

## Chapter 9

# Influencing the Impact of Business on Human Rights Corporate Social Responsibility through Transparency and Reporting

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### Introduction

International human rights instruments emphasize the central role of states in ensuring that fundamental rights are protected. The conventional focus of human rights advocacy, therefore, has aimed at exposing rights abuses by states and governments. However, more recently, several multinational corporations have come under scrutiny as potentially complicit in human rights abuses based on their conduct abroad.

Interest in the role of business in human rights violations and the relationship of business to human rights has increased in recent years as more information on the impacts of various industry practices becomes available to the public. Human rights and environmental campaigners have exposed the ways in which the business practices of certain multinational corporations are inconsistent with international environmental and human rights law. Using traditional and nontraditional forms of media, campaigners in cooperation with conscious consumers and activist investors are seeking more transparency from the business community regarding ways in which business practices impact society. Members of affected communities, in cooperation with human rights and environmental campaigners, are demanding that corporate actors be held accountable

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for the adverse impacts associated with particular business practices. Corporations increasingly confront the challenge of reputational risks that are bad for business when the ways that they conduct business are perceived by a conscious segment of the public to be bad for people or the planet.

Concurrently, efforts to bring corporate conduct into alignment with respect for human rights by expanding the social responsibility of business have increased. Campaigners fighting to ensure corporate accountability for abuses have opted for adjudication in courts of law, advocacy in the court of public opinion, or, increasingly, both. For example, in recent years, several lawsuits have been brought against corporations in federal courts across the United States under the Alien Tort Statute (ATS), a statutory provision that allows aliens access to federal courts when the law of nations has been violated.<sup>1</sup> Many of these lawsuits have concerned the conduct of multinational corporations with operations in developing countries. Claimants in these suits often alleged that business enterprises have engaged in or been complicit in violations of international human rights guarantees. Comparable actions to hold corporations accountable for involvement in human rights violations have been filed in foreign domestic courts and before international tribunals.<sup>2</sup>

Rights campaigners seeking to challenge corporate conduct outside the United States in U.S. federal courts can no longer count on the ATS as an avenue to access remedies for individuals and communities injured abroad. In *Kiobel v. Royal Dutch Petroleum*, the U.S. Supreme Court held that the extension of jurisdiction over tort claims by aliens for incidents that occurred overseas would run counter to the strong presumption against extraterritorial application of the laws of the United States.<sup>3</sup> The presumption precludes remedy for violations of the law of nations that occur outside the United States.<sup>4</sup> Though the court held that the ATS does not apply to conduct that occurs entirely within a foreign nation, it did leave open a number of significant questions “regarding the reach and interpretation” of the statute, leading Justice Kennedy to suggest in his concurrence that “proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation” in future cases involving allegations of grave

1. 28 U.S.C. § 1350.

2. See, e.g., Ian Cobain, *British Mining Company Faces Damages Claim after Allegations of Torture in Peru*, *GUARDIAN* (UK, Oct. 18) 2009, <http://www.guardian.co.uk/world/2009/oct/18/peru-mon-terrico-metals-mining-protest> (reporting on suit brought in UK); Sarah Arnott, *Farmers Sue Shell Over Oil Spills in Niger Delta*, *INDEPENDENT* (UK, Dec. 3, 2009) <http://www.independent.co.uk/news/business/news/farmers-sue-shell-over-oil-spills-in-niger-delta-1833087.html> (reporting on suit brought in Dutch court); John Lichfield, *French Oil Firm Accused of Complicity with Military Regime*, *INDEPENDENT* (UK, Oct. 4, 2007) <http://www.independent.co.uk/news/world/asia/french-oil-firm-accused-of-complicity-with-military-regime-395921.html> (reporting on suit brought in Belgian court); Ian Traynor, *Gypsies Win Right to Sue IBM Over Role in Holocaust*, *THE GUARDIAN* (UK, June 22, 2004) <http://www.guardian.co.uk/technology/2004/jun/23/secondworldwar.internationalnews> (reporting on suit brought in Swiss court).

3. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013).

4. *Id.*

abuses of the “international law principles protecting persons.”<sup>5</sup> Justice Breyer, in his concurrence, argued that federal courts could conceivably assert jurisdiction over cases consistent with foreign relations law where “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>6</sup> Absent a statute with greater specificity, even where tort claims do “touch and concern the territory of the United States,” the court has held that “the claims must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>7</sup> The court did not determine whether the law of nations recognizes corporate liability for human rights violations.<sup>8</sup>

Recent legislation in the United States may offer alternative options to the accountability arsenal of those who are working to better understand the connection between corporate conduct and human rights abuses. The contested new social reporting requirements contained in financial-reform legislation will provide the public with more information on the relationship between commerce and human rights conditions. The new reporting requirements may also offer an opportunity for some corporations to promote their better business practices and capture a competitive advantage among conscious consumers and socially responsible investors.

This chapter reviews recent initiatives in the United States and abroad, aside from litigation, that attempt to address the human rights consequences of how business is conducted at home and abroad.

The following section on Federal Legislation will discuss recently enacted and proposed legislation at the federal and state levels that addresses the relationship between human rights and corporate conduct through various reporting requirements. Specifically, this part will examine the trend toward leveraging securities law to promote corporate accountability through information and disclosure. It also briefly outlines examples of efforts to hold corporations accountable for alleged abuses and to regulate the relationship of corporations to human rights in other jurisdictions.

The section on Leveraging Securities Law will discuss recent international frameworks and industry-specific, multi-stakeholder initiatives combining the efforts of the business community, investors, activists, and consumers to address corporate complicity in rights abuses and define best practices for businesses. Specifically, this part will consider initiatives in the extractive industry and retail manufacturing sectors. It will also examine the potential for greater self-regulation and expanded corporate social-responsibility commitments

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5. *Id.* at 1669 (Kennedy, J., concurring).

6. *Id.* at 1671 (Breyer, J. concurring); Justices Ginsberg, Sotomayor, and Kagan joined the concurrence.

7. *Id.* at 1669.

8. *Id.* at 1663.

consistent with international human rights standards pursuant to international and industry-specific initiatives. This part will also review, in particular, the UN “Protect, Respect and Remedy” Framework and Guiding Principles on Business and Human Rights and the UN Global Compact. Private initiatives led by industry will also be outlined.

The chapter concludes with an assessment of the practical implications for business of the growing trend toward greater transparency in a context of escalating expectations on the part of conscious consumers and activist investors. In sum, recent developments will require corporations that have not considered the ways their conduct could impact the enjoyment of human rights to move beyond business as usual.

## Federal Legislation: Corporate Accountability through Information and Disclosure

In the aftermath of the 1929 market crash that led the world into the Great Depression, Congress enacted the Securities Act of 1933 (Securities Act).<sup>9</sup> Because misstatements, omissions, and other fraud on the part of securities issuers were central factors contributing to the crash, the Securities Act required companies to disclose certain specified information about themselves upon the issuance of new securities to protect investors and prevent fraud.<sup>10</sup> The Securities Exchange Act of 1934 (Exchange Act) further expanded the circumstances under which mandatory information disclosures must be made and the nature of the information that must be disclosed to address similar perceived information asymmetries relating to securities purchased and sold in capital markets.<sup>11</sup> The integrated disclosure requirements of the Securities Act and the Exchange Act govern mandatory disclosure for statements, reports, and schedules filed with the Securities and Exchange Commission (SEC).<sup>12</sup>

9. Securities Act of 1933, 15 U.S.C. § 77 *et seq.*

10. For a comprehensive discussion of the history of securities regulation and origins of the Securities and Exchange Commission, *see generally*, JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* (2003); *see also* Daniel M. Firger, Note, *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) (emphasizing the importance of Congressional intent “to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public” (citing 77 Cong. Rec. 937 (1933))).

11. Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*; *see also* Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 *AM. U.L. REV.* 1131, 1170–71 (2003) (discussing the key legislative, regulatory, and judicial rationales supporting disclosure under the 1934 Act).

12. *See* SEC, Adoption of Integrated Disclosure System, Securities Act Release No. 33-6383 (1982), <http://www.sec.gov/rules/final/33-8591.pdf>.

Disclosures made to the SEC and the public are subject to a *materiality* test that sets a basic benchmark for the information firms are required to report.<sup>13</sup> The materiality requirement arises from gap-filling and antifraud rules contained in the Securities and Exchange Acts to ensure that disclosures made by issuers are not misleading. Information that is not required by the mandatory disclosure provisions contained in the Securities Act and the Exchange Act, or other information that does not meet the materiality benchmark, is deemed immaterial and need not be disclosed. The Supreme Court has held that “there must be a substantial likelihood that the disclosure of [an] omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” by the issuer for information to be deemed material and meet the benchmark.<sup>14</sup> When there is a substantial likelihood that a reasonable investor would consider information important in making a voting or investment decision, the information is material. Under the theory of efficient capital markets, absent the disclosure of mandated information and any additional *material* information, investors would be unable to value securities properly or take measures to protect against fraud, waste, or corporate mismanagement.<sup>15</sup>

### **Federal Statutes and Regulations: Obligations and Objectives**

Specific provisions of the recently adopted Dodd-Frank Wall Street Reform and Consumer Protection Act amend the Exchange Act to require firms to produce information on the extent, if any, to which their commercial activities can be associated with either conflict or corruption. The new disclosure regime contained in Dodd-Frank, in effect, makes matters that pertain to human rights material. A summary of significant provisions and proposals follows.

#### *Section 1502*

In July 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law.<sup>16</sup> Section 1502 of Dodd-Frank amends section 13 of the Securities Exchange Act of 1934 (15 USC § 78m) and requires disclosures, largely

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13. See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1208–09 (1999).

14. T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see also Basic Inc. et al. v. Levinson, 485 U.S. 224, 232 (applying materiality standard set forth in T.S.C. Indus. in the merger context).

15. The Efficient Capital Markets hypothesis holds that stock prices reflect available information relevant to their values. See Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 619 (1988); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 564–65 (1984).

16. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter the Dodd-Frank Act]. See also Helene Cooper, *Obama Signs Overhaul of Financial System*, NEW YORK TIMES (Jul. 21, 2010) <http://www.nytimes.com/2010/07/22/business/22regulate.html>.

on corporate due diligence procedures, relating to conflict minerals that originate in the Democratic Republic of the Congo (DRC).<sup>17</sup>

#### Conflict Commerce in the Context of the Democratic Republic of the Congo

Although a significant portion of the world's mineral wealth lies beneath the soil of the DRC, the country suffers from a particularly acute case of the *resource curse*. A term coined by economists, the resource curse refers to the counterintuitive *inverse relationship* between a country's economic growth and its abundance in mineral or natural resources.<sup>18</sup> The condition is common in countries that have economies with a high ratio of natural resource exports to gross domestic product (GDP).<sup>19</sup> Countries afflicted with the resource curse are more likely to experience slower and lower economic growth than comparable economies,<sup>20</sup> and frequently they are less democratic, more corrupt, and have a higher risk of violent conflict.<sup>21</sup> Mineral exports from the DRC were estimated to exceed \$6 billion in 2008.<sup>22</sup> Tin, tantalum, tungsten, and gold are the primary minerals mined in the DRC for international trade.<sup>23</sup>

According to the United Nations, the eastern region of the DRC—where large deposits of the ores of tin, tantalum, tungsten, and gold are located—remains “the site of one of the world's worst humanitarian crises.”<sup>24</sup> Replicating past patterns of exploitation, enslavement, and abuse established under the colonial rule of King Leopold II and Belgium, current competition for control over mineral wealth by armed factions continues

17. Dodd-Frank Act, § 1502, 124 Stat. 2213–18 (2010)(to be codified at 15 U.S.C. § 78m(p)).

18. See Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, 21 Nat'l Bureau of Econ. Research, Working Paper No. 5398 (1995) (documenting correlation between natural resource abundance and negative growth), <http://www.nber.org/papers/w5398>.

19. *Id.* at 22.

20. See also Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L. J. 9 (2008).

21. See, e.g., Paivi Lujala, *Deadly Combat Over Natural Resources: Gems, Petroleum, Drugs and the Severity of Armed Civil Conflict*, 53 J. CONFLICT RESOL. 50 (2009); James D. Fearon, *Primary Commodities Exports and Civil War*, 49 J. CONFLICT RESOL. 483 (2005); Macartan Humphreys, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, 49 J. CONFLICT RESOL. 508, 510–13 (2005); Michael L. Ross, *How Does Natural Resource Wealth Influence Civil War? Evidence from Thirteen Cases*, 58 INT'L ORG. 35 (2004).

22. See John Burchill, *Out of the Heart of Darkness: A New Regime for Controlling Resource Extraction in the Congo*, 10 ASPER REV. OF INT'L BUS. AND TRADE L. 99, 100 (2010) (citing United States Geological Survey, 2008 Minerals Yearbook: Africa (Washington, D.C.: United States Department of the Interior, Feb. 2010)).

23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1030, THE DEMOCRATIC REPUBLIC OF THE CONGO: U.S. AGENCIES SHOULD TAKE FURTHER ACTIONS TO CONTRIBUTE TO THE EFFECTIVE REGULATION AND CONTROL OF THE MINERALS TRADE IN THE EASTERN DEMOCRATIC REPUBLIC OF THE CONGO 6 (2010) [Hereinafter GAO Report: DRC].

24. UN: DRC One of World's “Worst Humanitarian Crises,” MAIL & GUARDIAN ONLINE (South Africa, June 11, 2010), <http://mg.co.za/article/2010-06-11-un-drc-one-of-worlds-worst-humanitarian-crises>; see also GAO Report: DRC *supra* note 23 at 1.

to claim the lives of many civilian Congolese.<sup>25</sup> An estimated 5.4 million people have died as a result of civil war and conflict in the DRC.<sup>26</sup>

Despite peace accords that formally ended the civil war, conflict still persists in the DRC, fueled by an illegal and illicit trade in minerals that relies on forced and slave labor. Proceeds from the sale of minerals enable belligerent groups in the eastern DRC to sustain conflict and instability.<sup>27</sup> According to UN estimates, the minerals trade accounts for 20 to 40 percent of the revenue of armed groups operating in the region.<sup>28</sup> Profits are primarily derived from exploitation and extortion of the Congolese civilian population. Illegal armed groups in control of mines force civilians to work extracting minerals under conditions that are unsafe and exploitative.<sup>29</sup>

Corrupt elements of the Congolese national military are also involved in the illicit minerals trade and abuses against the civilian population.<sup>30</sup> The worst instances of extreme violence against the civilian population—massacres, mutilations, and rapes—often occur when illegal armed groups and some elements of the Congolese national military compete to consolidate control over resource-rich areas and economic activities along trading routes through abuse and intimidation.<sup>31</sup>

The United States is the largest donor to the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO),<sup>32</sup> currently the UN's largest and

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25. GLOBAL WITNESS, SAME OLD STORY: A BACKGROUND STUDY ON NATURAL RESOURCES IN THE DEMOCRATIC REPUBLIC OF CONGO 3 (2004) [hereinafter Same Old Story].

26. International Medical Corps, <http://internationalmedicalcorps.org/sslpage.aspx?pid=359#.UsBoJrK9KSM> (last updated Dec. 4, 2013); BENJAMIN COGHLAN ET AL., INTERNATIONAL RESCUE COMMITTEE, MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS ii (2007) (estimating that between 1998 and 2007, approximately 5.4 million, or 8 percent of the DRC population, died as a result of the conflict).

27. John R. Crook, *New U.S. Legislation Requires Transparency in Conflict Minerals Trade*, 104 AM. J. INT'L L. 668 (2010) (citing U.S. Dep't of State Press Release No. 2010/627, Industry Representatives Discuss Conflict Minerals at the U.S. Department of State (May 14, 2010), <http://www.state.gov/r/pa/prs/ps/2010/05/121880.htm>).

28. GAO Report: DRC, *supra* note 23 at 16.

29. HUMAN RIGHTS CENTER ET AL., LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO 2 (2008), <http://www.law.berkeley.edu/HRCweb/pdfs/LivingWithFear-DRC.pdf>.

30. GAO Report: DRC, *supra* note 23 at 16; *see also* Thomas Fessy, *Congo General "Profits from Blood Gold"*, BBC (Nov. 10, 2010), <http://www.bbc.co.uk/news/world-africa-11722142> (discussing the involvement of a top DRC military personnel in gold mining in conflict regions).

