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Abstract: § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act targets human rights abuses abroad, rather than financial reforms at home. It requires certain reporting companies to make disclosures about the conflict minerals necessary in the production or function of their products. After repeated delays, the SEC finalized a conflict minerals disclosure rule, outlining the process companies must follow to satisfy their disclosure obligations. This comment discusses that process, as well as the costs imposed on the companies required to make conflict minerals disclosures. It also highlights an important effect of those costs: reporting companies will seek to improve their supply chains and pass some of the mandated due diligence burden to other supply chain businesses through contracts. But enforcement of these contracts, breaches, and litigation in foreign jurisdictions will all increase the total costs of the conflict minerals disclosure regime, including on foreign suppliers themselves. This comment concludes that until the international community collectively commits to end the conflict minerals trade, § 1502 and the SEC conflict minerals rule will not effectively achieve their intended benefits. The costs of compliance are simply too high.

[*] J.D., Northwestern University School of Law, 2015; Bachelor of Music, Piano Performance, Brigham Young University, 2011. I have only ever succeeded in my endeavors because of the inspiring people in my life. I'm thankful for my parents, Steven and Cindy, and my sisters, Jordan and Kenzie, and all our moments of friend-ship, laughter, impressions, and love. And I'm grateful for my husband, Brendan Madden, who has not only expanded my vision, but also filled my life with goodness. Many thanks to the editorial board of this journal. All errors in this note, of course, are mine.

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I. AN INTRODUCTION TO THE PROBLEMS OF THE CONFLICT MINERALS DISCLOSURE REQUIREMENTS

Middle of the night legislative additions, regulation in unfamiliar territory, and weak first-round corporate responses: all describe the circumstances surrounding the Dodd-Frank conflict minerals disclosure regime. While § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act sought to address human rights abuses abroad, the costs and consequences of doing so have sparked controversy and call its processes into question. As conflict minerals disclosures have ramped up companies reporting under the Securities Exchange Act face new challenges in a market that seems ever more socially conscious.

In promulgating § 1502 of Dodd-Frank and its subsequent SEC rule, both Congress and the SEC overlooked the effects conflict minerals disclosure requirements would have on preexisting and future contracts with foreign suppliers.[1] § 1502 essentially requires Exchange Act reporting companies to make disclosures about conflict minerals[2] necessary in the production or function of their products.[3] The accompanying SEC rule imposes significant costs on the companies that are required to make these disclosures.[4] These costs will spread to other businesses in product supply chains as reporting companies seek to incorporate the SEC's mandated due diligence requirements into their contract terms.[5] However, the intended

[1] The conflict minerals provisions of Dodd-Frank § 1502 and the resulting SEC rule are controversial, and many have called the economic analyses of Congress and the SEC into question. *See, e.g.*, Nat'l Ass'n of Mfrs. v. Sec. Exch. Comm'n, No. 13-cv-635, 2013 WL 3803918 (D.D.C. July 23, 2013) (summarizing some of the "more significant comments and issues considered" by the SEC during its rule-making process); *see also The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo Before the Subcomm. on Int'l Monetary Policy & Trade of the H. Comm. on Fin. Serv.*, 112th Cong. 1-44 (2012) [hereinafter *Costs and Consequences of Dodd-Frank*] (exploring the impact of Dodd-Frank § 1502 on American companies and its likelihood of achieving the desired effects). This note focuses on one area these analyses overlooked: how the conflict minerals disclosure requirements affect *private contracts.*

[2] A "conflict mineral" is defined as "columbite-tantalite, cassiterite, gold, wolframite, or their derivatives" (which include tantalum, tin, and tungsten), or any other minerals or their derivatives that the Secretary of State determines are "financing conflict" in the Democratic Republic of Congo or any adjoining countries. Conflict Minerals, Exchange Act Release No. 34-67716, 77 Fed. Reg. 56,275 (Sept. 12, 2012) [hereinafter Conflict Minerals Release].

[3] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p) (2010).

