welcomed the law. *See* Prince Kihangi Kyamwami, Secretary General, Statement to the Bureau of Study, Observation, and Coordination of the Regional Development of Walikale (Aug. 16, 2011), *available at* https://salsa.democracyinaction.org/o/1552/images/bedewa-comment-on-dodd-frank-act-16-aug-2011.pdf.

61. Taylor, *supra* note 14, at 105.

62. For a discussion of section 1502's positive effects on mining sector reform and local mining communities in the DRC, see *The Unintended Consequences of Dodd–Frank's Conflict Minerals Provision*

any negative local consequences are outweighed by the rule's humanitarian intent, which is to prevent armed groups from benefiting from the trade of conflict minerals.[63]

B. Perspective of Companies

While there is a diversity of perspectives among companies over the legislation, the most prominent voices come from industry groups and the U.S. Chamber of Commerce, which are largely critical of sections 1502 and 1504. With regard to section 1502, manufacturing and extractive companies are supportive of the underlying goal of combating trade in conflict minerals, but they have a number of concerns about the legislation. First and most important is the financial cost of compliance, which the SEC has estimated to be at least $1 billion in initial compliance costs, and $200 to $400 million in ongoing compliance costs.[64] According to the National Association of Manufacturers, expenses for complying with section 1502 include the costs of new or revised computer systems and software, evaluation of products and supply chain vendors, modification of supplier contracts, participation in industry-wide validation schemes, and independent third-party audits.[65] Expenses attributed to complying with section 1504 include revising accounting systems to provide information by project rather than just by reporting entity, integrating this information into current financial reporting and control systems, training local accountants to record data consistent with reporting requirements, and negotiating agreements with joint venture partners to permit such information to be collected, analyzed, and disclosed.[66] These costs would disproportionately

Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Financial Services, 113th Cong. (2013) (statement of Sophia Pickles, Global Witness), *available at* http://financialservices.house.gov/uploadedfiles/hhrg-113-ba19-wstate-spickles-20130521.pdf.

63. This position is corroborated by the U.S. Department of State's statement of active support for the continued implementation of section 1502 and the diffusion of OECD Due Diligence Guidance reporting norms. *See* ROBERT D. HORMATS, UNDER SECRETARY OF STATE FOR ECON. GROWTH, ENERGY, & THE ENV'T, U.S. DEP'T OF STATE, STATEMENT CONCERNING CONTINUED IMPLEMENTATION OF CONFLICT MINERALS DUE DILIGENCE PURSUANT TO SECTION 1502 OF THE DODD–FRANK ACT (2013), http://www.state.gov/e/eb/rls/othr/2013/205465.htm. Additionally, the EU recently decided to proceed with similar legislation, as announced at the OECD Forum on May 2–3, 2013. *See Guidelines for Multinational Enterprises, Forum on Implementing Due Diligence in the 3Ts and Gold Supply Chains*, OECD, http://www.oecd.org/daf/inv/mne/multistakeholder-forum-may-2013.htm (last visited Oct. 23, 2013).

64. *See, e.g.*, Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,398, 56,412.

65. *See* Letter from the Nat'l Ass'n of Mfrs. to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Nov. 19, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-69.pdf.

66. *See* SEC. & EXCH. COMM'N, NATIONAL MINING ASSOCIATION WHITE PAPER ON SEC IMPLEMENTATION OF SECTION 1504 OF THE DODD–FRANK WALL STREET REFORM AND CONSUM-

affect small and medium-sized businesses, particularly with regard to section 1502 since it lacks a *de minimis* exception for issuers using small amounts of conflict minerals.

A second concern is the absence of definitions for what supply chain due diligence entails, as well as the scope and substance of the auditing process. Some companies argue that due diligence results should be evaluated according to a "reasonable care standard," since 100% accuracy is not possible given the fluid nature of supply chains.[67] In particular, the chain of custody requirement under section 1502 is exceedingly difficult to comply with because of the length and complexity of the global supply chain, where a purchaser may not have adequate leverage to force a supplier to disclose material content. While the OECD framework is promising, it is relatively new (having been finalized in 2010) and is currently undergoing an implementation program informed by multi-stakeholder dialogue.[68] Therefore, companies lack confidence that these processes are workable and have requested flexibility in the framework given the diversity of companies and products impacted.[69] Furthermore, companies are uncertain about the auditing process, including its scope (e.g., whether the audit covers only the Conflict Minerals Report or the entire supply chain due diligence process), who would be qualified to conduct such an audit, and what needs to be included in the certification process.[70]

Finally, some companies fear that the legislation will damage their competitive position in relation to foreign competitors and may impact their business relationships with the countries in which they operate. Securities law applies only to publicly listed companies, so private and foreign companies would not have to bear the costs. Moreover, disclosure laws may place a company in breach of contracts or host government laws, thus further putting them at a competitive disadvantage.[71] In the case of section

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ER PROTECTION ACT (EXTRACTIVE RESOURCE ISSUER DISCLOSURE OF PAYMENTS TO GOVERNMENTS) (Nov. 16, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-52.pdf.