31. GAO Report: DRC, *supra* note 23 at 15. Sexual violence has been a prevalent feature of the conflict. For a discussion of rates of rape among Congolese women, *see* Amber Peterman et al., *Estimates and Determinants of Sexual Violence against Women in the Democratic Republic of Congo*, 101 AM. J. PUB. HEALTH 1060, 1063, 1064 tbl. 2 (2011). For a discussion of the injuries inflicted on the civilian population, *see* HUMAN RIGHTS CENTER, ET AL., LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO 2 (2008), <http://www.law.berkeley.edu/HRCweb/pdfs/LivingWithFear-DRC.pdf>.

32. GAO Report: DRC *supra* note 23 at 1; *see also* *Improving Governance in the Democratic Republic*

most expensive peacekeeping operation.<sup>33</sup> The Democratic Republic of Congo Relief, Security and Democracy Promotion Act of 2006 announced the policy of the United States to promote peace and security in the DRC by disarming illegal armed groups, protecting civilians, and ensuring that those responsible for abuses and destabilizing the DRC would be held accountable.<sup>34</sup> Section 1502 can be seen as an effort on the part of Congress to promote these aims and ensure that American businesses are not unwittingly complicit in providing further fuel to the conflict in the DRC.

#### The Content of Section 1502: Objectives and Obligations

Appreciating the urgent need to address the human rights abuses associated with the ongoing violence in the DRC, fueled in significant part by the proceeds from the illicit trade in conflict minerals by armed groups in the eastern region, Congress crafted provisions pertaining to the trade of DRC conflict minerals that were included into Dodd-Frank.<sup>35</sup> The broad aim of the provision is to disrupt the connection between violent conflict and commercial activity.<sup>36</sup> Section 1502 of Dodd-Frank is a federal, legally binding regulatory initiative in the United States that is intended to curtail commercial complicity in international human rights violations.<sup>37</sup>

Section 1502 requires publicly traded companies that utilize certain conflict minerals to report the due diligence steps they have taken to determine the source of their minerals. The goal of this provision is to ensure that companies demonstrate that links along their product supply chains are not, in effect, providing further financial support for the violent

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*of the Congo: Testimony Before the Senate Foreign Relations Comm. and the African Affairs Subcomm.*, 112th Cong. (2011) (statement of Johnnie Carson, Asst. Sec'y, Bureau African Affairs).

33. Shannon Raj, *Blood Electronics: Congo's Conflict Minerals and the Legislation That Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 988 (2011) (citing UN S.C. Rep. of the Security Council Mission to Central Africa (Nov. 21–25, 2004) at 5, 26, UN Doc. S/2004/934 (Nov. 20, 2004)).

34. GAO Report: DRC *supra* note 23 at 1.

35. The conflict minerals provision in the Dodd-Frank Act was approved by a voice vote on an amendment proposed by Senator Sam Brownback (R-KS). In a statement issued after the vote, Senator Russ Feingold (D-WI), who cosponsored the amendment, explained that their aim was to address reports issued by the UN Group of Experts in support of UN S.C. Res. 1857 (2008), which called on Member States to take measures “to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase.” See Lucinda A. Low et al., *FCPA Self-Reporting and the Effects of the Dodd-Frank Whistleblower Provisions: A New Calculus*, PRACTICING LAW INSTITUTE (May 5, 2011).

36. See 145 CONG. REC. S3816–17 (daily ed., May 17, 2010) (statement of Sen. Durbin) (Section 1502 “encourages companies using [conflict] minerals to source them responsibly” and also seeks to “address where the armed groups are receiving their funding”).

37. For legislative history of section 1502, see Conflict Minerals, 75 Fed. Reg. 80948, 80950–75 (proposed Dec. 23, 2010), <http://www.gpo.gov/fdsys/pkg/FR-2010-12-23/pdf/2010-31940.pdf>; 156 Cong. Rec. S3976 (daily ed., May 19, 2010) (statement of Sen. Feingold). In his statement before Congress, Senator Feingold described section 1502 as a unique contribution to securities regulation in that it is intended to ensure “greater transparency around how international companies are addressing issues of foreign corruption and violent conflict that relate to their business.” 156 Cong. Rec. S3976.



conflict in the DRC or otherwise contributing to the country's emergency humanitarian situation.<sup>38</sup> To serve these ends, issuers must annually disclose whether "conflict minerals" that are "necessary to the functionality or production" of a manufactured product originated in the DRC or an adjoining country.<sup>39</sup> For the purposes of section 1502, "conflict minerals" are defined to include columbite-tantalite (coltan), cassiterite (tin), wolframite (tungsten), and gold, or their derivatives, as well as any others determined by the secretary of state to fund conflict in the DRC or an adjoining country that shares an internationally recognized border with the DRC. The DRC is bordered by Angola, Burundi, the Central African Republic, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia.

Section 1502 imposes a duty on corporations using conflict minerals from the DRC, or nations neighboring the DRC, to submit a report to the SEC detailing measures taken to exercise due diligence with respect to determining the source and chain of custody of its minerals. According to section 1502, the report must disclose the facilities used to process the conflict minerals, the country of origin of the conflict minerals, the issuer's efforts to determine the specific originating mine, and whether products manufactured or contracted for manufacture by the corporation are "DRC conflict free."<sup>40</sup>

Under section 1502, due diligence must include at a minimum an independent private-sector audit of the corporation's report, conducted in a manner consistent with standards that are to be established by the comptroller general of the United States in consultation with the secretary of state.<sup>41</sup> Congress intends for certified audits to constitute a "critical component" of due diligence in establishing the source and chain of custody for minerals used in manufacturing.<sup>42</sup> In addition to SEC reporting and certified audits, section 1502 requires issuers to provide the same information to the public on their Internet Web site.

Under the language of the statutory provision, products are "DRC conflict free" when they "do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country."<sup>43</sup> Products originating from areas "under the control of armed groups" are not DRC conflict free. In particular, products are not conflict free if they contain materials from those areas within the DRC or its neighboring nations where armed groups physically control mines or force civilians to mine, transport, or sell conflict minerals; tax, extort, or control any part of trade routes; or tax, extort, or control trading facilities in whole or in part.<sup>44</sup>

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38. See Dodd-Frank Act, *supra* note 16, at §1502(a). Due diligence standards are also contained in the UN Guiding Principles on human rights endorsed in 2011 by the UN Human Rights Council. However, the two due diligence frameworks are quite different, as will be discussed below.

39. *Id.* § 1502(b).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* § 1502(e)(5).

The secretary of state in consultation with the administrator of the United States Agency for International Development is tasked with developing a strategy to address the connections between commercial products, conflict minerals, armed groups, and human rights abuses.<sup>45</sup> Among other things, the strategy will seek to develop a plan to provide guidance to commercial actors in conducting due diligence on the origin of minerals that may make it into the formal sector from the informal and illicit activities of armed groups.<sup>46</sup> The strategy will also set forth a description of punitive measures that can be taken against individuals or entities whose commercial activities are supporting armed groups and perpetuating rights abuses.<sup>47</sup> In accordance with the recommendation of the UN Group of Experts on the Democratic Republic of Congo, the secretary of state is also to produce and make available to the public a map of mineral-rich regions and trade routes under the control of armed groups.

The comptroller general must assess the efficacy of the legislation in promoting peace and security in the DRC and adjoining countries and evaluate the issues encountered by the SEC in enforcing the provisions of the amended reporting requirements.<sup>48</sup> The secretary of commerce must assess the accuracy of the independent private-sector audits and due diligence processes and make recommendations for improving the accuracy of audits and establishing standards of best practice.<sup>49</sup>

The SEC has promulgated rules changing the annual reporting requirements of issuers that file reports pursuant to sections 13(a) or 15(d) of the Securities Exchange Act of 1934 to implement section 1502.<sup>50</sup> Under the rules, all issuers that manufacture, or contract to manufacture, products for which conflict minerals are necessary to functionality or production must make conflict-minerals disclosures.<sup>51</sup> The rules do not exempt foreign private issuers or smaller reporting companies.<sup>52</sup> In addition to announcing new rules, the SEC has also adopted a new form, Form SD, to facilitate the disclosures consistent with section 1502.<sup>53</sup>

The rules apply equally to those issuers who manufacture and those who contract to manufacture products. Therefore, issuers selling products, irrespective of the level of their

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45. *Id.* § 1502 (c)(1)(A).

46. *Id.* § 1502 (c)(1)(B)(ii).

47. *Id.* § 1502 (c)(1)(B)(iii).

48. *Id.* § 1502 (d)(2)(A) and (B).

49. *Id.* § 1502 (d)(3)(B).

50. *See* Conflict Minerals, 77 Fed. Reg. 56,274 *et seq.* (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).

51. *See* Conflict Minerals, 77 Fed. Reg. 56,290–92 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).

52. *See* Conflict Minerals, 77 Fed. Reg. 56,290–92 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b). *See* Proposed Rules, 77 Fed. Reg. at 56,277, <http://www.gpo.gov/fdsys/pkg/FR-2012-09-12/pdf/2012-21153.pdf>.

53. 77 Fed. Reg. 56,274 (Sept. 12, 2012).

influence over the manufacturing process, must still report if they have contracted with another party to have products manufactured specifically for the issuer.<sup>54</sup> However, pure retailers that have no influence over the manufacture of products and no contractual or other involvement in manufacturing would not be required to provide information regarding any conflict minerals in products sold in retail stores.<sup>55</sup> Also, mining issuers are not considered manufacturers under the rules.<sup>56</sup>

The SEC has divided the disclosure process into three stages. First, the issuer must determine whether it is subject to the Conflict Minerals Provision. The term *conflict mineral* is defined in the rules to include cassiterite, columbite-tantalite, gold, wolframite, and their derivatives, limited to tantalum, tin, and tungsten.<sup>57</sup> If the issuer is not one for whom these “conflict minerals” are necessary to the function or production of products manufactured or contracted for manufacture, the issuer would not be required to take any action, make any disclosures, or submit any reports.<sup>58</sup>

Although the SEC did not define “necessary to the functionality or production,” the rules do provide guidance in the form of a factor analysis to inform the determination.<sup>59</sup> Whether conflict minerals are “necessary” will depend on the particular context and circumstances of an issuer’s product or production.<sup>60</sup> Accordingly, the factors set forth by the SEC either individually or in the aggregate may be determinative regarding whether conflict minerals are “necessary” to a given product.<sup>61</sup> However, where a conflict mineral is contained in a product, the rules state that it should be considered “necessary to the functionality or production” of that product.<sup>62</sup> The rules do not provide for *de minimis* content exceptions.<sup>63</sup>

If the issuer is one for whom any of the aforementioned conflict minerals are necessary to the production of products manufactured or contracted for manufacture, the issuer must move to the second stage of the disclosure process. Stage two requires the issuer to determine whether its conflict minerals originated in the DRC or neighboring nations after conducting a “reasonable country of origin inquiry.”<sup>64</sup> If the issuer determines that its minerals did not originate in the DRC or neighboring nations, it must disclose this determination as well as the process it used to conduct its reasonable country-of-origin

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54. See Conflict Minerals, 77 Fed. Reg. 56,290–92 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).

55. *Id.*

56. *Id.* at 56,292.

57. *Id.* at 52,685.

58. *Id.* at 56,279.

59. *Id.* at 56,295–98.

60. 77 Fed. Reg. at 56,295.

61. *Id.*

62. *Id.* at 56,296.

63. *Id.* at 56,298.

64. *Id.* at 56,310–14.

inquiry, demonstrating the basis for its conclusions in the body of its specialized disclosure report on Form SD. The issuer must also provide a link on its Internet Web site.<sup>65</sup>

The rules do not state what a reasonable country-of-origin inquiry should entail; rather, the SEC has indicated that the amount of inquiry depends on the issuer's "particular facts and circumstances" as well as "the available infrastructure at a given point in time."<sup>66</sup> However, the rules do contemplate that as systems for discovering the origin of minerals improve, the facts and circumstances informing reasonable inquiry may also change.<sup>67</sup> In sum, as access to information concerning the flow of conflict minerals in the stream of commerce improves, a mode of inquiry that might be adequate under present circumstances could become inadequate in the future.<sup>68</sup>

If after conducting a reasonable country-of-origin inquiry, "the issuer knows that it has necessary conflict minerals that originated in the Covered Countries and did not come from recycled or scrap sources, or if the issuer has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources," the issuer must proceed to the final stage of the disclosure process.<sup>69</sup> The third stage requires the issuer to prepare a Conflict Minerals Report (CMR).<sup>70</sup> Issuers are to use an internationally or nationally recognized due diligence framework, if available, for the specific conflict mineral at issue.<sup>71</sup> The rules reference the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas as satisfying the criteria for due diligence.<sup>72</sup> The CMR must contain "a description of the measures the issuer has taken to exercise due diligence on the source and chain of custody" of conflict minerals where it has reason to believe that its minerals may have originated in the countries covered under section 1502 and may not have come from scrap or recycled sources.<sup>73</sup>

For a temporary period, the rules allow issuers that are unable to determine the mineral origins through due diligence to label their products "DRC conflict undeterminable."<sup>74</sup> After the temporary period, issuers that cannot determine minerals origins through due diligence can label their products "not been found to be 'DRC Conflict Free.'"<sup>75</sup> Unless

65. *Id.* at 56,315.

66. *Id.* at 56,311.

67. *Id.* at 56,311–12.

68. *Id.*

69. *Id.* at 56,280, 56,313.

70. *Id.* at 56,320.

71. *Id.* at 56,281.

72. *Id.* at 56,326. *See also* OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2011), <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf>.

73. *Id.* at 56,320.

74. *Id.* at 56,321–22.

75. *Id.* at 56,322.

an issuer's products are "DRC Conflict Free," the CMR must include a description of the facilities used to process the issuer's minerals, the country of origin, and the issuer's efforts to determine the specific location of the mine.<sup>76</sup>

The CMR must also include, among other things, a description of measures taken by the issuer to exercise due diligence in sourcing minerals and securing the chain of custody of its minerals.<sup>77</sup> The SEC is requiring that the description of measures taken by issuers to exercise due diligence include a certified independent private-sector audit, and that this audit report also be provided with the CMR.<sup>78</sup>

Under the rules, the CMR will be filed as an exhibit to Form SD.<sup>79</sup> The language of section 1502 requires these reports to be "submitted."<sup>80</sup> The SEC distinguishes between materials "furnished" to it and materials "filed" with it; issuers are subject to less liability for false or misleading statements in materials "furnished."<sup>81</sup> The rules now require that issuers file Form SD, which must include the issuer's reasonable country-of-inquiry process and, where required, the CMR.<sup>82</sup> The rules require each issuer "to provide its annual conflict minerals information in its specialized disclosure report on Form SD for every calendar year from January 1 to December 31 and the specialized disclosure report will be due to the Commission on May 31 of the following year. The first reporting period for all issuers will be from January 1, 2013, to December 31, 2013, and the first specialized disclosure report must be filed on or before May 31, 2014."<sup>83</sup>

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Business Roundtable sued to challenge the SEC's final rule,<sup>84</sup> seeking review on a number of points, including the following:

1. Whether the commission violated its duty and did not conduct adequate economic analysis;
2. Whether the commission erroneously concluded it lacked authority to adopt a *de minimis* exception;

76. *Id.* at 56,320.

77. *Id.* at 56,320.

78. *See id.* at 46.

79. *See id.* at 49–50.

80. *See* Dodd Frank Act, *supra* note 16, at § 1502 (b).

81. *See* Conflict Minerals, 75 Fed. Reg. at 80,960.

82. *Id.* In a letter to the SEC, Senator Durbin and Representative McDermott objected to the SEC's treatment of the term *submit* in Section 1502, arguing that Congress intended for the term to be synonymous with *file*, not *furnish*. Letter from Sen. Richard J. Durbin & Rep. Jim McDermott to Mary L. Schapiro, Chairman SEC 2 (Feb. 28, 2011), <http://www.sec.gov/comments/s7-40-10/s74010-88.pdf>.

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

84. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified in 17 C.F.R. Parts 240 and 249b) and Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213–18 (2010) (codified in relevant part at 15 U.S.C. § 78m(p)). As stated under rule 15 U.S.C. § 78c(f) and 15 U.S.C. § 78w(a)(2).

3. Whether the commission's interpretation of "did originate" in 15 USC § 78m(p)(1) (A) is erroneous or arbitrary and capricious;
4. Whether the rule's "reasonable country of origin inquiry" is too costly an approach to monitoring supply chains;
5. Whether the commission's interpretation of 15 USC § 78m(p)(2)(B) is erroneous;
6. Whether the shorter transition period for big companies is arbitrary and capricious when the adherence to the rule depends on smaller companies to comply;
7. Whether the rule violates the First Amendment to the U.S. Constitution by compelling speech.

Amnesty International intervened in the litigation, arguing that the SEC's final rules should be upheld.<sup>85</sup> On July 23, 2013, the U.S. District Court for the District of Columbia concluded that the challenge to the SEC's final rules lacked merit.<sup>86</sup> The SEC's final rules currently stand as promulgated.

Even though the proposed rules to implement section 1502 were considerably delayed before being released in final form and remained in litigation for several months, according to an early report by the UN Group of Experts on the DRC, section 1502 had already generated "a massive and welcome impact," requiring "the world to take due diligence and conflict financing seriously."<sup>87</sup> The group reported a reduction in the level of conflict financing as commercial actors seeking conflict-free status have stopped purchasing from suspect sources and have demonstrated interest in taking ownership over greater lengths of the supply chain to create a closed system of custody over minerals from production to export.<sup>88</sup> However, the group has also called for "correct calibration" of the SEC regulations on disclosure to allow trade from areas that would improve the situation in the DRC.<sup>89</sup> Some commentators have cautioned that an unintended consequence of section 1502 could be the creation of a de facto embargo on minerals from the DRC, costing civilians their livelihood.<sup>90</sup> The interim report of the Group of Experts, though support-

85. See Petitioners' Preliminary Statement of Issues at 1–2, *Nat'l Ass'n of Mfr. v. S.E.C.* (Nov. 12, 2012) (No. 12-1422) and Motion for Leave to Intervene as Respondents at 9-13, *Nat'l Ass'n of Mfr. v. S.E.C.* (Nov. 19, 2012) (No. 12-1422).

86. *Nat'l Ass'n of Mfrs. v. S.E.C.*, No. 13-CV-635, 2013 WL 3803918 at \*1 (D.D.C., Jul. 23, 2013).

87. Letter from Fred Robarts, Coordinator Group of Experts on the DRC reestablished pursuant to resolution 1952 (2010), to Mary Schapiro, Chairman Securities and Exchange Commission (Oct. 21, 2011), <http://www.sec.gov/comments/s7-40-10/s74010-346.pdf>.

88. UN Group of Experts on the Democratic Republic of the Congo, Rep., transmitted by letter dated Nov. 18, 2011, from the Chair of the Security Council Comm. established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, ¶¶ 368–70, UN Doc. S/2011/738 (Dec. 2, 2011), [www.un.org/ga/search/view\\_doc.asp?symbol=S/2011/738](http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738).

89. *Id.* at 3.

90. See, e.g., Laura Seay, *What's Wrong with Dodd-Frank 1502: Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* 11–16 (Center for Global Development,

ive of section 1502, also contained similar concerns.<sup>91</sup> Other commentators have called attention to the need for policymakers to remain mindful of the potential risk of imposing adverse impacts on the very communities affected by conflict when considering various strategies to curb commercial contribution to conflict in the region.<sup>92</sup>

The final report of the Group of Experts credits the SEC for recognizing OECD standards, and by extension the group's due diligence framework, in the final rules.<sup>93</sup> However, the group has criticized the failure to recognize the importance of risk mitigation in the final rules.<sup>94</sup> The group favored the adoption of a risk-mitigation process that would have allowed businesses to continue purchasing minerals in areas where state security forces are present, provided the businesses implement a strategy to assess the situation and substantiate improvement.<sup>95</sup> Under the risk-mitigation approach, a company would cease to conduct business in the region only when the security situation did not improve.<sup>96</sup>

#### *Section 1504: Resource-Extraction Payment Reporting Legislation*

Section 1504 of Dodd-Frank amends section 13 of the Securities Exchange Act of 1934 to require disclosures by issuers engaged in resource extraction.<sup>97</sup> A resource-extraction issuer has a duty to disclose under the section if it is ordinarily required to file an annual report with the SEC and if it engages in the "commercial development of oil, natural gas, or minerals."<sup>98</sup> Commercial development includes exploration, extraction, processing, exporting, acquiring a license, and other activities related to oil, natural gas, or minerals.<sup>99</sup>

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Working Paper No. 284, 2012), <http://www.cgdev.org/content/publications/detail/1425843>; Jonny Hogg, *Congo Miners Suffer as Traceability Rule Bite*, REUTERS (May 5, 2011), <http://www.reuters.com/article/2011/05/05/congo-democratic-minerals-idUSLDE7431UG20110505>; Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, GOETTINGEN J. OF INT'L L. 3, 1, 129–54 (2011); Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, HARV. BUS. L. REV. ONLINE, [www.hblr.org/2012/01/conflict-minerals-and-sec-disclosure-regulation/](http://www.hblr.org/2012/01/conflict-minerals-and-sec-disclosure-regulation/) (January 10, 2012).

91. Group of Experts on the Democratic Republic of the Congo, Interim Report of the Group of Experts on the Democratic Republic of the Congo in Accordance with Paragraph 4 of Security Council Resolution 2021 (2012) UN Doc. S/2012/348 at ¶¶ 140, 151 (June 21, 2012).

92. Louise Arimatsu & Hemi Mistry, International Law Programme Paper IL PP 2012/01, *Conflict Minerals: The Search for a Normative Framework* (Sept. 2012), [http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0912pparimatsu\\_mistry.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0912pparimatsu_mistry.pdf).

93. Group of Experts on the Democratic Republic of the Congo, Final Report of the Group of Experts on the Democratic Republic of the Congo in Accordance with Paragraph 4 of Security Council Resolution 2021 (2012), annex 72 at 193–94, UN Doc. S/2012/843 (Nov. 15, 2012).

94. *Id.*

95. *Id.*

96. *Id.*

97. Dodd-Frank Act, *supra* note 16 §1504 (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m)).

98. *Id.*

99. *Id.* § 1504 (q)(1)(A).

Resource-extraction issuers, within the meaning of section 1504, must report to the SEC any payments made directly, through a subsidiary, or through an entity under its control to a foreign government or the federal government.<sup>100</sup> Covered corporations—those required to file an annual report with the SEC and engaged in commercial development of oil, natural gas, or minerals—must report how much they pay governments for activities related to commercial development on a country-by-country and project-by-project basis.<sup>101</sup> All payments that are “not *de minimis*” must be reported.<sup>102</sup> According to observers, this may potentially be consistent with an understanding of *de minimis* implying “payment so insignificant as to be irrelevant to an analysis (e.g. an investor’s risk assessment).”<sup>103</sup> The final rules promulgated by the SEC define “not *de minimis*” to mean “any payment, whether a single payment or a series of related payments that equals or exceeds \$100,000 during the most recent fiscal year.”<sup>104</sup>

Section 1504 shares much in common with the Foreign Corrupt Practices Act (FCPA). The express aim of section 1504 is to decrease corruption by increasing transparency in the resource extraction sector.<sup>105</sup> The FCPA regulates the overseas conduct of U.S. businesses and companies traded in U.S. capital markets, and it prohibits payments to “foreign officials” in exchange for favorable treatment.<sup>106</sup>

The FCPA prohibits bribery, and section 1504 mandates transparency. Under the FCPA, businesses monitor certain interactions with governments and government officials where the opportunity for or appearance of bribery or corruption may be more likely.<sup>107</sup> Section 1504 is more expansive on one level and perhaps more restrictive on another. For example, the rules implementing section 1504 require a broader range of reporting, in that *all* payments to governments must be disclosed without respect to whether there is elevated risk of illegality.<sup>108</sup> In this respect, section 1504 will require greater specificity in

100. *Id.* § 1504 (q)(2)(A).

101. *Id.* § 1504 (q)(2)(A)(i)–(ii).

102. *Id.* § 1504 (q)(1)(C)(i)(II).

103. *See, e.g.*, REVENUE WATCH INSTITUTE, DISCLOSURE RULES: U.S. AND EU STANDARDS (June 16, 2011), [www.renewwatch.org/sites/default/files/EU-US-rules.pdf](http://www.renewwatch.org/sites/default/files/EU-US-rules.pdf).

104. 77 Fed. Reg. 56,365 *et seq.* at 56,368 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).

105. *Id.* at 56,365 (Congressional intent informing increased transparency was “to help empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.”).

106. 15 U.S.C. § 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78 dd-3(f)(2)(A) (defining “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”).

107. *See* ERNST & YOUNG, UNDERSTANDING THE EFFECTS AND CHALLENGES OF SECTION 1504 at 3 (April 2013), [http://www.ey.com/Publication/vwLUAssets/Dodd\\_Frank\\_section\\_1504/\\$FILE/Understanding\\_the\\_effects\\_and\\_challenges\\_of\\_Section\\_1504.pdf](http://www.ey.com/Publication/vwLUAssets/Dodd_Frank_section_1504/$FILE/Understanding_the_effects_and_challenges_of_Section_1504.pdf).

108. *Id.*



monitoring than many corporations may currently assume, thus expanding obligations.<sup>109</sup> On another level, the definition of “foreign government” in the rules differs from the definition in the FCPA pertaining to “foreign officials,” and it appears to be at variance with prior enforcement actions.<sup>110</sup> Under the rules, a foreign government must have a majority ownership share of a company for a company to be considered controlled by a foreign government.<sup>111</sup> Prior FCPA enforcement actions have found entities with less than 50 percent foreign government ownership or control to be instrumentalities of foreign governments and the employees of such entities to be foreign officials.<sup>112</sup>

The rules do not contain a specific definition of the term *project*, appreciating that “depending on the particular industry or business in which an issuer operates, and other factors such as size,” the definition could vary.<sup>113</sup> However, the SEC has determined that the scope of the definition of a *foreign government* is not limited to foreign national governments but extends to subnational entities, “including a state, province, county, district, municipality or other level of subnational government.”<sup>114</sup> The American Petroleum Institute (API), concerned that the costs of compliance will have negative effects on the profits of its members, has opposed such disaggregated reporting.<sup>115</sup> The campaign group Publish What You Pay (PWYP) is a proponent of the measure and counters that disclosure of detailed information is essential for civil society efforts to monitor corporate and government interactions.<sup>116</sup> Oxfam America, a member of the PWYP coalition, filed suit against the SEC, seeking to compel the agency to issue a final rule pursuant to section 1504 and alleging, among other things, that the SEC’s failure to comply with section 1504’s statutory deadline to promulgate a final rule constitutes unreasonable and unlawful delay.<sup>117</sup>

However, when at last the SEC issued the final rules, the API, the Chamber of Commerce of the United States of America, the Independent Petroleum Association of America (IPAA), and the National Foreign Trade Council (NFTC) brought suit to challenge the rules. They argued, among other things, that the rules violate the First Amendment by

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109. *Id.*

110. Debevoise & Plimpton LLP, FCPA UPDATE at 3–4 (Oct. 2012), [http://www.debevoise.com/files/Publication/8cc917ab-1009-43b3-b10a-78f694d59dc7/Presentation/PublicationAttachment/017a004d-a359-492d-8e94-7cfd2aac79e4/FCPA\\_Update\\_October\\_2012.pdf](http://www.debevoise.com/files/Publication/8cc917ab-1009-43b3-b10a-78f694d59dc7/Presentation/PublicationAttachment/017a004d-a359-492d-8e94-7cfd2aac79e4/FCPA_Update_October_2012.pdf).

111. 77 Fed. Reg. at 56,389.

112. Debevoise & Plimpton LLP, FCPA UPDATE at 3–4 (Oct. 2012), [http://www.debevoise.com/files/Publication/8cc917ab-1009-43b3-b10a-78f694d59dc7/Presentation/PublicationAttachment/017a004d-a359-492d-8e94-7cfd2aac79e4/FCPA\\_Update\\_October\\_2012.pdf](http://www.debevoise.com/files/Publication/8cc917ab-1009-43b3-b10a-78f694d59dc7/Presentation/PublicationAttachment/017a004d-a359-492d-8e94-7cfd2aac79e4/FCPA_Update_October_2012.pdf).

113. 77 Fed. Reg. at 56385.

114. *Id.* at 56,388–89.

115. *Costs & Criticisms: The Facts about Disclosure Rules*, REVENUE WATCH (Sept. 7, 2011), [http://www.revenuewatch.org/publications/fact\\_sheets/costs-criticisms-facts-about-disclosure-rules](http://www.revenuewatch.org/publications/fact_sheets/costs-criticisms-facts-about-disclosure-rules).

116. Daniel Kaufmann & Veronika Penciakova, *Transparency, Conflict Minerals and Natural Resources: Debating Sections 1502 and 1504 of the Dodd-Frank Act*, THE BROOKINGS INSTITUTION (Dec. 20, 2011), [http://www.brookings.edu/opinions/2011/1220\\_debating\\_dodd\\_frank\\_kaufmann.aspx](http://www.brookings.edu/opinions/2011/1220_debating_dodd_frank_kaufmann.aspx).

117. *See* Compl. at ¶¶ 21–31, 39–45, *Oxfam America, Inc. v. S.E.C.* (D. Mass. 2012) (No. 12-10878).

compelling speech on a controversial matter to influence political affairs.<sup>118</sup> They also contended that the rules were arbitrary and capricious, in violation of the commission's statutory duty to consider the effect of a rule on efficiency, competition, and capital formation.<sup>119</sup> Oxfam America intervened in the litigation. On July 2, 2013, the U.S. District Court for the District of Columbia vacated the final rules and remanded the matter back to the SEC for further proceedings to remedy deficiencies.<sup>120</sup> The SEC's failure to allow exemptions to reporting for countries that prohibit payment disclosure, such as Angola, Cameroon, China, and Qatar, was ruled an arbitrary and capricious error.<sup>121</sup> The court also found fault with the scope of public disclosures mandated by the SEC, observing that "the Commission fundamentally miscalculated the scope of its discretion at critical junctures, viewing itself as shackled by the words 'report' and 'compilation.'"<sup>122</sup> The SEC must now remedy the rule's "deficiencies" as identified by the court on remand.

#### *Leveraging Securities Law to Promote Corporate Social Responsibility and Protect Human Rights*

As noted above, these new duties to disclose are not without detractors. Indeed, these legally binding transparency initiatives have been challenged in court and confront a common set of criticisms concerning costs and institutional capacity. Moreover, commentators and corporations troubled by the transparency trend argue that the significant compliance costs associated with new disclosure requirements would be disproportionate to any benefits to investors.<sup>123</sup> The SEC estimates that approximately 1,200 corporations may be required to file disclosures pursuant to section 1502, but other observers anticipate that the number of companies required to report could be up to five times larger.<sup>124</sup> Indeed, because the conflict minerals found in the DRC are also found in a wide variety of consumer and industrial products, including laptop computers, cell phones, jewelry, cars, and planes, Dodd-Frank stands to impact an array of different industries.

These legislative changes are also likely to have extraterritorial effects, whether or not similar measures are taken in other countries.<sup>125</sup> All U.S. and foreign corporations registered

118. Brief for Petitioners at 2, *Am. Petroleum Inst. v. S.E.C.* (D.C. Cir. 2012) (No. 12-1398).

119. *Id.* at 3; see also Brief of Intervenor Oxfam Am., Inc., *Am. Petroleum Inst. v. S.E.C.* (D.C. Cir. 2012) (No. 12-1398).

120. *Am. Petroleum Inst. v. S.E.C.*, No. 12-1668, 2013 WL 3307114, at \*1, U.S. District Court (D.D.C.) for the District of Columbia (2013).

121. *Id.* at \*12.

122. *Id.* at \*4.

123. 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, 330–31 (2011).

124. Jason Zweig, *Can Annual Reports Save Lives?* THE WALL STREET JOURNAL (Dec. 17, 2011), <http://online.wsj.com/article/SB10001424052970203733304577102412994084008.html>.