67. *See* Letter from the Advanced Med. Tech. Ass'n to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Nov. 17, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-57.pdf; Letter from the Nat'l Ass'n of Mfrs. to Mary L. Schapiro, *supra* note 65.

68. *See* OECD, *Implementation Programme for the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Long Term Governance Arrangement* (Feb. 2013), *available at* http://www.oecd.org/daf/inv/mne/LongTermGovernanceArrangement.pdf. *See also Guidelines for Multinational Enterprises: Implementing the OECD Due Diligence Guidance*, OECD, http://www.oecd.org/daf/inv/mne/implementingtheguidance.htm (last visited Oct. 23, 2013).

69. *See* Letter from the Nat'l Ass'n of Mfrs. to Mary L. Schapiro, *supra* note 65.

70. *See* Letter from the Info. Tech. Indus. Council to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Nov. 18, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-68.pdf.

71. *See* Letter from the Am. Petroleum Inst. to Div. of Corp. Fin., Sec. & Exch. Comm'n (Oct.

1504, companies such as Royal Dutch Shell are concerned that foreign governments may legally prohibit disclosure of payments that had been made to them, as they may view such payments as confidential, competitively sensitive, or a security risk.[72] In some cases, these prohibitions are included in contracts between companies and foreign governments. The legislation's requirement to disclose payments would lead to renegotiation of these contracts or, at worst, may force companies to withdraw from the U.S. capital markets. For those reasons, companies argue that sections 1502 and 1504 operate against the SEC's obligation to consider "whether [an] action will promote efficiency, competition and capital formation."[73]

Despite the overwhelming opposition by industry groups against sections 1502 and 1504, there are prominent companies that are supportive of the legislation. For example, Newmont Mining and Statoil ASA have declared their support for section 1504. In addition, many electronics companies including Panasonic, General Electric, and Microsoft have backed section 1502 and distanced themselves from the views of the U.S. Chamber of Commerce and the National Association of Manufacturers.[74] Many of these companies, which oppose any efforts to overturn the legislation, have already been participating in multi-stakeholder and industry initiatives aimed at supply chain transparency, including the Electronic Industry Citizenship Coalition, the Global eSustainability Initiative, and the International Tin Research Institute's Tin Supply Chain Initiative.[75]

C. Perspective of Investors

The main concern with respect to investors is whether laws such as sections 1502 and 1504 provide material information or simply overload investors with data that is difficult to interpret.[76] Corporate actors and regulators have inserted themselves into this debate as they argue that the rules

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12, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf.

72. *See* Letter from Royal Dutch Shell to Meredith Cross, Dir., Div. of Corp. Fin., Sec. & Exch. Comm'n (Oct. 25, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf.

73. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(f), 80a-2(c) (2012).

74. *See* Business & Human Rights, *Electronics Companies' Responses to Allegations that Their Industry Associations Undermine Conflict Minerals Legislation*, CORP. SOC. RESP. WIRE (Aug. 1, 2012, 11:55 AM), http://www.csrwire.com/press_releases/34439-Electronics-Companies-Responses-to-Allegations-That-Their-Industry-Associations-Undermine-Conflict-Minerals-Legislation.

75. *See* ELECTRONIC INDUSTRY CITIZENSHIP COALITION, http://www.eicc.info/ (last visited Oct. 23, 2013); GLOBAL E-SUSTAINABILITY INITIATIVE, http://gesi.org/ (last visited Oct. 23, 2013); *International Tin Supply Chain Initiative*, INTERNATIONAL TIN RESEARCH INSTITUTE, https://www.itri.co.uk/index.php?option=com_zoo&task= item&item _id=2192& Itemid=189 (last visited Oct. 23, 2013).