125. See *Conflict Minerals—Detailed Guidance*, FOREIGN & COMMONWEALTH OFFICE (UK), <http://www.fco.gov.uk/en/global-issues/conflict-minerals/legally-binding-process/> (last visited Dec. 29, 2013).

with the SEC must report.<sup>126</sup> Companies outside the United States that want to develop business relationships with SEC-listed companies will also need to meet the standards to remain attractive potential partners.<sup>127</sup> Consistent with the demands of conscious consumers, corporations down the supply chain that are not demonstrably conducting business in a manner that supports respect for human rights could become disfavored. Retailers may increase efforts to source from suppliers with better business practices to avoid reputational risks associated with disclosures that could link a brand with conflict or slavery.<sup>128</sup>

Beyond the potential cost and scope of mandatory reporting regimes, institutional capacity has been raised as an objection. Some commentators have argued that sections 1502 and 1504 of Dodd-Frank are improper interventions, motivated by public policy concerns rather than concerns for shareholders or potential investors being misled, which is the primary problem reporting to the SEC is intended to prevent.<sup>129</sup> Critics also question the institutional competence of the SEC for managing social, as distinct from financial, reporting.<sup>130</sup> It is argued that the information requirements of Dodd-Frank regarding conflict minerals appear to mark an unwarranted departure from the SEC's mission to "protect investors, maintain fair, orderly and efficient markets and facilitate capital formation."<sup>131</sup>

Alternatively, it would be conceivable to see the recent proliferation of social reporting duties as an appropriate interpretation of evolving market trends that have made social criteria more important to investors. As some commentators have observed, this view is consistent with that espoused by the Guiding Principles (to be discussed below) as outlined by the UN secretary-general's special representative on the issue of human rights and transnational corporations and other business enterprises.<sup>132</sup> For instance, Guiding Principle 3(d) offers that states should "encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts," and it supports the development of reporting requirements for human rights: "Financial reporting

126. See *Dodd-Frank Section 1504: Transparency Legislation*, FOREIGN & COMMONWEALTH OFFICE (UK), <http://www.fco.gov.uk/en/global-issues/conflict-minerals/legally-binding-process/dodd-frank-act-section-1504> (last visited Dec. 29, 2013).

127. See *Legally Binding Process*, FOREIGN & COMMONWEALTH OFFICE (UK), *supra* note .

128. For discussions of how a corporation's approach to social and environmental issues can affect its reputation and long-term financial performance, see, e.g., DELOITTE RESEARCH, *DISCLOSURE OF LONG-TERM BUSINESS VALUE: WHAT MATTERS? 2-3* (2012), [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_scc\\_materialitypov\\_032812.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_scc_materialitypov_032812.pdf); UNEP FINANCE INITIATIVE, ENVIRONMENTAL AND CORPORATE GOVERNANCE ISSUES TO EQUITY PRICING: 11 SECTOR STUDIES BY BROKERAGE HOUSE ANALYSTS AT THE REQUEST OF THE UNEP FINANCE INITIATIVE ASSET MANAGEMENT WORKING GROUP 7 (2004), [http://www.unepfi.org/fileadmin/documents/amwg\\_materiality\\_equity\\_pricing\\_report\\_2004.pdf](http://www.unepfi.org/fileadmin/documents/amwg_materiality_equity_pricing_report_2004.pdf).

129. See Lynn, *supra* note 123 at 330-31.

130. See Lynn, *supra* note 123 at 330-31.

131. See Lynn, *supra* note 123 at 330.

132. See generally J.C. Drimmer & N.J. Phillips, *Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues*, 1 HUM. RTS. & INT'L LEGAL DISCOURSE 131 (2012).

requirements should clarify that human rights impacts in some instances may be ‘material’ or ‘significant’ to the economic performance of the business enterprise.”<sup>133</sup>

Regarding the institutional challenge the provisions may present for the SEC, sections 1502 and 1504 are not entirely without precedent. There are other examples of the SEC reaching into the realm of social concerns with respect to security threats and climate change. The SEC established the Office of Global Security Risk within its Division of Corporation Finance to develop procedures to identify all listed companies operating in “terrorist-sponsoring states” as identified by the Department of State.<sup>134</sup> The commission has also issued interpretive guidance to companies on reporting the impact of climate change on their businesses.<sup>135</sup> Because section 1502 requires the involvement of the secretary of state and the comptroller general, any institutional limitations on the part of the SEC could be addressed with support from other agencies with relevant experience. This approach is supported in Guiding Principle 8, which calls for horizontal policy coherence between governmental departments and agencies.

Finally, through cooperation, corporations may be able to reduce the costs of compliance. For example, the Electronic Industry Citizenship Coalition (EICC) has partnered with the Global e-Sustainability Initiative (GeSI) to form the voluntary Conflict-Free Smelter (CFS) assessment program, which will aid companies in identifying sources that are conflict free.<sup>136</sup> The Public Private Alliance for Responsible Minerals Trade (PPA), led by a governance committee consisting of the State Department, the U.S. Agency for International Development (USAID), industry, and other civil society organizations such as the Enough Project, intends to pilot supply-chain systems to enable corporations to source from mines audited and certified as conflict free.<sup>137</sup> Over time, cooperative efforts such as these could reduce the costs any one corporation will incur.

133. *Id.* (citing Ruggie Report § 3(d) & (cmt)). “The commentary to the draft Guiding Principles released in November 2010 was even more explicit on this point: ‘Financial reporting requirements should clarify that human rights impacts in some instances may be “material” or “significant” from the investors’ point of view and indicate when they should be disclosed.’” See *Draft Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework* (Nov. 22, 2010), <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf> § 5 (cmt) (“2010 Draft Ruggie Report”).

134. Amy Deen Westbrook, *What’s in Your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151, 1195–1221 (2010) (describing and analyzing the effectiveness of the Office of Global Security Risk), <http://www.washburnlaw.edu/faculty/westbrook-amy-fulltext/2010-59depaulawreview1151.pdf>.

135. See John M. Broder, *S.E.C. Adds Climate Risk to Disclosure List*, N.Y. TIMES (Jan. 28, 2010) at B1.

136. See ELECTRONIC INDUSTRY CITIZENSHIP COALITION & GLOBAL E-SUSTAINABILITY INITIATIVE, EICC-GeSI CONFLICT FREE SMELTER (CFS) ASSESSMENT PROGRAM: FREQUENTLY ASKED QUESTIONS (2012) [http://www.gesi.org/DesktopModules/Bring2mind/DMX/Download.aspx?TabId=129&Command=Core\\_Download&EntryId=515&PortalId=0&TabId=129](http://www.gesi.org/DesktopModules/Bring2mind/DMX/Download.aspx?TabId=129&Command=Core_Download&EntryId=515&PortalId=0&TabId=129).

137. See U.S. STATE DEP’T, PUBLIC-PRIVATE ALLIANCE FOR RESPONSIBLE MINERALS TRADE (Nov. 15, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/177214.htm>.

### *Proposed Legislation: Business Transparency on Trafficking and Slavery*

Further human-rights-related amendments to the Securities and Exchange Act could be on the horizon. A federal proposal to require supply-chain transparency would have reached a wide range of business enterprises. The U.S. State Department has observed in its report on human trafficking, “with the majority of modern slaves in agriculture and mining around the world . . . it is impossible to get dressed, drive to work, talk on the phone, or eat a meal without touching products tainted by forced labor.”<sup>138</sup> House Bill 2759, titled the Business Transparency on Trafficking and Slavery Act, proposed to amend section 13 of the Securities Exchange Act of 1934 by adding another new subsection that would mandate disclosures relating to slavery conditions within product supply chains.<sup>139</sup>

Under the proposal, issuers would have been required to include in their annual reports to the SEC a disclosure describing measures, if any, the company had taken to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within its supply chains.<sup>140</sup> The text of the bill explained that the worst form of child labor is work performed by children that would violate international standards, including those set forth in the International Labour Organization Convention No. 182.<sup>141</sup>

138. U.S. STATE DEP’T, *TRAFFICKING IN PERSONS REPORT 30* (10th ed. 2010), <http://www.state.gov/documents/organization/142980.pdf>.

139. Business Transparency on Trafficking and Slavery Act of 2011, H.R. 2759, 112th Cong. (1st Sess. 2011). See also Tawnee Vevacqua, *Investors Support the Business Transparency on Trafficking and Slavery Act*, FTS BLOG (Jan. 27, 2012), <http://ftsblog.net/2012/01/27/investors-support-the-business-transparency-on-trafficking-and-slavery-act/> (reporting that the bill was supported by the Interfaith Center on Corporate Responsibility and the Forum for Sustainable and Responsible Investment); ATEST *National Call on Business Transparency Legislation*, ATEST (June 27, 2012), [http://www.endslaveryandtrafficking.org/legislative\\_updates/atest-national-call-business-transparency-legislation](http://www.endslaveryandtrafficking.org/legislative_updates/atest-national-call-business-transparency-legislation); Bill Summary & Status Search Results, THE LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/?&Db=d112&querybd=@FIELD%28FLD001+@4%28Human+trafficking%29%29> (last visited June 6, 2013); see also Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Congress (1st Sess. 2013) (proposing increased government oversight of industries using forced and child labor, encouraging publicly traded and private entities to “disclose annually on their Web sites and to the Secretary any measures taken to address conditions of forced labor, slavery, human trafficking, and child labor within their supply-chains.” The bill was referred to committee on February 28, 2013); See also California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2012); Michael F. Taveira, *United States: California Transparency in Supply Chains Act*, MONDAQ (April 22, 2013), <http://www.mondaq.com/unitedstates/x/235020/California+Transparency+In+Supply+Chains+Act>; Anna Williams Shavers, *Human Trafficking, the Rule of Law, and Corporate Social Responsibility*, S.C. J. INT’L L. & BUS. (Fall, 2012) n.243.

140. *Id.*

141. The ILO Convention No. 182, Article 3, provides in pertinent part that the term “the worst forms of child labour” comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring, or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

The bill was referred to the House Financial Services Committee and later failed in the Subcommittee on Capital Markets and Government Sponsored Enterprises.<sup>142</sup> The measure was unsuccessfully reintroduced, and though there has not been further action on it to date, the effort does illustrate an increasing interest in business transparency.

#### Modern Slavery in the Stream of Commerce

The United States is the world's largest importer.<sup>143</sup> In 2010, the Department of Labor identified 134 goods from 74 countries around the world made by forced labor and child labor.<sup>144</sup> According to a U.S. Department of State Human Smuggling and Trafficking Center report, an estimated 800,000 men, women, and children are trafficked across international borders each year.<sup>145</sup> Of these, approximately 80 percent are women and girls, and up to 50 percent are children under the age of eighteen.<sup>146</sup>

Though the Smoot-Hawley Tariff Act of 1930 (Smoot-Hawley) already prohibits importation of goods made with forced labor or convict labor, it has broad exceptions.<sup>147</sup> Moreover, because the original legislative intent of Smoot-Hawley was to protect American manufacturers from unfairly priced goods and not to protect consumers from tainted goods, courts have held that consumers do not have standing to bring a civil action in U.S. courts for enforcement of the labor provision of Smoot-Hawley.<sup>148</sup>

#### Objectives and Obligations

The proposed legislation reflected an understanding that forced labor, slavery, human trafficking, and the worst forms of child labor are serious human rights abuses committed for commercial profit, and that the current legislative and regulatory framework to prevent goods produced under abusive conditions from entering the stream of commerce

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(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

<http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>.

142. *Business Transparency on Trafficking and Slavery Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr2759#overview>. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:hr2759> (last visited Dec. 29, 2013).

143. *Statistics Database: United States*, WORLD TRADE ORG. (Apr. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US> (reporting U.S. rank in world trade number one in imports, number two in exports).

144. U.S. DEP'T LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 1 (2012), <http://www.dol.gov/ilab/programs/ocft/2012TVPRA.pdf>.

145. See U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 7 (2008), <http://www.state.gov/documents/organization/105655.pdf>.

146. *Id.*

147. See *Business Transparency on Trafficking and Slavery Act of 2011*, *supra* note 142 at § 1(b)(4).

148. *Id.* § 1 (b)(5). 21 J. OF POL'Y HIST. No. 2 (2009). For a discussion of historical and political factors that contributed to the creation of Smoot-Hawley, see generally Kumiko Koyama, *The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill?*

flowing into the United States remains gravely inadequate.<sup>149</sup> Consequently, the proposed Business Transparency on Trafficking and Slavery Act was intended to offer information to the public and to encourage businesses to identify and address abusive conditions that may exist along links in their supply chains.<sup>150</sup>

The proposed legislation would have imposed a duty on issuers having annual global receipts in excess of \$100 million to disclose information in a report titled *Policies to Address Forced Labor, Slavery, Human Trafficking and the Worst Forms of Child Labor*.<sup>151</sup> The required disclosure under the proposal would have described the extent to which, if any, the issuer:

1. “[m]aintains a policy to identify and eliminate risks of forced labor, slavery, human trafficking, and the worst forms of child labor within its supply chain”;
2. prohibits the use of its “products, facilities, or services to obtain or maintain someone under conditions of forced labor, slavery, human trafficking, and the worst forms of child labor”;
3. “[e]ngages in verification of product supply chains to evaluate and address risks of forced labor, slavery, human trafficking and the worst forms of child labor”;
4. “[a]ssesses supply chain management and procurement systems” to verify that suppliers have systems in place “to identify risks of forced labor, slavery, human trafficking and the worst forms of child labor”;
5. “[r]equires its suppliers . . . to certify that materials incorporated into . . . product[s] comply with the laws regarding forced labor . . . in the country or countries in which they [conduct] business”;
6. “[m]aintains internal accountability standards . . . and [sets] procedures” for failure to implement systems to uphold such standards;
7. educates employees with “direct responsibility for supply chain management” about issues associated with “forced labor, slavery, human trafficking and the worst forms of child labor” to “mitigat[e] risks within the supply chain”;
8. “audits labor recruiters and ensures that recruitment practices are compliant with company standards.”<sup>152</sup>

If the issuer maintains a policy to identify and eliminate risks of labor abuses, the disclosure shall include the text of the policy or a substantive description of the elements

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149. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 206, 207, 212, 215 (2011) (establishes a minimum wage, sets a forty-hour week, guarantees overtime compensation, and prohibits child labor; also includes a “Hot Goods” provision, prohibiting the sale or transport of goods from factories with conditions violating its provisions).

150. Business Transparency on Trafficking and Slavery Act of 2011, § 1(b)(4), §1(c)(3), H.R. 2759, 112th Cong. (1st Sess. 2011).

151. *Id.* § 2(r)(4), §2(r)(5)(B).

152. *See id.* § 2(r)(1)(A)-(J).

of the policy.<sup>153</sup> In its disclosure, the issuer should describe the greatest risks that it has identified within the supply chain and the steps it has taken toward ameliorating potential abuses.<sup>154</sup> The issuer should also state whether its supply-chain assessments to address potential abuses and identify risks were conducted by an independent third party.<sup>155</sup> In addition, the issuer should specify whether its verification process includes consultations with independent unions, workers' associations, or workers within workplaces.<sup>156</sup>

An issuer filing disclosures under the proposed legislation would be required to make the information contained in its disclosure to the SEC available to the public with a "conspicuous and easily understood link to the relevant information" that is located on the issuer's home page and clearly labeled "Policies to Address Forced Labor, Slavery, Human Trafficking and the Worst Forms of Child Labor."<sup>157</sup> Issuers without a Web site would be required to respond within thirty days after receiving a written request for the disclosure from an investor or consumer. Such issuers would achieve compliance with the disclosure provision by providing that party with the information it reported to the SEC pursuant to the legislation.<sup>158</sup> In instances where the issuer has identified issues within its supply chain, it should ensure that remediation is provided to those who have been identified as victims of forced labor, slavery, human trafficking, and the worst forms of child labor, and it must report on remedial measures taken.<sup>159</sup>

Though this particular proposal did not succeed, the growing public concern about product origins suggests that similar measures may be introduced in the future.

### **State Legislation: Objectives and Obligations**

In addition to federal legislative action to promote greater transparency to protect human rights, there is similar activity at the state level. A variety of state and local governments have undertaken initiatives aimed at improving transparency and alleviating poverty that could have positive impacts on the promotion of human rights. A few illustrations of these efforts are described below.

#### *California Transparency in Supply Chains Act (CTSCA)*

In 2010, California enacted the first state law requiring manufacturers and retail companies to publicly disclose their policies to eradicate slavery, forced labor, and human trafficking within their supply chains.<sup>160</sup> The CTSCA was the inspiration for the proposed federal

153. *Id.* § 2(r)(1)(A).

154. *Id.* § 2(r)(1)(C)(i).

155. *Id.* § 2(r)(1)(C)(ii).

156. *Id.* § 2(r)(1)(C)(iii).

157. *Id.* § 2(r)(4).

158. *Id.*

159. *Id.* § 2(r)(1)(J).

160. CAL. CIV. CODE § 1714.43 (West 2012) [hereinafter Cal. Supply Chain Act].



bill,<sup>161</sup> and therefore the two acts are very similar. The CTSCA differs from the federal proposal in that the federal proposal limits disclosure requirements to publicly traded companies and therefore requires disclosure to be made in companies' annual reports to the SEC.<sup>162</sup> The CTSCA, on the other hand, requires all retailers and manufactures that do business in California and have over \$100 million in annual gross receipts to disclose on their company Web site any efforts being made to eradicate slavery and human trafficking from their supply chains.<sup>163</sup>

The law takes up a "critical clarion call for action" made by the California Department of Justice in a 2007 report entitled *Human Trafficking in California*, which contained a comprehensive list of recommendations to combat human trafficking.<sup>164</sup> The report concluded that "California bears a moral responsibility to exert leadership, through government and business purchasing practices, to implement and monitor codes of conduct assuring fair and humane labor practices throughout their supply chain."<sup>165</sup> As the world's ninth-largest economy—after the United States, China, Japan, Germany, France, the United Kingdom, Italy, and Brazil<sup>166</sup>—California passed the CTSCA to leverage the substantial economic power of California consumers to promote social responsibility in the business community and prevent the use of forced labor in its supply chains.

The CTSCA became effective January 1, 2012. Retailers and manufacturers subject to its provisions are required to disclose their efforts, if any, to ensure that their supply chains are free from slavery and human trafficking by evaluating and addressing risks along links of the supply chain. Initial estimates indicate that California's supply-chain transparency reporting requirements will reach approximately 3,200 companies.<sup>167</sup>

As with the requirement under the failed federal provision, the disclosure must be prominently displayed on the retail seller's or manufacturer's Web site and include a link to the required information placed on the business's home page.<sup>168</sup> Those retailers or manufacturers without an Internet presence are required to provide a written disclosure

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161. Business Transparency on Trafficking and Slavery Act of 2011, §2 (b)(3).

162. *Id.* preamble.

163. Cal. Supply Chain Act § 1714.43(a)(1), (b).

164. *The California Transparency in Supply Chains Act of 2010: New Information to Aid Consumer Purchasing Decisions: Hearing on S.B. 657 before the Assemb. Comm. on Judiciary*, at 1–2 (June 23, 2010) [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0651-0700/sb\\_657\\_cfa\\_20100628\\_112914\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_cfa_20100628_112914_asm_comm.html) (last visited July 10, 2012).

165. *Id.* at 1.

166. CTR. FOR CONTINUING STUDY OF THE CAL. ECONOMY, 2010 CALIFORNIA ECONOMY RANKINGS (2012), <http://www.ccsce.com/PDF/Numbers-Jan-2012-CA-Economy-Rankings-2010.pdf>; *California Economy Ranking in the World*, ECONOMIC POST (Feb. 3, 2011), <http://econpost.com/californiaeconomy/california-economy-ranking-among-world-economies>.

167. Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. 80, 81 (2012).

168. *See* Cal. Supply Chain Act, *supra* note 163 at § 1714.43(b).

of efforts to eradicate trafficking within thirty days of receiving a written request for the disclosure from a consumer.<sup>169</sup>

The disclosure must, at a minimum, explain the extent to which the business entity is engaged in activities to eradicate slavery and trafficking, including (1) verifying product supply chains to evaluate and address risks of human trafficking and slavery; (2) auditing suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains; and (3) requiring direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.<sup>170</sup> These disclosures must note whether audits for information were conducted by an independent third party and were unannounced.<sup>171</sup> Failure to comply with California's reporting requirements may result in an action brought by the attorney general of California for injunctive relief.<sup>172</sup>

Although the only relief available under the CTSCA for failure to report is injunctive, the enforcement strength of the statute may be in consumer choice and consciousness. California's Business and Professions Code permits consumer claims for unfair business practices (section 17200) and for false advertising (section 17500) complement the CTSCA.<sup>173</sup> A California resident sued Nike under this code for making false and misleading statements about labor conditions in its factories in Asia.<sup>174</sup> After the U.S. Supreme Court declined to review the lower court's decision,<sup>175</sup> Nike settled the suit.<sup>176</sup>

The recent disclosure duties placed on industry by new federal and state legislation have faced both praise and criticism from various stakeholders. For example, in California the new law was celebrated by a broad coalition of human rights, law enforcement, and employee rights organizations as an important advance in protecting human rights. However, it was condemned as costly and burdensome by a coalition of business trade organizations including the California Chamber of Commerce, California Grocers Association, California Manufacturers and Technology Association, California Retailers Association, and TechAmerica.<sup>177</sup> Similarly, at the federal level, reporting requirements and due diligence obligations were welcomed by rights campaigners but met with resistance from some

169. *Id.*

170. *Id.* at (c)(1)–(3).

171. *Id.* at (c)(2).

172. *Id.* at (d).

173. CAL. BUS. & PROF. CODE § 17,200 *et seq.* (2003).

174. *Kasky v. Nike, Inc.*, 45 P.3d, 243, 119 Cal. Rptr.2d 296 (Cal. 2002).

175. *Nike, Inc. v. Kasky*, 539 U.S. 654, 657–58 (2003) (dismissing grant of certiorari as improvidently granted).

176. Press Release, Fair Labor Association, Fair Labor Association Receives \$1.5 Million in Settlement of *Kasky v. Nike* First Amendment Case: Funds to Be Used to Benefit Factory Workers and Consumers (Sept. 12, 2003). See also Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. J. INT'L HUM. RTS. 262, 286 n.168 (2008) (citing William Baue, *The Implications of the Nike and Kasky Settlement on CSR Reporting*, ETHICAL CORPORATION (September 23, 2003)).

177. *Bill Analysis: Hearing on S.B. 657 before the Assembly Comm. on Judiciary* 12–13 (CA Jun. 29,

segments of the business community.<sup>178</sup> Nonetheless, voluntary CSR reporting continues unabated in response to political and market pressures. There is no reason to discount the increasing relevance of transparency initiatives. However, questions remain about how these efforts will ultimately impact industry.

### *Living-Wage Ordinances*

Several U.S. jurisdictions have adopted policies intended to improve socioeconomic conditions in their communities by elevating the wages of employees through the contractual choices made for provision of public services.<sup>179</sup> Because governments award contracts to private businesses to provide services to the public, and taxpayers fund these contracts, living-wage ordinances reflect a growing sentiment that it is appropriate to direct taxpayer funds toward advancing the interests of municipalities and taxpayers.<sup>180</sup> Government contracts are intended to promote economic development, job creation, and retention. Also chief among the interests articulated by local governments are creating jobs that keep workers (who are also taxpayers) and their families out of poverty.<sup>181</sup> Yet evidence suggests that people who provide municipal services often work for low wages and live at or below the poverty line.<sup>182</sup> Evidence further suggests that paying living wages tends to improve the quality of government services by reducing the instability of absenteeism and high turnover.<sup>183</sup>

Living-wage ordinances require that government service contracts be awarded only to those employers that pay employees at a specified minimum compensation level.<sup>184</sup> Though the wage levels vary among regions, this level is usually above that set under a legally mandated minimum wage and is meant to allow individuals employed full time to provide food, housing, health care, child care, and basic transportation for

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2010), [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0651-0700/sb\\_657\\_cfa\\_20100628\\_112914\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_cfa_20100628_112914_asm_comm.html).

178. See, e.g., 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, 336–39 (2011); Cecelia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105, 120 (2012); Letter from the U.S. Chamber of Commerce to the SEC (Feb. 28, 2011), <http://www.sec.gov/comments/s7-40-10/s74010-87.pdf>.

179. Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1057 (2007).

180. T. WILLIAM LESTER & KEN JACOBS, CTR. FOR AM. PROGRESS ACTION FUND, *CREATING GOOD JOBS IN OUR COMMUNITIES: HOW HIGHER WAGE STANDARDS AFFECT ECONOMIC DEVELOPMENT AND EMPLOYMENT* (Nov. 2010), [http://www.americanprogressaction.org/issues/2010/11/pdf/living\\_wage.pdf](http://www.americanprogressaction.org/issues/2010/11/pdf/living_wage.pdf).

181. *Id.*

182. Los Angeles Admin. Code Ordinance No. 172336, Art. 11 Living Wage, Sec. 10.37 Legislative Findings at 1 (1996), [http://bca.lacity.org/index.cfm?nxt=lco&nxt\\_body=content\\_two.cfm](http://bca.lacity.org/index.cfm?nxt=lco&nxt_body=content_two.cfm).

183. *Id.*

184. Jon Gertner, *What Is a Living Wage?* eq N.Y. TIMES (Jan. 15, 2006), <http://www.nytimes.com/2006/01/15/magazine/15wage.html?pagewanted=all>.

themselves and their families.<sup>185</sup> Currently, thirty-two California cities and counties have living-wage ordinances.<sup>186</sup>

Although the base wage in living-wage ordinances varies, certain basic features are shared among different jurisdictions. For example, the basic type of employer covered depends on the size of the contract and the number of employees.<sup>187</sup> Generally, wages are adjusted upward annually from a set level linked to an accepted index.<sup>188</sup> For instance, San Diego's ordinance requires annual upward adjustments to reflect changes in the consumer price index for all urban consumers within its metropolitan statistical area.<sup>189</sup> In addition to meeting the fair-wage floor, covered employers are required to provide covered employees with a minimum number of compensated days of leave for illness, vacation, or personal necessity upon the employee's request.<sup>190</sup> Covered employers must also grant a set number of uncompensated days of leave to covered employees who have exhausted compensated days off.<sup>191</sup> Employees are to be notified of their rights pursuant to living-wage provisions, and employers must post such notifications and others at the work site in a prominent place in an area frequently and easily accessed by employees.<sup>192</sup>

In the instance of an employer's violation of a living-wage ordinance, the municipality with which the employer has contracted may declare a material breach of contract and exercise remedies including contract termination and a monetary refund for payments on services not yet rendered.<sup>193</sup> Furthermore, an employer in violation of a living-wage ordinance may be prohibited from future contracts for a term of years or until restitution has been fully paid.<sup>194</sup> Governments may also sue a covered employer for failure to comply with living-wage ordinances and seek remedies including, among others, payments to covered employees for unpaid wages and health care premiums.<sup>195</sup> Additionally, employers that fail to comply with these ordinances risk incurring fines for each violation; a greater fine is accrued for each day the violations remain uncured.<sup>196</sup>

185. See *Living Wage Overview*, UC BERKELEY LABOR CTR., <http://laborcenter.berkeley.edu/livingwage/overview.shtml> (last visited Mar. 14, 2012).

186. *Id.*

187. See, e.g., *Living Wage and Self-Sufficiency Resources*, UC BERKELEY LABOR CTR., <http://laborcenter.berkeley.edu/livingwage/resources.shtml> (last visited Dec. 29, 2013).

188. *Id.*

189. See San Diego Municipal Code, Art. 2 Admin. Code, Div. 42: City of San Diego Living Wage Ordinance § 22.4220 (b) [hereinafter San Diego Living Wage Ordinance].

190. See, e.g., *Living Wage and Self-Sufficiency Resources*, UC BERKELEY LABOR CTR., <http://laborcenter.berkeley.edu/livingwage/resources.shtml> (last visited Dec. 29, 2013).

191. *Id.*

192. *Id.*

193. See, e.g., San Diego Living Wage Ordinance § 22.4230 (d)(1)(enforcement provisions).

194. See, e.g., San Diego Living Wage Ordinance § 22.4230 (d)(2).

195. See, e.g., San Diego Living Wage Ordinance § 22.4230 (d)(4)(i).

196. See, e.g., San Diego Living Wage Ordinance § 22.4230 (d)(4)(ii).

### *Public Procurement Ordinances*

Like living-wage ordinances, public procurement programs also use contractual choices to promote economic development and social justice.<sup>197</sup> Public procurement ordinances frequently give preference to local businesses for awarding bids on public projects.<sup>198</sup> On occasion, however, local government contracting choices have been used to impact global issues by structuring incentives to create changes in social policies.<sup>199</sup> For example, public authorities in the United States and Europe used procurement practices to protest apartheid by threatening corporations operating in South Africa with the loss of government contracts.<sup>200</sup>

Public procurement promises to be an important avenue for influencing corporate conduct, as sustainable and social procurement concepts gain ground and government authorities exercise such preferences. In the European Union, purchases by public authorities already account for an estimated 20 percent of GDP.<sup>201</sup> The European Commission has long acknowledged the potential social dividends public procurement policies in the EU member states could pay in promoting corporate respect for human rights and environmental protection.<sup>202</sup> In fact, the European Parliament has asked the European Commission to explore how social and environmental considerations could be integrated into public procurement and to educate public purchasers about the opportunities for

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197. For an examination of how governments use contracting to promote social justice, see generally CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT AND LEGAL CHANGE* (2007).

198. See California Small Business Procurement and Contract Act, CAL. GOV'T CODE § 14835–47 (West 2012). Public procurement ordinances allow governments to prefer domestic producers when procuring goods over producers from other countries. A simple example of public procurement is the government's purchase of domestically manufactured automobiles for police vehicles and other government uses. Such ordinances are often viewed as barriers to trade because they allow governments to procure goods from domestic producers that may be less efficient than those of foreign producers. Developing countries often use public procurement as a way to strengthen infant industries, and public procurement policies have been shown to have a meaningful impact on development. Victor Mosoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?* 25 U. PA. J. INT'L ECON. L. 593, 599 (2004). At the state level, procurement ordinances like California's allow the state government to give preference to companies that are either registered in or have their principle place of business in California when purchasing goods for government use. See Cal. Gov't Code §§ 14835–47. “Nothing in the purposes animating the commerce clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

199. Christopher McCrudden, *Using Public Procurement to Achieve Social Outcomes*, 28 NATURAL RESOURCES FORUM, 257, 263 (2004).

200. See McCrudden, *BUYING SOCIAL JUSTICE*, *supra* note 197 at 9–10.

201. Christopher Bovis, *Where Does the Regulation of Public Procurement and Public Private Partnerships Take the Member States of the EU?* 2 EUR. PUB. PRIVATE PARTNERSHIP L. REV. 53, 53 (2011).

202. See Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW J. INT'L HUM. RTS. 262, 290 (2008); Peter Kunzlik, *Making the Market Work for the Environment: Acceptance of (Some) “Green” Contract Award Criteria in Public Procurement*, 15 J. ENVTL. L. 175, 189 (2003).

greater integration of these considerations in their purchasing decisions.<sup>203</sup> The commission has also issued an interpretive communication on European community law relevant to public procurement.<sup>204</sup> Therefore, it is clear that governments are leveraging their dual role in the market as regulators and purchasers through procurement programs that take account of social criteria.

### Comparative Approaches to Corporate Social Responsibility

As illustrated by socially conscious public procurement policies in the European Union, the United States is not alone in experimenting with creating incentives to promote greater corporate social responsibility. Legislative organs in other jurisdictions have also undertaken efforts to further define the responsibilities of corporations in global society. Additionally, courts outside the United States have exercised jurisdiction over corporations accused of engaging in conduct contrary to respect for human rights.<sup>205</sup> A few examples are discussed below.

#### *Litigation*

Though the future of civil litigation in the United States against corporations for their role in human rights abuses has been sharply curtailed by the Supreme Court's recent decision in *Kiobel* (discussed earlier), similar suits against corporations have been and continue to be filed in other jurisdictions. Several resolutions of the European Parliament speak to the question of civil liability for corporate conduct abroad alleged to involve human rights abuses.<sup>206</sup> European conflict-of-laws regulations allow the courts of EU member states to assert jurisdiction over cases against corporations registered or domiciled in the European Union for damages sustained in third countries.<sup>207</sup> Therefore, "courts of EU Member States are competent to adjudicate civil proceedings against corporations based in the EU for acts which have taken place outside the EU even if the damage occurred outside the EU and the victim is not domiciled in the EU."<sup>208</sup>

Such cases have been filed in the English High Court against companies such as BP Exploration Co. for their environmental impact in Colombia. A Belgian court entertained the claims of refugees from Myanmar who brought suit against TotalFinaElf, alleging the

203. See Wouters, *Corporate Human Rights Responsibility*, *supra* note 201 at 290 n.198 (citing Parliament Resolution 2002/278 on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366-C5-0161/2002/2069 (COS) of 30 May 2002, 2003 O.J. (C 187 E), Preamble, Recital J.)).