76. *See* Letter from Royal Dutch Shell to Meredith Cross, *supra* note 72.

do not benefit investors. They are concerned that the SEC is straying from its mission and that any benefit to shareholders is outweighed by the considerable compliance costs borne by companies. David Lynn, former Chief Counsel of the SEC's Division of Corporation Finance, decries the use of securities regulation to achieve social and public policy goals, such as those in sections 1502 and 1504. Lynn argues that attempts "to utilize the public disclosure process to achieve ends other than to protect investors, to maintain fair, orderly, and efficient markets, and to facilitate capital formation could risk overburdening both issuers and investors with costly disclosure requirements for information that is not material to any investment or voting decision."[77]

Interestingly, however, there are no publicly filed investor comments to the SEC that are critical of sections 1502 or 1504. The only vocal investors in the debate over this legislation have been socially responsible investment groups and pension funds worth more than $1.2 trillion, who have voiced their strong support.[78] They claim that the information disclosed will aid their risk analyses and help strengthen markets. According to these investors, due diligence is necessary for them to assess and mitigate companies' human rights risk exposure.

With regard to section 1504, investors have not had access to "sufficiently detailed, audited, consistent, and comparable data regarding host government payments" to account for potential "regulatory, taxation, political, and reputational risks."[79] Such risks are material to decision-making by investment groups such as Calvert Investments, which asserts that disclosure under section 1504 "would be very useful in the accurate calculation of cost curves that determine whether and for how long a project may remain economic."[80] According to socially responsible investors, existing disclosure of revenues do not provide sufficiently quantified and detailed information to determine a company's exposure to such risks.[81]

Investment groups have made similar observations regarding section 1502. Trillium Asset Management, for instance, argues that the rule will both protect investors and have an effect on a significant public interest.[82]

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77. 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, 339 (2011).

78. *See* Press Release, As You Sow, Investor Statement Regarding Conflict Minerals from the Democratic Republic of the Congo (Apr. 9, 2010), http://www.asyousow.org/publications/2009-01-07%20-%20DRC%20Investor%20Sttmt.pdf.

79. Letter from Calvert Asset Mgmt., Inc. & Soc. Inv. Forum to Meredith Cross, Dir., Div. of Corp. Fin., Sec. & Exch. Comm'n (Nov. 15, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.

80. *Id.*

81. *See id.*

82. *See, e.g.*, Letter from Trillium Asset Mgmt. to Mary L. Schapiro, Chairman, Sec. & Exch.

It will protect investors by "requiring a high level of disclosure within a company's supply chain, thereby allowing investors to evaluate supply chain policies and practices, make company to company comparisons, and calculate the level of risk associated with conflict mineral sourcing."[83] It will also expose the potential reputational and financial risk to companies unknowingly sourcing conflict minerals that are funding the humanitarian crisis in the DRC.[84] While investors acknowledge the compliance costs associated with the two Dodd–Frank provisions, they argue that those costs are outweighed by the benefits of risk recognition and mitigation for both investors and resource extraction issuers.

III. AN ARGUMENT FOR USING SECURITIES LAW TO ACHIEVE CORPORATE ACCOUNTABILITY

I argue that using securities law is an innovative strategy that has the potential to further the movement for corporate accountability and human rights compliance, but only if framed in the right manner. Carefully crafted securities regulation can bridge the translation gaps between the business and human rights communities, who hold divergent goals, are made up of distinct constituencies, and speak different languages. It can operationalize emerging international human rights norms through a domestic mechanism with real teeth. Moreover, given the materiality of human rights risks, securities regulation is an appropriate mechanism for conveying information about these risks to investors.

A. Operationalizing Human Rights Through Mandatory Regulations

The time is ripe for corporate accountability through mandatory regulations. Until recently, the movement for corporate social responsibility has largely focused on voluntary commitments. Companies embraced this approach as a means of deflecting state regulation and expressing their good "corporate citizenship."[85] The UN Global Compact represents the downfalls of a voluntary approach, and the need for binding regulation.

Launched in 2000, the UN Global Compact is a voluntary initiative to encourage companies to embrace ten principles on human rights, the environment, labor, and anti-corruption.[86] It currently boasts over 7000 corporate signatories in 145 countries around the world. Rather than serving as a

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Comm'n (Nov. 22, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-79.pdf.

83. *Id.*

84. *See id.*

85. *See* Archie B. Carroll, *The Four Faces of Corporate Citizenship*, 100 BUS. & SOC'Y REV. 1 (1998).

86. *See generally* UN Global Compact, *supra* note 11.

regulatory instrument, the Global Compact aims to mainstream its principles among companies by sharing best practices, fostering dialogue and partnerships with civil society organizations, and promoting corporate self-regulation. Yet this form of soft law lacks independent monitoring and enforcement mechanisms, and has been criticized for being conceptually vague and difficult to implement.[87] There is also a critique from within the United Nations. Maude Barlow, senior adviser on water issues to the President of the UN General Assembly, called the Global Compact "bluewashing in terms of wrapping the United Nation's good housekeeping seal of approval around corporate behaviors that we don't think always change."[88] This critique hurts not only the United Nations and human rights advocates, but also those companies that sign on to the Global Compact because they are genuinely trying to change their behavior.

While voluntary initiatives such as the Global Compact have been successful in raising corporate awareness about CSR, they have failed to adequately take into account the internationally-recognized responsibility of companies to respect human rights.[89] The 2011 UN Guiding Principles on Human Rights, which was unanimously approved by the UN Human Rights Council, recognizes this responsibility and calls on states to enforce laws that require companies to address their human rights impacts.[90] In particular, states should adopt financial reporting requirements that "clarify that human rights impacts in some instances may be 'material' or 'significant' to the economic performance of the business enterprise."[91]

Mandatory disclosure can create a level playing field and reduce any competitive disadvantage associated with a commitment to human rights. This form of regulation can "provide information to the public to correct for information asymmetries," "promote more informed consent or deliberation," and "change the behavior of the firm by making managers more aware of and concerned about their organization's social outputs."[92] Yet information disclosure also has its drawbacks. For instance, companies may disclose information but not change their actual practices. These laws

87. *See generally* Surya Deva, *Global Compact: A Critique of the UN's Public-Private Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107 (2006); Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1 (2007); *see also* William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253 (2003).

88. *UN's New Water Advisor Calls the Global Compact "Bluewashing*,*"* GLOBAL COMPACT CRITICS (Dec. 10, 2008), http://globalcompactcritics.blogspot.ca/2008/12/uns-new-water-advisor-calls-global.html.

89. *Guiding Principles on Business and Human Rights*, *supra* note 36.

90. *Id.* at 3, 4, 8.

91. *Id.* at 9.

92. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 695 (2003).

do not prohibit companies from engaging in particular activities but simply require companies to report on whether they do. Therefore the effectiveness of disclosure will depend on whether the information shapes the decision-making of investors, civil society advocates, and host state governments, who would then apply pressure on companies to improve their behavior.

Securities regulation is the preferred form of information disclosure for corporate human rights performance for a variety of reasons. First, there are clear sanctions imposed on companies for not reporting. For instance, sections 1502 and 1504 require disclosure through a new Form SD that will be deemed filed under the Securities Exchange Act of 1934 and will be subject to section 18 of the Exchange Act, which deals with liability for any false or misleading statements.[93] In contrast, another recent law on supply chain transparency — the 2010 California Transparency in Supply Chains Act — only requires disclosure on a company's website.[94] The exclusive remedy for failure to comply with the law is an action brought by the Attorney General of California for injunctive relief. It remains to be seen whether the act will be enforced through such a remedy.

The second reason why securities regulation is more appropriate than other information disclosure regimes, such as the California legislation, is because financial disclosure rules communicate a link between human rights risks and financial performance. As I will discuss in the next section, the materiality of certain human rights risks suggests that this information is important to investors and belongs in securities filings. Treating human rights risks as financial risks sends the message that these are issues that companies must pay attention to.

The third and perhaps most important justification for using securities law is to facilitate the operationalizing of human rights into the day-to-day decision-making of companies. Securities law is the point of entry into a firm's operations, and part of the culture of a company is complying with these laws. Firms not only have an institutional structure for securities compliance within their legal departments, but they also use enterprise risk management technology systems that can easily accommodate the inclusion of additional risks.[95] Human rights can be integrated into existing

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93. *See, e.g.*, Conflict Minerals, 77 Fed. Reg. at 56,280.

94. The 2010 California Transparency in Supply Chains Act, which took effect January 1, 2012, requires companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking. The act outlines five activities that companies must report on their websites, including supply chain verifications, audits, and training. It applies to retail sellers and manufacturers doing business in California that have annual gross receipts exceeding one hundred million dollars. California Transparency in Supply Chains Act of 2010, S.B. 657, 2009–10 Reg. Sess. (Cal. 2010).

95. *See* Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010) (discussing the prominent role of technology for legal compliance and the

software, which standardizes compliance across firms and their supply chains. In addition, technology can concretize a business process — in this case, the identification and mitigation of human rights risks — and change corporate culture around that activity.

B. The Materiality of Human Rights Risks

The most powerful argument for the inclusion of human rights in securities filings is that they are material, based on the SEC's definition of what a reasonable investor would consider important in making an investment decision.[96] This contention includes three components. First, a company's human rights risks are relevant to the reasonable investor and necessary for the public interest, but are currently not publicly available. Second, rather than issue new rules, the SEC can interpret existing rules to provide transparency to investors and promote the public interest through corporate accountability. Third, there may be greater costs to companies in the long term from not reporting.