204. *Commission Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement*, COM (2001).

205. For additional information on such developments outside the U.S., see the chapters by Chambers and Tyler, Srinivasan, and Muchlinski and Rouas in this book.

206. See, e.g., Wouter, *supra* note 201, at 295 n.234.

207. See, e.g., Wouter, *supra* note 201, at 295 n.235.

208. See, e.g., Wouter, *supra* note 201, at 295.

company was complicit in crimes associated with the construction and operation of a pipeline committed against civilians by the Myanmar military.<sup>209</sup> One episode has spawned litigation across multiple jurisdictions against the Dutch multinational Trafigura after a ship chartered by its London office unloaded a waste shipment in the Ivory Coast and residents near the disposal sites became ill.<sup>210</sup> Proceedings were instituted against the corporation in the Netherlands, the United Kingdom, and France.<sup>211</sup> A case commenced by Nigerian farmers and the Friends of the Earth against Shell in the Netherlands seeking reparation for environmental contamination concluded with the court finding the firm's Nigerian subsidiary liable for damage and ordering the subsidiary to pay compensation.<sup>212</sup>

### *Reporting Regulation*

Though some European commentators lament that European approaches to corporate social responsibility are “both broad and underdeveloped,”<sup>213</sup> to the extent that certain member states of the European Union already do mandate reporting on matters that are not financial, the European policy agenda on corporate social responsibility appears more established than current U.S. efforts. On the other hand, it was after the U.S. Congress passed section 1504 of the Dodd-Frank Act that the European Commission issued draft directives requiring companies listed on EU stock exchanges to disclose their payments to governments for oil, gas, minerals, and timber.<sup>214</sup> Individual European nations appear to be working toward transparency on social issues relevant to corporate respect for human rights, even though EU law currently does not formally require companies to adopt policies or report on CSR efforts.<sup>215</sup> Nevertheless, a conceptual shift in the status of CSR is

209. *Case Profile: Total Lawsuit in Belgium (re Myanmar)*, BUS. & HUMAN RIGHTS RES. CTR., <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma> (last visited Dec. 29, 2013).

210. *Case Profile: Trafigura Lawsuits (re Cote d' Ivoire)*, BUS. & HUMAN RIGHTS RES. CTR., <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire> (last visited Apr. 27, 2012).

211. See Rob Evans, *Trafigura Fined €1M for Exporting Toxic Waste to Africa*, THE GUARDIAN (UK, July 23, 2010).

212. *Shell Nigeria Case: Court Acquits Firm on Most Charges*, BBC NEWS AFRICA (Jan. 30, 2013) <http://www.bbc.co.uk/news/world-africa-21258653>. See also Friday Alfred Akpan v. Royal Dutch Shell, PLC, Judgment District Court of the Hauge, Docket No. C/09/337070/HA ZA 09-1580 (Jan. 30, 2013) (declaratory judgment: subsidiary committed specific tort of negligence insufficiently securing against sabotage and oil spills and ordering compensation for damages suffered).

213. See, e.g., Ruben Zandvliet, *Corporate Social Responsibility Reporting in the European Union: Towards a More Univocal Framework*, 18 COLUM. J. EUR. L. F. 38 (2011).

214. See Revenue Watch, U.S. and EU Standards, *supra* note 103, at 1. See also, Barbara Lewis, *EU Politicians Vote for Tough Oil, Gas Anti-corruption Law*, REUTERS CANADA (Sept. 18, 2012), <http://ca.reuters.com/article/topNews/idCABRE88H0LE20120918>.

215. The current EU CSR Strategy makes clear that while it is planning to legislate in the area of reporting and public procurement pertaining to human rights, CSR remains a voluntary initiative within the EU sphere. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14*

emerging in the European Union as the commission has explicitly departed from an earlier definition of CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”<sup>216</sup> More recently, in its renewed CSR strategy communication, the commission defines CSR as “the responsibility of enterprises for their impacts on society,”<sup>217</sup> wording conceptually more in line with that presented in the Guiding Principles on business and human rights, discussed below. It also emphasizes the importance of having processes in place for corporations to “integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders” to minimize adverse impacts and maximize “the creation of shared value” for shareholders and society at large.<sup>218</sup>

Two directives of the European Parliament are worthy of note with respect to recent developments in CSR and human rights in the region: the Accounts Modernization Directive and the Unfair Commercial Practices Directive. The Accounts Modernization Directive amends earlier directives that had informed provisions of company law in Europe with respect to reporting and accounting. It provides that annual reports should, where “necessary” to understand a company’s position or performance, include “non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.”<sup>219</sup> Reporting requirements under the Modernization Directive have been deemed by some as “ambiguous” due to the lack of clarity on what actually encompasses an environmental or employment issue to be reported.<sup>220</sup> The Modernization Directive has been seen as “undemanding” due to the wide discretion vested in corporations regarding whether and what to report.<sup>221</sup>

Several member states of the European Union have implemented, and many have even enhanced, the nonfinancial reporting measures of the directive. For instance, French law mandates disclosure of nonfinancial performance measures.<sup>222</sup> This requirement means

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for *Corporate Social Responsibility*, EUROPEAN COMMISSION, [http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf). For a review of measures taken by different jurisdictions, see STEVE LYDENBERG & KATIE GRACE, *INNOVATIONS IN SOCIAL AND ENVIRONMENTAL DISCLOSURE OUTSIDE THE UNITED STATES* (2008), [http://www.domini.com/common/pdf/Innovations\\_in\\_Disclosure.pdf](http://www.domini.com/common/pdf/Innovations_in_Disclosure.pdf).

216. See Beate Sjaafjell & Linn Anker-Sorensen, *Directors’ Duties and CSR* (forthcoming 2013) (citing COM (2001) 366 final).

217. *Id.* (citing COM (2011) 681 final, Section 3.1).

218. *Id.* (citing COM (2011) 681 final, section 3.2).

219. *Id.* (citing Parliament and Council Directive L 178/16, 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, 2003 O.J. (L 178) 16 (EC) (Articles 1.4 and 2.10 of the Directive pertains to annual reporting and consolidated annual reporting)).

220. *Id.*

221. Zandvliet, *supra* note 213 at 39.

222. Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT’L L. REV., 855, 878 (2007) (citing Law No. 2001-420 of May 15, 2001, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 16, 2001 at 7776).



that corporations listed on the French stock exchange are required to comment on the social and environmental consequences of their activities in their annual reports.<sup>223</sup> Belgium, Germany, and the United Kingdom all mandate disclosures by pension-fund managers.<sup>224</sup> Under these disclosure requirements, managers of pension funds must reveal whether and how social, environmental, and ethical issues inform investment decisions.<sup>225</sup> Denmark has integrated international CSR instruments (discussed below) into its reporting requirements.<sup>226</sup>

The Unfair Commercial Practices Directive prohibits false and misleading advertisements and renders the use of unfair commercial practices that improperly distort transactional decision making actionable under EU law.<sup>227</sup> This does not exclude representations made by corporations with respect to social or environmental impacts. Therefore, it is feasible that “inaccurate or incomplete representations by corporations about CSR or their adherence to and compliance with voluntary codes of conduct [could] be attacked.”<sup>228</sup> Litigation brought against Nike in California under state laws prohibiting unfair business practices and false advertising raised similar claims.

The directive prohibits commercial practices that (1) conflict with professional diligence obligations and (2) alter materially or are likely to alter materially the typical consumer’s choices, distorting his or her decision making with respect to a product.<sup>229</sup> Put another way, it is unfair under EU law for commercial advertisements to “appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he [or she] would not have taken otherwise.”<sup>230</sup> The efforts

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223. *Id.*

224. *See* Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy, etc.) Amendment Regulations, 1999 S.I. 1999/1849, reg. 11A(a) (UK) (amending Occupational Pension Schemes (Investment) Regulations, 1996, SI 1996/3127 (UK)); Local Government Pension Scheme (Management and Investment of Funds) (Amendment) Regulations, 1999, S.I. 1999/3259 (UK) (amending Local Government Pension Scheme (Management and Investment of Funds) Regulations, 1998, S.I. 1198/1831 (UK)); Law Concerning Supplementary Pensions and the Fiscal Regime of Such Pensions and of Certain Supplementary Benefits Concerning Social Security (April, 28, 2003) art. 42, §1 (F.R.G.); *see also* Wouters, *supra* note 176, at 285 n.158 (listing citations to the laws of member states that have exceeded EU reporting requirements).

225. *See* Wouters, *supra* note 176, at 285 n. 158.

226. Karin Buhmann, *Migration of CSR-Related International Norms into Companies Self-Regulation Through Company Law: The Danish CSR Reporting Requirement*, 2 EUR. BUS. L. REV. 187, 187–216 (2013) (Danish reporting provisions allow companies participating in the United Nations Global Compact that have submitted a Communication of Progress (CoP) to “double” as the company’s CSR report for statutory purposes).

227. *Id.* at 287.

228. *Id.* at 287.

229. *Id.* at 287 n.174 (citing Parliament Directive (EC) 2005/29, Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450 (EEC), Directives 97/7 (EC), 98/27 (EC) and 2002/65 (EC) of the Council of the European Parliament and the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, (November 6, 2005) sec. 1, 2006 O.J. (L 149) 22. Arts. 5, 6).

230. Parliament Directive (EC) NO 2006/2004 of the European Parliament and of the Council,

of EU member states to enforce the directive range widely from self-regulation to regulations enforced by government agencies, which suggests that application of the directive in relation to social and environmental considerations might be inconsistent. Nevertheless, the directive does demonstrate a trend toward demanding greater transparency on the part of businesses where business practices may place human rights at risk.

## Multi-stakeholder Processes Taking Stock of Stakeholder Interests

Complementing the binding regulatory moves toward greater transparency are several nonbinding policies, principles, and cooperative platforms now in place to promote greater corporate social responsibility. In some instances voluntary initiatives have informed the content of binding regulations. A few examples are outlined briefly below, starting with the most recent global project to articulate more clearly the responsibilities of corporations with respect to human rights.

### The UN Framework and Guiding Principles

The UN secretary-general special representatives for business and human rights issued Guiding Principles for the Implementation of the UN “Protect, Respect and Remedy” Framework after consultation with a broad range of stakeholders. The Guiding Principles offer operative guidance to states and businesses and clarify the roles and responsibilities of each as to three core principles: (1) the duty of states to protect against human rights abuses by third parties, including business enterprises; (2) the responsibility of corporations to respect human rights by avoiding human rights infringements and by addressing adverse human rights impacts in which they are involved; and (3) access to judicial and nonjudicial remedies for victims of rights abuses. The Guiding Principles offer both foundational and operational guidance to corporations concerning their human rights responsibilities.<sup>231</sup>

Some human rights campaign groups have expressed disappointment that the Framework and Guiding Principles did not go further in creating binding obligations for corporations and regret that the international community has failed to produce a legally binding framework for ensuring accountability.<sup>232</sup> Proponents of the process that generated

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(November 6, 2005) Sec. 1, 2006 O.J. (449) 22. Art. 2(e).

231. UN Spec. Rep. of the Sec’y-Gen., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 (April 7, 2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>. For further detail on the Guiding Principles, see Part I of this book.

232. *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, FIDH-WORLDWIDE HUMAN RIGHTS MOVEMENT (Jan. 2011), <http://www.fidh.org/Joint-Civil-Society-Statement-on-9066>. For a discussion of the shortcomings of soft law and voluntary instruments to address the role of business in rights abuses, see generally Christopher Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, in *WORLD REPORT 2013* (Human Rights Watch ed. 2013) <http://www.hrw.org/world-report/2013/essays/without-rules>.

the Framework and Guiding Principles point out that industry's involvement indicates that it is a pragmatic way of addressing the problems that concern campaigners. Though it is early to assess the likelihood of their success, the Framework and Guiding Principles provide a salient starting point from which to advance human rights and to put the issue of business practices that impair the enjoyment of human rights on the public agenda.

The U.S. government, among others, has embraced the Guiding Principles and made them the basis of the U.S. Government Approach on Business and Human Rights. It cites the Guiding Principles as a "minimum" standard of conduct for states and businesses and points to both reputational and legal benefits of adherence. The approach also appears to frame human rights standards as a basis of business innovation and economic growth.<sup>233</sup>

At the conclusion of the special representative's mandate, the UN Human Rights Council established a "working group on the issue of human rights and transnational corporations and other business enterprises."<sup>234</sup> The working group consists of five independent experts who are appointed by the council with an appreciation for achieving a balanced geographical representation of stakeholders to serve for a three-year term. Among other things, the group has been charged with the responsibility to "promote the effective and comprehensive dissemination and implementation" of the Guiding Principles; to "seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders" to promote good practices for implementing the Guiding Principles; to "provide support for efforts to promote capacity-building" and "provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights"; to "integrate a gender perspective throughout the mandate"; and to "explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities."<sup>235</sup>

The working group also conducts country visits to support the work of its mandate.<sup>236</sup> The working group made its first country visit to Mongolia in 2012 and conducted a country visit to the United States in 2013. It will report its findings annually to the Human Rights Council and the General Assembly.<sup>237</sup>

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233. *U.S. Government Approach on Business and Human Rights*, U.S. STATE DEP'T, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR (May 1, 2013), <http://www.humanrights.gov/2013/05/01/u-s-government-approach-on-business-and-human-rights/>.

234. Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, 17th Sess. Agenda item 3 A/HRC/17/L.17/Rev. 1.

235. *Id.* at ¶ 5.

236. *Id.* at ¶ 5(d).

237. A/HRC/17/L.17/Rev.1.

### The UN Global Compact

A strategic policy initiative of the United Nations, the UN Global Compact provides a forum for businesses that have expressed a commitment to aligning their business practices with ten principles in the areas of human rights, labor, the environment, and anticorruption. The human rights principles contained in the compact provide the following: “(1) Businesses should support and respect the protection of internationally proclaimed human rights; and (2) make sure that they are not complicit in human rights abuses.”<sup>238</sup>

Understanding business as a driver of globalization and appreciating the challenges and opportunities businesses confront in a global economy, the Global Compact serves as a platform for business to collaborate and partner with governments, civil society, labor, and the United Nations. Hopefully these partnerships will ensure that more benefits than burdens accrue to society as a result of cooperation and collaboration to confront common challenges.

To achieve better human rights outcomes, the Global Compact “seeks to combine the best properties of the UN, such as moral authority and convening power, with the private sector’s solution-finding strengths, and the expertise and capacities of a range of key stakeholders.”<sup>239</sup> Its stated approach is to do so as a complement, rather than as a substitute, for regulatory regimes. Still, it commands a measure of accountability associated with participation in the compact, and it has periodically expelled participants for failure to comply with compact commitments.<sup>240</sup>

After the Guiding Principles were adopted, the compact and the United Nations Office of the High Commissioner for Human Rights (OHCHR) issued a statement on the relationship between the Guiding Principles and compact commitments.<sup>241</sup> According to the OHCHR, the Guiding Principles “provide further conceptual and operational clarity” to the human rights commitments contained in the compact.<sup>242</sup> Because the Guiding Principles are a global standard and apply to all business enterprises, they “provide an authoritative

238. *The Ten Principles*, UN GLOBAL COMPACT, <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> (last visited Dec. 29, 2013).

239. *Id.*

240. Jo Confino, *Cleaning up the Global Compact Dealing with Corporate Free Riders*, THE GUARDIAN (Mar. 26, 2012), <http://www.guardian.co.uk/sustainable-business/cleaning-up-un-global-compact-green-wash> (analyzing the reasons 3,100 businesses have been delisted by the UN Global Compact in recent years); Cristina Garza, *U.S. Companies Drag their Feet on UN Global Compact*, TRIPLE PUNDIT: PEOPLE, PLANET, PROFIT (May 24, 2013), <http://www.triplepundit.com/2013/05/companies-dragging-feet-sign-global-compact/> (reporting that as of May 2013 6 percent of the large U.S. participants and 23 percent of small and medium size U.S. participants have been delisted from the UN Global Compact).

241. *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments* (July 2011), [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf) (describing the Guiding Principles as providing “further conceptual and operational clarity” for Principle 1 and Principle 2 of the Global Compact), [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf).