There is a growing recognition that human rights risks could affect the value of companies, and that investors should take them into account. Socially responsible investors (SRIs), who screen companies based on various social criteria, are no longer a fringe group. The SRI market in the United States includes more than $3 trillion in assets, which represents 12% of the total assets under professional management.[97] The SRI market has grown 34% since 2005 and more than 380% since 1995.[98] Yet interest in sustainability issues is not restricted to SRIs. Institutional investors are also requesting data on the social and environmental impacts of their investments. For example, the California Public Employees Retirement System (CalPERS) stated in its Global Principles of Accountable Corporate Governance:

> CalPERS believes that boards that strive for active cooperation between corporations and stakeholders will be most likely to create wealth, employment and sustainable economies. With adequate, accurate and timely data disclosure of environmental, social, and governance practices, shareowners are able to more effectively make investment decisions by taking into account those practices of the companies in which the Fund invests.[99]

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unintended consequences of doing so).

96. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

97. SOC. INV. FORUM FOUND., 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 8 (2010).

98. *Id.*

99. CALPERS, GLOBAL PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE 18 (Nov.

In fact, there are more than 800 global investment institutions with $32 trillion in assets that are signatories to the United Nation's Principles for Responsible Investment, which promotes incorporation of environmental, social, and governance issues in investment analysis and decision-making, as well as disclosure of those issues in annual financial reports.[100]

As investors select their portfolios, they need the requisite information to assess companies' exposure to material risks, including potential liability from lawsuits or government action, as well as damage to a company's reputation should there be a credible allegation of human rights abuses. Sections 1504 and 1502 require companies to provide this type of information. According to Calvert Investments and the Social Investment Forum, information disclosed through section 1504:

> should enable investors to have enhanced confidence in management's guidance regarding future production and should attract assets from long-term equity investors to compliant issuers, which should provide greater stability to an issuer's asset base and enable management to make forward-thinking decisions in the interest of investors with the confidence that the outcomes of those decisions will be judged over long-term investment horizons.[101]

In addition, information disclosed through section 1502, including the potential hidden risks in companies' supply chains, provides investors with the transparency necessary to protect their investments. Because existing data is not reliable, comprehensive, standardized, or consistent across companies, government-mandated disclosure is necessary.

The case for disclosure of human rights-related risks compares to that for political spending, on which the SEC is considering whether to propose a new rule.[102] In their influential article that puts forward a case for an SEC rule on corporate political spending, Lucian A. Bebchuk and Robert J. Jackson, Jr. argue that shareholders have significant interest in receiving information about such spending.[103] Their evidence includes investors' extensive use of shareholder proposals requesting disclosure of corporate spending on politics. We can apply the same measure to gauge investor

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14, 2011), *available at* https://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/invest/201111/item03b.pdf.

100. *See, e.g.*, UN Principles for Responsible Inv., *PRI Strategy and Work Stream Update* (June 2012), *available at* http://www.unpri.org/files/201206_PRIStrategyUpdate.pdf.

101. Letter from Calvert Asset Mgmt., Inc. & Soc. Inv. Forum to Meredith Cross, *supra* note 79.

102. The SEC's consideration of this issue is a result of a rulemaking petition filed by a group of corporate and securities law professors in August 2011. Letter from the Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murray, Sec'y, Sec. & Exch. Comm'n (Aug. 3, 2011), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

103. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013).

interest in human rights. During the 2011 proxy season, 44 shareholder proposals were categorized in the areas of labor and human rights and 36 proposals concerned sustainability.[104] The total number combined (80 proposals) compares to the number of proposals on political spending in 2011, which was 82.[105] As Bebchuk and Jackson note, the SEC has previously taken the frequency of shareholder proposals into account when it considered changing its executive compensation disclosure requirements in 1992.[106]

The SEC has the authority to promulgate social disclosure rules "if a significant minority of investors' priorities have expanded to include a concern with the social and environmental effects of the companies in which they invest."[107] I argue that the "reasonable investor" has evolved and now finds this information material. Moreover, given the international legal regime that holds companies responsible for respecting human rights,[108] disclosure falls within the category of a company's efforts to comply with the law.[109]

1. The Need for Disclosure Guidance on Existing Rules

If it is appropriate for the SEC to require disclosure on human rights-related risks, by what mechanism should it do so? Should it require a specialized disclosure requiring supply chain due diligence, as is mandated by section 1502 with regard to conflict minerals? I argue that section 1502 is not the model for more expanded human rights-related disclosure at the SEC. A more effective mechanism that addresses company concerns and is less likely to be challenged in courts is the development and publication of interpretive guidance on existing rules — following the model of recent disclosure guidance on climate change and cybersecurity risks.[110]

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104. This data is based on a categorization by AS YOU SOW, PROXY PREVIEW 39–40, 48 (2011), *available at* http://www.asyousow.org/publications/ProxyPreview_2011.pdf.

105. *Id.* at 45–46. Bebchuk and Jackson rely on data from another source, *Proxy Proposals*, SHARKREPELLENT.NET, http://sharkrepellent.net (select proxy proposals brought by shareholders during the 2012 proxy season; conduct search for all proposals; find proposals classified in the "Social/Environmental Issues," "Social Issues Related," "Political Issues" subcategories). They note that during the 2012 proxy season, seventy-one shareholder proposals related to political spending. *See, e.g.*, Bebchuk & Jackson, *supra* note 103, at 938.

106. *See, e.g.*, Bebchuk & Jackson, *supra* note 103, at 929.

107. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1263 (1999).

108. *See Guiding Principles on Business and Human Rights*, *supra* note 36.

109. *See* Williams, *supra* note 107, at 1277–83.

110. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 33-9106, Exchange Act Release No. 34-61469; Financial Reporting Release No. FR-82, 75 Fed. Reg. 6290 (Feb. 8, 2010); SEC CF Disclosure Guidance: Topic No. 2: Cybersecurity (Oct. 13, 2011), *available at* http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

Section 1502's tenuous connection to the SEC's mandate and the exorbitant costs that companies will face under the regulation suggests that this is not a practical model for future human rights disclosure. Critics of the SEC's authority to adopt section 1502 note that investor protection was not the primary purpose behind the Dodd–Frank provision. The SEC recognizes that its authority is based on a congressional mandate to help end the humanitarian crisis in the DRC, but it also acknowledges that the disclosed information may be material to investors in their decision-making. The final rule states:

> [U]nlike in most of the securities laws, Congress intended the Conflicts Mineral Provision to serve a humanitarian purpose, which is to prevent armed groups from benefiting from the trade of conflict minerals. There may also be a benefit to investors given the view expressed by some commentators that the provision also protects investors by requiring disclosure of information that may be material to their understanding of the risks of investing in an issuer or its supply chain. To the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the Conflict Minerals Statutory Provision, the rule could improve informational efficiency.[111]

One could argue that under section 14(a) of the Securities Exchange Act of 1934, the SEC can promulgate disclosure rules not only on information for the protection of investors, but also on information in the public interest since it impacts shareholder value.[112] In this case, one issue of public concern is the ongoing conflict in the DRC, which presents potential reputational and financial risks to companies that are unknowingly sourcing conflict minerals from war zones.[113] Another issue of public interest is the promotion of greater public accountability of corporate managers, which the SEC has used as a rationale for previous disclosure requirements.[114] Cynthia Williams, who authored an influential article in this area, argues that expanded social disclosure as a mechanism for corporate accountability is consistent with the SEC's public interest disclosure power granted

111. Conflict Minerals, 77 Fed. Reg. at 56,350.

112. *See generally* Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n (1994).

113. Letter from Trillium Asset Mgmt. to Mary L. Schapiro, *supra* note 82.

114. For example, the SEC has issued disclosure requirements concerning executive compensation and the composition of a company's Board of Directors. *See* Executive Compensation Disclosure, Securities Act Release No. 6962, Exchange Act Release No. 31,327, 52 SEC Docket 1961 *passim* (Oct. 16, 1992); Proposed Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 14,970, 15 SEC Docket 291, 291 (July 18, 1978); Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 15,384, 16 SEC Docket 348 (Dec. 6, 1978).

under section 14(a), which is distinct from its investor protection grant of power under that section.[115]

Consistency with the SEC's public interest disclosure power and a congressional mandate, however, may not be enough to save section 1502 or similar provisions in the future. Current litigation by the U.S. Chamber of Commerce, the National Association of Manufacturers, and Business Roundtable challenges the rule and argues that the SEC violated its duty to conduct an adequate economic analysis. The parties cite the enormous compliance costs associated with section 1502 and the agency's inability to quantify the rule's benefits for the Congolese people.[116] They rely on the U.S. Court of Appeals for the District of Columbia Circuit's recent decision in *Business Roundtable v. SEC* (as well as a ten-year line of earlier appellate decisions), which raised the bar for economic analysis in rulemaking.[117] In that case, the court struck down the agency's proxy access rule for failing "adequately to assess the economic consequences" of the rule.[118] The court relied on the statutory requirement that the SEC had to consider, along with the protection of investors and whether an action will promote efficiency, competition, and capital formation when it adopts rules of the public interest.[119] In response to the case and congressional concerns, the agency issued staff guidance that highlights the rigorous economic analysis that future rules will be subject to.[120]