242. *Id.*

framework” for compact participants to implement their commitments.<sup>243</sup> Because the compact has a global network of participants, it is well positioned to provide the support necessary to put the Guiding Principles into practice.<sup>244</sup>

The UN Human Rights Council recently commended the compact for its work on human rights tools.<sup>245</sup> The compact reports that the working group considers the Global Compact network to be “one of the most important channels” through which to achieve uptake and implementation of the Guiding Principles.<sup>246</sup> The compact also hosted the working group’s roundtable dialogue with representatives of the business community during the group’s recent country visit to the United States.<sup>247</sup>

The executive director of the Global Compact contributed to the development of the Framework and Guiding Principles issued by the UN secretary-general’s special representative on business and human rights development. The compact continues to maintain a close relationship with the UN working group that was created to continue the work of the special representative and put the principles into practice.<sup>248</sup> In fact, a member of the UN working group is based in the Global Compact office.<sup>249</sup>

Where the Guiding Principles set forth a minimum standard, participants in the Global Compact have committed to strive for more than the minimum. For example, though the Guiding Principles speak of undertaking efforts to avoid adverse impacts, the compact speaks of undertaking efforts to advance the realization of human rights.<sup>250</sup> Perhaps for this reason, Global Compact publications continue to refer to companies possessing “spheres of influence,<sup>251</sup>” a term expressly rejected by the Guiding Principles in favor of the term

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243. *Id.* at 2.

244. E-mail from Michael Addo, Member of the United Nations Working Group on Business and Human Rights, Special Procedures of the United Nations Human Rights Council to Erika George, Professor of Law, University of Utah, S.J. Quinney College of Law (June 6, 2013) (on file with author).

245. Human Rights Council Res. 21/5, Rep. of the Human Rights Council, 21st Sess., UN Doc. A/HRC/RES/21/5 (Oct. 16, 2012); Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 *Tex. Int’l L.J.* 33, 51–61 (Fall 2012); Jena Martin Amerson, “*The End of the Beginning?*” *A Comprehensive Look at the UN’s Business and Human Rights Agenda from a Bystander Perspective*, 17 *Fordham J. Corp. & Fin. L.* 871, 890–96 (treating the UN Global Compact as a piece of the history building toward the Guiding Principles).

246. E-mail from Ursula A. Wynhoven, General Counsel UN Global Compact Office, to Erika George, Professor of Law, University of Utah, S.J. Quinney College of Law (Jun. 3, 2013)(on file with author).

247. Press Release, UN Global Compact, U.S. Companies Discuss Guiding Principles on Business and Human Rights (Apr. 29, 2013) (on file with author).

248. *Id.*

249. *Id.*

250. *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments* (July 2011), [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf) (describing the Guiding Principles as providing “further conceptual and operational clarity” for Principle 1 and Principle 2 of the Global Compact).

251. UN Global Compact brochure, [http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf).

*leverage*. However, because the compact predated the Guiding Principles, compact materials are being updated to better reflect the Guiding Principles.<sup>252</sup> The processes and priorities of each are different but complementary; both the Guiding Principles and the compact are “part of a wider process within the UN to secure business engagement with human rights.”

### **Voluntary Initiatives, Nongovernmental Advocacy, Shareholder Activism**

Though campaigners tend to speak the language of human rights, some corporations have engaged with human rights issues using the language of corporate social responsibility. For instance, some corporations have created codes of conduct in cooperation with multiple stakeholders.<sup>253</sup> Discussed below are a few examples of voluntary initiatives, selected for their contribution to the creation of recent binding reporting legislation (as reviewed above) or for their potential to inform future efforts to further define corporate obligations to respect human rights.

#### *Extractive Industries Transparency Initiative*

The Extractive Industries Transparency Initiative<sup>254</sup> (EITI) is of particular relevance given the Dodd-Frank conflict-mineral provisions. It is a multi-stakeholder organization of governments, corporations engaged in resource extraction, and concerned civil society groups. EITI is considered “a focal point for the movement to promote greater transparency” between extractive companies and governments in resource-rich, but often economically poor, countries.<sup>255</sup> This initiative aims to “increase transparency over payments and revenues in the extractives sector in countries heavily dependent on these resources.”<sup>256</sup> In other words, EITI is an effort to reverse the *resource curse* by disclosing financial transactions to counter the kinds of corruption often at the root of rights violations.<sup>257</sup>

The EITI framework contains twelve principles related to transparency, government accountability, sustainable economic growth, and national sovereignty, among other topics.<sup>258</sup> Countries can commit to being EITI compliant by requiring extractive companies that

252. E-mail from Michael Addo, Member of the United Nations Working Group on Business and Human Rights, Special Procedures of the United Nations Human Rights Council, to Erika George, Professor of Law, University of Utah, S.J. Quinney College of Law (Jun. 6, 2013) (on file with author).

253. See, e.g., THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org>; EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eitransparency.org/eiti/principles>; GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Pages/default.aspx> (last visited Dec. 29, 2013)

254. EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, <http://eiti.org/> (last visited May 11, 2012).

255. 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, 51 (2008).

256. *Statement of Principles and Agreed Objectives*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, [http://info.worldbank.org/etools/docs/library/57454/eiti\\_stat\\_of\\_principles.pdf](http://info.worldbank.org/etools/docs/library/57454/eiti_stat_of_principles.pdf) (last visited Dec. 29, 2013).

257. *Id.*

258. *Id.*

operate within their borders “to report their oil, gas and mining payments, which are then reconciled against reported receipts from the government and made public.”<sup>259</sup> Currently, there are twenty-one EITI-compliant countries and sixteen EITI candidate countries.<sup>260</sup> Additionally, extractive companies operating in EITI-implementing countries can choose to become EITI-supporting companies by declaring support and endorsement of the EITI principals, and supporting EITI through annual financial contributions.<sup>261</sup> Over eighty oil, gas, and mining companies have chosen to support the EITI in this way.<sup>262</sup>

Before EITI, governments of resource-rich countries kept confidential the revenues obtained from commercial actors engaged in natural resource extraction. The shroud of secrecy cloaked corruption. Multinational firms seeking to secure valuable concessions to exploit resource-rich areas often ignored misappropriation. Now, many EITI countries are demonstrating significant improvements in their interactions with extractive companies. For example, Nigeria, which was one of the first countries to begin implementing the EITI process, is now not only an EITI-compliant country, but it has initiated transparency measures that go beyond the EITI requirements.<sup>263</sup>

The EITI's efficacy has been questioned because it is a purely voluntary organization.<sup>264</sup> Nevertheless, the EITI's impact has been far-reaching.<sup>265</sup> The Dodd-Frank provisions and other reporting legislation build on the efforts of the EITI in promoting corporate transparency and accountability regarding the human rights impacts of extractive companies. In fact, it was referenced in the floor debates over section 1504 of the Dodd-Frank Act, and an explicit reference is made to the EITI in the legislation.<sup>266</sup>

### *The Kimberley Process*

Another voluntary global initiative developed by government, industry, and civil society representatives is the Kimberley Process Certification Scheme (KPCS).<sup>267</sup> KPCS seeks to stem the flow of conflict diamonds into the stream of commerce to reduce the ability of

259. Genasci & Pray, *supra* note 255, at 51.

260. *EITI Countries*, EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, <http://eiti.org/countries> (last visited May 11, 2013).

261. *Supporting Companies*, EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, <http://eiti.org/supporters/companies> (last visited May 29, 2013).

262. *Company Support of the EITI*, EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, <http://eiti.org/supporters/companies/howto> (last visited May 29, 2013).

263. Dr. Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*, 29 HOUS. J. INT'L L. 327, 339–40 (2007).

264. Martin Sandbu, *Regulation: Voluntary Transparency Scheme Faces Scrutiny*, FIN. TIMES (June 17, 2010), <http://www.ft.com/intl/cms/s/0/dd252206-78da-11df-a312-00144feabdc0.html#axzz2gQEsFebV>.

265. See, e.g., Paul D. Ocheje, *The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa*, 8 J. SUSTAINABLE DEV. IN AFR. 222, 232–33 (2006) (assessing implementation of the EITI audit program in Nigeria as a significant shift from *business as usual* with broader consequences for transparency in other areas).

266. Dodd-Frank § 1504 (codified at 15 U.S.C. § 78m(q)(1)(C)(ii) (2012)).

267. Governments from Angola to Zimbabwe are members. For a full list of the fifty participating

armed groups to use rough diamonds to finance violent opposition against legitimate governments. Proponents of the KPCS have credited it with reducing conflict in several countries. Opponents critical of KPCS contend that incentives to comply have not been sufficiently resolved, such that the benefits of noncompliance significantly outweigh the costs of compliance, resulting in even more diamonds on the black market.<sup>268</sup>

Recently, the KCPS has come under serious challenge from Global Witness, a nongovernmental organization instrumental in its creation.<sup>269</sup> In 2011, Global Witness left the KCPS in protest over a series of “shoddy compromise[s]” that have “turned an international conflict prevention mechanism into a cynical corporate accreditation scheme” and served to undermine the integrity and earlier achievements of the KCPS.<sup>270</sup>

The two predecessor bills to Dodd-Frank § 1502 (U.S., Bill S. 891, Congo Conflict Minerals Act of 2009, 111th Cong., 2009, and U.S., Bill H.R. 4128, Conflict Minerals Trade Act of 2009, 111th Cong., 2009) did incorporate the critiques of KPCS into their deliberations and intended to overcome some of its shortcomings.<sup>271</sup>

#### *The Electronic Industry Citizenship Coalition*

The Electronic Industry Citizenship Coalition (EICC) administers a code of conduct throughout the information and communications technology (ICT) supply chain.<sup>272</sup> Currently, nearly eighty member companies located across Asia, the Americas, and Europe make up the EICC.<sup>273</sup> The overall objectives of the EICC are to: (1) create a code of conduct common across the industry; (2) establish a process for the assessment and administration of supply chains to address sourcing, employment, and environmental concerns; (3) provide training and education to improve social and environmental performance in the supply chain; and (4) raise external awareness through stakeholder engagement.<sup>274</sup>

Before the EICC was formed, the global electronics industry had no systems in place that would permit a corporation to determine easily the origins of materials used in

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governments in the KPCS as of January 2012, *see* <http://www.kimberleyprocess.com/web/kimberley-process/kp-participants-and-observers>.

268. Competitive Enterprise Institute, In the Matter of Public Comments Proposed Rule: Conflict Minerals, Before the U.S. Securities and Exchange Commission Release No. 34-63547, File No. S7-40-10, 75 Fed. Reg. 80,948 (Dec. 23, 2010).

269. *Our History*, GLOBAL WITNESS, <http://www.globalwitness.org/about-us/our-history> (last visited Dec. 29, 2013) (“Our campaigning led to the creation of the precedent-setting Kimberley Process Certification Scheme and to our joint nomination for the Nobel Peace Prize.”).

270. *Why We Are Leaving the Kimberley Process*, GLOBAL WITNESS (Dec. 5, 2011), <http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch>.

271. Statement from Sen. Feingold about the Conflict Minerals Provision, S4697 (Apr. 23, 2009).

272. *See* Bob Leet, Presentation, *Introduction to the Electronic Industry Citizenship Coalition* (Apr. 12, 2011) [hereinafter EICC Introduction].

273. *Membership List*, ELECTRONIC INDUS. CITIZENSHIP COALITION, [http://www.eicc.info/about\\_us05.shtml](http://www.eicc.info/about_us05.shtml) (last viewed May 11, 2013).

274. *Id.*



products or the production process. Participation in the program is entirely voluntary and limited to corporations.<sup>275</sup> Although corporate only, another EICC aim is to “solicit feedback from stakeholders” outside industry to better “focus efforts on positive social and environmental change and improvement.”<sup>276</sup> The outcomes the EICC would like to achieve are increased efficiency and productivity for customers and suppliers, greater economic development, better working conditions, and cleaner environmental conditions.<sup>277</sup>

Because suppliers may have several different customers with different codes of conduct and different demands for implementation, multiple audits and assessments of the same supplier by different corporations can lead to an inefficient use of resources and inconsistent assessment findings.<sup>278</sup> Particularly given the rapid growth of initiatives to create better social and environmental outcomes in the supply chain, members of the coalition agreed to come together to create a common approach to aid suppliers. Though the trend in responsible supply-chain management is to form industry initiatives to tackle human rights problems in the supply chain,<sup>279</sup> it is important to note that these initiatives continue to have limited success. For instance, Apple (an EICC member) recently faced significant negative publicity surrounding its Foxconn supplier in China, where several workers committed suicide, allegedly due to poor working conditions at the factory.<sup>280</sup>

## Conscious Consumers and Activist Investors

Recent transparency initiatives appear to share two related underlying rationales: (1) the influence of industry (such as those initiatives described above) can make a difference, and (2) the consuming public actually cares about people worlds away and will make different purchasing choices as they become conscious of the high costs imposed on others. For example, the author of the CTSCA deemed the bill a “consumer empowerment measure,” explaining,

275. *Id.*

276. *Id.*

277. *Id.*; see generally GHGM, SOCIAL AND ENVIRONMENTAL RESPONSIBILITY IN METAL SUPPLY TO THE ELECTRONIC INDUSTRY (2008), <http://www.eicc.info/documents/SERMetalSupplyreport.pdf>.

278. See, e.g., The Global Enabling Trade Report 2012: Reducing Supply Chain Barriers, World Economic Forum 2012 (Robert Z. Lawrence, Margareta Drzeniek Hanous & Sean Doherty eds., 2012), [http://www3.weforum.org/docs/GETR/2012/GlobalEnablingTrade\\_Report.pdf](http://www3.weforum.org/docs/GETR/2012/GlobalEnablingTrade_Report.pdf).

279. Sune Skadegaard Thorsen & Signe Andreasen, *Remodelling Responsible Supply Chain Management: The Corporate Responsibility to Respect Human Rights in Supply Chain Relationships*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2012).

280. Terrence O'Brien, *Apple and Foxconn Agree to Drastically Improve Working Conditions Following Fair Labor Association Report*, ENGADGET (Mar. 29, 2012), <http://www.engadget.com/2012/03/29/apple-and-foxconn-agree-to-drastically-improve-working-condition/>.

Consumer spending and corporate investment in business are leverage points that can turn around a system that has for too long allowed traffickers and economies to operate with impunity. There is an increasing push for consumer transparency, certification, and more rigorous regulation.<sup>281</sup>

Similarly, the federal proposal to require supply-chain reporting is informed by an appreciation for the possibility that

legislation is necessary to provide the information the public demands, recognizing that businesses can be part of the solution to these problems when they transparently provide information to consumers and investors, and subsequently respond to consumer and investor demands for business reasons, rather than solely reacting to governmental prescriptions on how to conduct their business.<sup>282</sup>

These fundamental assumptions about the market for altruism, if correct, could place a value on respect for human rights that has been largely absent in corporate social responsibility programs. Because these transparency initiatives solely and simply require information disclosure to the relevant regulatory authorities and the public without expressly prohibiting any particular business practice, enforcement appears to rest on whether consumers decide to make different choices. By preferring, perhaps, a conflict-free consumer electronic product assembled without using forced laborers, slaves, trafficking victims, or children over products associated with abuses, transparency may create a taste for respecting human rights.<sup>283</sup> For instance, consumer collaborations that share information about a variety of products provide support for the position that the recently enacted disclosure requirements could make a difference to a significant number of consumers.<sup>284</sup>

281. The California Transparency in Supply Chains Act of 2010: New Information to Aid Consumer Purchasing Decisions, Before the Assembly Committee on the Judiciary (June 29, 2010), [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0651-0700/sb\\_657\\_cfa\\_20100628\\_112914\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_cfa_20100628_112914_asm_comm.html).

282. *Supra* note 177 §1(c)(3).

283. For profiles and analysis of social-conscious consumers and cause-marketing, see generally NIELSEN, *THE GLOBAL, SOCIALLY-CONSCIOUS CONSUMER* (2012); Jens Hainmueller, Michael J. Hiscox & Sandra Sequeira, *Consumer Demand for the Fair Trade Label: Evidence from a Field Experiment* (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1801942](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801942); Maria Loureiro & Justus Lotade, *Do Fair Trade and Eco-Labels in Coffee Wake Up the Consumer Conscience?* 53 *ECOLOGICAL ECON.* 129 (2005); DANISH FASHION INST., *THE NICE CONSUMER: RESEARCH SUMMARY AND DISCUSSION PAPER* (2012).