Following *Business Roundtable*, the SEC faces a significant analytical burden in future rulemaking.[121] It is unlikely that the agency will adopt new disclosure rules that are too costly for businesses and whose benefits are not easily quantifiable. Extending section 1502's supply chain due diligence requirement to all companies — not just those that possibly manufacture minerals originating in the DRC or its neighbors, or even just to those companies that source minerals from conflict zones — would impose a significant financial burden on them and would require companies to apply

115. *See, e.g.*, Williams, *supra* note 107, at 1297.

116. *See* Opening Brief of Petitioners, Nat'l Ass'n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. Jan. 16, 2013).

117. *See id.*; Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 290 (2013). *See also* Am. Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009); Chamber of Commerce of the United States v. SEC, (*Chamber II*), 443 F.3d 890 (D.C. Cir. 2006); Chamber of Commerce of the United States v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Timpinaro v. SEC, 2 F.3d 453 (D.C. Cir. 1993).

118. Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

119. 15 U.S.C. §§ 78c(f), 80a-2(c) (2012).

120. Memorandum from RSFI and OGC, Sec. & Exch. Comm'n, on Current Guidance on Economic Analysis in SEC Rulemakings to Staff of the Rulewriting Divisions and Offices, Sec. & Exch. Comm'n (Mar. 16, 2012), *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

121. *See* Kraus & Raso, *supra* note 117.

a process where the standards and procedures are still under development. What companies instead need is guidance on how to conduct analysis on human rights risks and identify those risks that are material to investors.

Therefore, I recommend that the SEC take a more conservative approach by releasing interpretive guidance that clarifies companies' existing obligations to disclose human rights-related material risks under Item 503(c) (Risk Factors) of Regulation S-K; Item 103 (Legal Proceedings); and Item 303 (Management's Discussion and Analysis). Such guidance would not change the current "materiality" standard, but instead would outline possible human rights risks (e.g., labor practices, working conditions, and human rights abuses) that companies should report in their 10-Ks. There is precedent for the SEC to issue this type of guidance, as it has recently done with respect to climate change and cybersecurity risks.[122]

Interpretive guidance on risks related to human rights would clarify existing rules and would thus not require a cost-benefit analysis that could be challenged in court. In order to standardize the information presented to investors and avoid boilerplate discussion, the guidance could also include a set of key performance indicators that are material to investors.[123] The SEC could draw from the sustainability accounting standards being developed by the newly established Sustainability Accounting Standards Board, which is compiling industry-specific performance indicators and management disclosures for use in securities filings.[124] By issuing disclosure guidance, the SEC would also be responding to ongoing pressure from investment groups who have requested comprehensive, comparable data through sustainability reporting.[125]

2. The Costs of Not Reporting

In the long term, there may be greater costs to companies from not reporting human rights risks and taking steps to mitigate human rights abuses, particularly in conflict-affected areas. These costs range from reputa-

122. *See* sources cited *supra* note 110.

123. *See* Robert G. Eccles et al., *The Need for Sector-Specific Materiality and Sustainability Reporting Standards*, 24 J. APPLIED CORP. FIN. 66, 70 (2012).

124. The Sustainability Accounting Standards Board (SASB) is a 501(c)(3) non-profit organization engaged in the development and dissemination of sustainability accounting standards for use by publicly listed corporations in disclosing material sustainability issues. Launched in 2011 and funded by grants and foundations, SASB aims to develop standards for 89 industries in 10 sectors for use in SEC Forms 10-K and 20-F. *See* SUSTAINABILITY ACCOUNTING STANDARDS BOARD, http://www.sasb.org/ (last visited Oct. 24, 2013).

125. For instance in 2009, the SEC received a petition signed by more than fifty organizations to issue interpretive guidance on sustainability risks and require companies to report on a uniform set of sustainability indicators. *See* Letter from Soc. Inv. Forum to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (July 21, 2009), *available at* http://www.sec.gov/comments/265-25/26525-13.pdf.

tional damage that can affect a company's share price to the denial of a "social license" to operate by local communities and civil society groups.[126] Companies are increasingly dependent on third-party suppliers or local subsidiaries, whose potential contribution to human rights violations, if undetected or unresolved, could significantly impact a company's reputation, brand image, and sales. Take the case of Apple Inc., which was subject to harsh criticism beginning in 2010 for labor rights violations and a string of suicides at its Chinese contractor Foxconn.[127] Because of the damage to its reputation (and therefore a likely concern about its share price), Apple hired the non-profit Fair Labor Association to audit working conditions at Foxconn with the goal of improving working conditions.[128] Yet companies need to audit not only their supply chains but also their operations to ensure that they are not unwittingly condoning human rights abuses by their own employees. The BP oil disaster is an example of the high costs of neglecting worker safety and environmental standards.[129]

Moreover, companies that fail to disclose their social performance and do not take steps to comply with human rights and environmental norms may be denied a social license to operate by civil society groups and community members in host country governments.[130] A "social license" means that companies "are constrained to meet the expectations of society and avoid activities that societies (or influential elements within them) deem unacceptable."[131] It is especially important for extractive companies to obtain a social license when they operate in countries with weak governments that provide insufficient public services to their citizens. Obtaining a social license to operate from a community means engaging in meaningful consultation and getting community buy-in prior to the commencement of a project. Without community support, "informal economic sanctions" (e.g., demonstrations, blockades, civil unrest, and political opposition) can tran-

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126. *See, e.g.*, Neil Cunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308 (2004).

127. *See* Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES (Jan. 25, 2012), http://nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html.

128. *See* Keith Bradsher & Charles Duhigg, *Signs of Changes Taking Hold in Electronics Factories in China*, N.Y. TIMES (Dec. 26, 2012), http://nytimes.com/2012/12/27/business/signs-of-changes-taking-hold-in-electronics-factories-in-china.html.

129. *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983 (2011).

130. *See generally* Cunningham, Kagan & Thornton, *supra* note 126; Gary Lynch-Wood & David Williamson, *The Social License as a Form of Regulation for Small and Medium Enterprises*, 34 J.L. & SOC'Y 321 (2007); Jennifer A. Howard-Grenville, Jennifer Nash & Cary Coglianese, *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 LAW & POL'Y 73 (2008).

131. Cunningham, Kagan & Thornton, *supra* note 126, at 308.

spire, which significantly slow a project down or even threaten its continued operations.[132] Therefore, it is necessary for a company to manage possible human rights risks in order to maintain its long-term competitive advantage and reputation, and thereby minimize its economic costs.

CONCLUSION

The intersection between human rights and securities regulation uncovers the social dimensions of securities law as well as the corporatization of human rights law. Given the materiality of human rights-related risks, current regulatory frameworks would permit companies to disclose this information in their securities filings. Key performance indicators could clarify the material issues for each sector and improve companies' ability and willingness to report on their performance. But an important question remains: How can we address possible damage to a company's competitive advantage due to increased costs associated with social disclosure?

In order to relieve company concerns over a potential loss of competitive advantage, I argue that we need international regulatory convergence around social, and particularly human rights, disclosure. Within the spectrum of international coordination approaches around international securities law, scholars have debated the costs and benefits of regulatory competition versus regulatory cooperation, including convergence.[133] Under a regulatory competition approach, countries adopt distinct systems of securities regulation on which they compete to attract investors and other market participants.[134] Regulatory convergence, in contrast, means that countries develop similar systems of securities regulation. Following the recent global financial crisis, there have been renewed calls to facilitate cross-border cooperation through the setting of common rules and standards, information-sharing, and collaboration on supervision.[135]

International convergence may not be appropriate for all securities regulations, but it is essential for those that require global coordination — such as laws seeking to prevent human rights violations in corporate supply chains — and for those regulations that would bring about a competitive disadvantage to companies if only applied in one country. While rules such

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132. *Id.* at 323.

133. *See, e.g.*, Chris Brummer, *Post-American Securities Regulation*, 98 CALIF. L. REV. 327 (2010); James D. Cox, *Regulatory Duopoly in the U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1229–37 (1999); Eric J. Pan, *Four Challenges to Financial Regulatory Reform*, 55 VILL. L. REV. 743, 746 (2010) [hereinafter *Four Challenges*]; Eric J. Pan, *Structural Reform of Financial Regulation*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 796 (2011).

134. *See, e.g.*, Eric C. Chaffee, *Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587, 596 (2010).

135. *See, e.g.*, Eric J. Pan, *Four Challenges*, *supra* note 133, at 746.

as Dodd–Frank section 1502 have the potential to enhance such goals as global supply chain transparency, their effectiveness is curtailed by their limited applicability to companies listed in the United States. Countries should develop common standards that would require all companies to provide consistent and comparable information on material human rights risks. Such convergence is already in demand by investors with global portfolios and multinational companies seeking a standardized system of reporting. As financial reporting standards converge across world markets, requirements for human rights disclosure among companies should follow suit.