284. See, e.g., Richard E. White & Philip D. Kare, *The Impact of Consumer Boycotts on the Stock Prices of Target Firms*, 6 *J. APPLIED BUS. RES.* 63, 69 (2011) (“[C]onsumer Boycott announcements appear to have a statistically significant negative effect on stock prices.”); cf. Martinne Geller, *Wal-Mart Shares Drop 4.7 Percent after Bribery Allegations*, *REUTERS* (Apr. 23, 2012).

### *The Impact of Responsible Consumerism*

Consumers who care about the environment and social issues are using social media to raise awareness about the origins of a wide range of consumer products and educate the public about human rights abuses. Consider the following examples:

- The Web site [www.slaveryfootprint.org](http://www.slaveryfootprint.org) helps consumers detect whether slave labor may have been used to produce an item.<sup>285</sup> Visitors to this Web site are invited to take a scored survey to understand the way their product choices contribute to modern-day slavery. The Web site encourages visitors to share their total “slave score” with their friends and ask their favorite brands for information about modern slavery in their supply chains. Slaveryfootprint’s mobile application Free World allows consumers to find out about products at point of purchase.
- The Web site [www.chainstorereaction.com](http://www.chainstorereaction.com), in collaboration with the Alliance to Stop Slavery and End Trafficking (ASSET), facilitates forwarding e-letters to industry from concerned consumers. To date, more than 150,000 communications have been forwarded to more than 1,700 companies.
- The Web site [www.sourcemap.com](http://www.sourcemap.com) offers an interactive platform for exchanging information about sourcing and supply-chain links. An open, “crowdsourced” directory of product supply chains and carbon footprints, the Web site allows members to learn where products come from, what they are made of, and how the product may impact people or the planet.
- The mobile application Buycott, available for free on iOS and Android, allows consumers to create “campaign” lists of issues they do not want their purchasing to support. Users simply scan the barcode of a product using Buycott, and the application checks its crowdsourced databases for parent companies and their connections to the user’s campaigns. Users also create campaigns and provide information on unknown products and company contact information.<sup>286</sup>
- The Web site [www.goodguide.com](http://www.goodguide.com) provides a rating system that allows users to evaluate the negative impact of products they use on issues they care about. It also allows users to create and share products lists that receive positive ratings for their issues.

Additionally, a certain segment of consumers make purchasing decisions based on their social commitments to respect for human rights and environmental protection.<sup>287</sup> For

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285. Beth Duff-Brown, *Slave Labor Targeted in Calif. Law, Social Media*, ASSOCIATED PRESS (Dec. 30, 2011) (reporting project was developed with grant from Google).

286. *About Buycott*, BUYCOTT, <http://www.buycott.com/about> (last visited June 6, 2013). See also Andrew Leonard, *App of the Week: Buycott*, SALON (June 2, 2013), [http://www.salon.com/2013/06/02/app\\_of\\_the\\_week\\_buycott/](http://www.salon.com/2013/06/02/app_of_the_week_buycott/) (reviewing the application).

287. See, e.g., CONE LLC, 2010 CONE CAUSE EVOLUTION STUDY 14 (2010) (reporting survey results on consumer attitudes and behaviors toward corporate support of social and environmental issues).

instance, with respect to the conflict in the DRC, university students participating in the Conflict Free Campus Initiative have urged their universities to adopt investment and technology-procurement policies that avoid contributing to humanitarian crises.<sup>288</sup> These types of consumer campaigns are not new; they follow initiatives such as the state and university divestment campaign to protest apartheid.<sup>289</sup> However, as these conscious consumers share their concerns about business practices with others, there are bound to be implications for industry.

### *The Impact of Activist Investing*

Similarly, the increasing popularity of sustainable and responsible investing (SRI) offers evidence that expectations are escalating with respect to the social responsibility of business.<sup>290</sup> Although SRI remains a niche area, it is expanding rapidly.<sup>291</sup> By April 2013, the UN Principles for Responsible Investment reported that its signatory institutions accounted for socially responsible investments approximating \$34 trillion in assets under management.<sup>292</sup> Although only about 11 percent of investments target companies that meet criteria based on social, environmental, or good corporate-governance criteria,<sup>293</sup> the SRI market has

288. See, e.g., Kate Dailey, *How to Offset Your Conflict Mineral Guilt*, BBC NEWS MAGAZINE (Jan. 19, 2012), <http://www.bbc.co.uk/news/magazine-16535620>. University student groups using Facebook as a platform are working to raise awareness of issues associated with conflict minerals and advocated for universities to adopt procurement policies that do not contribute to worsening crisis. See Conflict-Free Campus Initiative Facebook page, FACEBOOK, <http://www.facebook.com/conflictfreecampus>; see also *Conflict Free Campus Initiative*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/conflict-free-campus-initiative>.

289. Margaret Jungk, *Shareholders Pressure McDonald's to Report Human Rights Impacts*, HUFF POST BUSINESS: THE BLOG (May 22, 2013), [http://www.huffingtonpost.com/margaret-jungk/mcdonalds-shareholders-no\\_b\\_3317423.html](http://www.huffingtonpost.com/margaret-jungk/mcdonalds-shareholders-no_b_3317423.html) (citing the pressure investors put on religious institutions during apartheid as the parent of more recent shareholder resolutions demanding companies such as Halliburton, Yahoo, and Google assess their human rights impacts).

290. According to a 2011 report, nearly one out of every eight dollars invested in the U.S. using professional management is invested according to SRI strategies. Meg Voorhes & Joshua Humphreys, *Recent Trends in Sustainable and Responsible Investing in the United States*, 20 J. OF INVESTING 90, 90 (2011).

291. Forbes reports regularly on stocks that receive positive rankings from ETF Channel's rankings of socially responsible dividends. Recent U.S. companies to receive such praise include Texas Instruments (3.3% yield) and AvalonBay Communities, Inc. (3.2% yield). See *Why Texas Instruments Is a Top 25 Socially Responsible Dividend Stock*, FORBES DIVIDEND CHANNEL (Mar. 22, 2013), <http://www.forbes.com/sites/dividendchannel/2013/03/22/why-texas-instruments-is-a-top-25-socially-responsible-dividend-stock/>; *AVB Named Top 25 Socially Responsible Dividend Stock*, FORBES DIVIDEND CHANNEL (May 31, 2013), <http://www.forbes.com/sites/dividendchannel/2013/05/31/avb-named-top-25-socially-responsible-dividend-stock/>; ETF Channel Staff, *25 Top Ranked Socially Responsible Dividend Stocks*, ETF CHANNEL (updated June 6, 2013), <http://www.etfchannel.com/slideshows/socially-responsible-dividends/>.

292. *About the PRI Initiative*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/about-pri/about-pri/> (last visited May 16, 2013).

293. Katherina Glac, *The Influence of Shareholders on Corporate Social Responsibility* 21 (Center for Ethical Business Culture, Working Paper No. 2 (2010)), [http://www.cebcglobal.org/uploaded\\_files/Glac\\_paper\\_on\\_Social\\_Investment\\_FINAL.pdf](http://www.cebcglobal.org/uploaded_files/Glac_paper_on_Social_Investment_FINAL.pdf); BUSINESS FOR SOCIAL RESPONSIBILITY, ENVIRONMENTAL,

grown at a faster pace than the market for conventional investments.<sup>294</sup> Furthermore, the legislative history of section 1502 of Dodd-Frank indicates an appreciation on the part of Congress that social issues do inform investment decisions.<sup>295</sup> Moreover, certain socially responsible investors have opposed the legal challenges brought against transparency regulations by certain business interests.<sup>296</sup> Investors are also working in cooperation with rights organizations. For example, Calvert Investments, the Interfaith Center on Corporate Responsibility, and the Institute for Business and Human Rights have published a guide for “mainstream investors across all asset classes, including hedge funds.”<sup>297</sup> The guide, *Investing the Rights Way*, outlines recent developments and key provisions of the UN Guiding Principles relevant to investors, among other things.

## Conclusion

Taken together with recent legislation, these trends toward an increasingly conscious consumer and activist investor segment with a greater interest in transparency should inspire industry to revisit the adage that “the only social responsibility of business is to make profits for its shareholders within the constraints of the law.”<sup>298</sup> A number of popular brands such as GAP and Nike adopted clean-labor policies after instances of bonded, child, or forced labor in their supply chains were exposed to the purchasing public.<sup>299</sup>

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SOCIAL, AND GOVERNANCE: MOVING TO MAINSTREAM INVESTING? 6 (2008), [http://bsr.org/reports/BSR\\_ESG\\_Mainstream\\_Investing.pdf](http://bsr.org/reports/BSR_ESG_Mainstream_Investing.pdf).

294. See PRICEWATERHOUSECOOPERS, DO INVESTORS CARE ABOUT SUSTAINABILITY?: SEVEN TRENDS PROVIDE CLUES 3 (2012), <http://www.pwc.com/us/en/corporate-sustainability-climate-change/publications/investors-and-sustainability.jhtml>. See also Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES (Apr. 24, 2013), <http://www.forbes.com/sites/feeonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know/> (Reporting that SRI investing has increased 22 percent since 2011 and now represents \$3.74 trillion in managed assets. Furthermore, Chamberlain suggests that one in every nine dollars of U.S. investments is used for SRI investments.).

295. See 156 CONG. REC. S3965-03, S3976 (daily ed. May 19, 2010) statement of Sen. Feingold, “Transparency . . . will help the United States and our allies more effectively deal with . . . complex problems . . . they will also help American consumers and investors make more informed decisions.”

296. Investor Statement in Support of SEC Rule 1502 on Conflict Minerals, Responsible Sourcing Network (June 3, 2013), <http://www.sourcingnetwork.org/storage/minerals-investors-group/CM%20Investor%20Statement%202013-05-28%20FIN.pdf> (Notifying public that on June 3, 2013, a group of 275 faith-based investment organizations signed a statement opposing a lawsuit against the SEC seeking to overturn Section 1502 of Dodd-Frank filed by the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Business Roundtable. These organizations represent \$458,670,218,008 of assets under management).

297. INSTITUTE FOR HUMAN RIGHTS ET AL., *INVESTING THE RIGHTS WAY: A GUIDE FOR INVESTORS ON BUSINESS AND HUMAN RIGHTS* (2013).

298. See Milton Friedman, *Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG, (Sept. 13, 1970).

299. See Amelia Gentleman, *Gap Moves to Recover from Child Labor Scandal*, N.Y. TIMES (Nov. 15, 2007), <http://www.nytimes.com/2007/11/15/business/worldbusiness/15iht-gap.1.8349422.html>; *Online*

Apple eventually had to respond with action after it became apparent that a segment of its consumers were concerned about reports of the human costs involved in manufacturing its products in China.<sup>300</sup> Apple is now reporting its efforts to address these conditions. Such a large and influential business actor could well change how the business of manufacturing is done, for the better.

The recent tragic deaths of thousands of laborers buried under collapsed buildings or consumed by fires while working in unsafe conditions in Bangladesh's garment factories, manufacturing *fast fashion* apparel for export, reflected poorly on popular brands.<sup>301</sup> Again, in the face of pressure from investors and consumers, the apparel sector has been forced to engage in greater due diligence and devise ways to do business in a manner that respects worker rights.<sup>302</sup> Several companies have agreed to accords that would provide: (1) "independent, rigorous factory safety inspections with public reports and mandatory repairs and renovations underwritten by Western retailers," and (2) "for workers and their unions to have a substantial voice in factory safety," among other things.<sup>303</sup> The tragedies

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*Extra: Nike's New Game Plan for Sweatshops*, BLOOMBERG BUSINESSWEEK MAGAZINE (Sept. 19, 2004), <http://www.businessweek.com/stories/2004-09-19/online-extra-nikes-new-game-plan-for-sweatshops> (Reporting Nike's solutions to late-1990s labor violations, including inspections staff and a monitoring collective that allows protestors to deal directly with Nike if violations are found in their factories); Steven Greenhouse, *Groups Press Big Retailers on Safety Overseas*, N.Y. TIMES (May 16, 2013), [http://www.nytimes.com/2013/05/17/business/global/investors-and-religious-groups-press-retailers-on-safety.html?ref=business&\\_r=0](http://www.nytimes.com/2013/05/17/business/global/investors-and-religious-groups-press-retailers-on-safety.html?ref=business&_r=0) (reporting that 123 religious groups and investment organizations representing \$1.1 trillion in investment assets signed a letter asking retailers to comply with a new factory safety plan. An additional letter signed by investment and pension funds representing \$1.35 trillion in assets was sent to retailers urging changes in safety standards in Bangladesh. The organizations are responding to the deadly collapse of a textile factory building in Bangladesh in April). See also *Diverse Coalition of Global Investors Managing More Than \$1.5 Trillion Calls for Systemic Reform to End Human Rights Abuses in Apparel Supply Chains*, BOSTON COMMON ASSET (May 22, 2013), <http://www.bostoncommonasset.com/news/BangladeshHumanRights.php>.

300. *Apple Press Info: Fair Labor Association Begins Inspection of Foxconn*, APPLE (Feb. 13, 2012), <http://www.apple.com/pr/library/2012/02/13Fair-Labor-Association-Begins-Inspections-of-Foxconn.html>; Kevin Drew, *Apple's Chief Visits iPhone Factory in China*, N.Y. TIMES (Mar. 29, 2012), <http://www.nytimes.com/2012/03/30/technology/apples-chief-timothy-cook-visits-foxconn-factory.html>; Charles Duhigg & Steven Greenhouse, *Electronic Giant Vowing Reforms in China Plants*, N.Y. TIMES (Mar. 29, 2012) at A1, <http://www.nytimes.com/2012/03/30/business/apple-supplier-in-china-pledges-changes-in-working-conditions.html?>; Poornima Gupta & Edwin Chan, *Apple, Foxconn Set New Standard for Chinese Workers*, REUTERS (Mar. 30, 2012), <http://www.reuters.com/article/2012/03/30/us-apple-foxconn-idUSBRE82S19720120330>.

301. See Steven Greenhouse, *Major Retailers Join Bangladesh Safety Plan*, N.Y. TIMES (May 13, 2013), [http://www.nytimes.com/2013/05/14/business/global/hm-agrees-to-bangladesh-safety-plan.html?\\_r=0](http://www.nytimes.com/2013/05/14/business/global/hm-agrees-to-bangladesh-safety-plan.html?_r=0); see also Charlie Campbell, *Retailers Sign Bangladesh Garment Factory Safety Deal*, TIME: WORLD (May 14, 2013), <http://world.time.com/2013/05/14/retailers-sign-bangladesh-garment-factory-safety-deal-as-collapse-rescue-efforts-wind-up/>.

302. See *Clothing Brands Must Work with Bangladesh to Prevent Another Disaster—UN Experts*, UN NEWS CENTRE (May 8, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44859&Cr=bangladesh&Cr1=#.UcNCZJytrk>.

303. Steven Greenhouse, *supra* note 299; see also *Unions Commend Deal after Bangladesh Collapse*, DEUTSCHE WELLE (May 17, 2013), <http://www.dw.de/unions-commend-deal-after-bangladesh-collapse/a-16820215>.

have resulted in multi-stakeholder dialogues and debates over how best to protect workers and what level of responsibility brands should assume for ensuring their products are not the result of a factory system that routinely places lives at risk.<sup>304</sup> For instance, the UN working group has announced that it will host a special session on managing human rights risks in the garment-sector supply chain.<sup>305</sup> Exposure of abuses through transparency regulations could force innovations in better ways of doing business, ultimately improving corporate governance and avoiding tragic outcomes.

These new national and state laws, as well as new global standards, signal a shift toward the creation of monitoring mechanisms to ensure that corporations meet their responsibility to respect human rights. To the extent that efforts such as deploying the power of public purchasing and leveraging securities laws prove successful in changing corporate conduct and curtailing rights violations, an expansion of similar efforts to incorporate social criteria in the market can be expected. The proliferation of voluntary codes of conduct crafted by individual corporations, industry associations, and multi-stakeholder organizations provided the normative foundation for mandatory disclosures measures. The added element of the SEC's power to enforce can only promote greater transparency and increase the possibility that human rights will be better respected by corporations.

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304. *Avoiding the Fire Next Time*, *ECONOMIST* (May 4, 2013), <http://www.economist.com/news/business/21577078-after-dhaka-factory-collapse-foreign-clothing-firms-are-under-pressure-improve-working>.

305. *Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited June 20, 2013); see also *Managing Human Rights Risk in the Garment Sector Supply Chain—What Lessons Learned from the Perspective of the UN Guiding Principles on Business and Human Rights?*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/Links/Repository/1019610> (last visited June 20, 2013).