[4] One commentator estimated that the costs for reporting companies following the due diligence policies under § 1502 and the SEC rule would total approximately $8 billion. This would include $1.2 billion for reporting companies to "change their legal obligations with each . . . first-tier supplier," $600 million for implementing "risk-based programs that use control processes to verify that suppliers are providing them with credible information and pushing legal obligations upstream," and $6 billion to "develop new information technology systems to collect information on each . . . first-tier supplier." Conflict Minerals Release, *supra* note 2, at 56,337.

[5] Interestingly, the idea for this note came from an assignment while the author worked as a legal

benefits of § 1502 may never come to fruition if U.S. companies either drop suppliers who are unwilling or unable to accept these requirements or bully others into compliance.

This note argues that the conflict minerals disclosure requirements negatively impact the contractual relations between reporting companies—those that must make the disclosures—and their upstream suppliers who are pressured into accepting many of the compliance costs. Part II outlines the standards and processes that reporting companies must follow to comply with the conflict minerals disclosure rules. Part III highlights the resulting costs for these companies. Part IV discusses the compliance costs for foreign suppliers. Part V reviews the first round of conflict minerals disclosures, and demonstrates the difficulties reporting companies face when filing complete reports. Part VI addresses the inefficacy of forcing an American regulatory framework on foreign companies through contracts, which undermines the purposes behind Dodd-Frank § 1502. Part VII emphasizes the need for greater international involvement before any American legislation can be effective. Finally, Part VIII concludes that Congress and the SEC seriously underestimated the costs of making conflict minerals disclosures, casting doubt on whether the goals of the disclosure requirements can actually be achieved by the means.

II. WEAKEST POSSIBLE ENFORCEMENT OR ROBUST REGULATION? OVERVIEW OF THE CONFLICT MINERALS DISCLOSURE REQUIREMENTS

While Congress intended that § 1502 constitute a major "step"[6] in ending the conflict minerals trade, many have debated both its hasty inclusion in Dodd-Frank[7] and its unknown and unintended consequences.[8] § 1502 attempted to respond to the "exploitation and trade" of minerals that finance "extreme levels of violence" in the eastern Democratic Republic of the Congo (DRC) and its surrounding countries (hereinafter covered countries).[9] Clearly, the provision was not aimed at "preventing another financial

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intern at a major international corporation. The question presented was whether a foreign subsidiary must comply with Dodd-Frank § 1502's conflict minerals disclosure requirements, and whether an American company could introduce those requirements as binding terms in a contract. The research was obviously conducted in response to a pending contract envisioning this exact situation.

[6] Letter from Carol Brunlinger, to Sec. & Exch. Comm'n (Jan. 24, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-40.htm.

[7] *See Costs and Consequences of Dodd-Frank, supra* note 1, at 1 (statement of Hon. Gary G. Miller, Chairman, H. Subcomm. on Int'l Monetary Policy & Trade).

[8] Laura E. Seay, CTR. FOR GLOBAL DEV., *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, 12 (2012) *available at* http://www.cgdev.org/blog/what's-wrong-dodd-frank- 1502-conflict-minerals-civilian-livelihoods-and-unintended .

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1502(a)

meltdown," the principal purpose behind the Dodd-Frank legislation.[10] Rather, the measure was focused on "fostering transparency about commercial activities" occurring in foreign countries by requiring disclosures about conflict minerals in manufactured products.[11] Interestingly, the Dodd-Frank conference committee added this provision "in the middle of the night," without providing Congress with the "opportunity to consider whether it would help in the conflict in the DRC," or what effects it would have on the minerals and goods coming from these regions into the United States.[12] Really, the provision seemed "hidden" within the 2,300 pages of the Dodd-Frank Act.[13]

The complexity and controversy surrounding § 1502 ultimately caused repeated delays in the release of the SEC's final conflict minerals rule.[14] The SEC received more than 13,000 letters during the rule comment period and held public roundtable discussions to "solicit feedback from interested

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(2010). *See also* 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 (2011) ("In many ways, the provision is reflective of a notion arising from time to time in the legislative and regulatory arena that, when lacking any direct ability to regulate or control the activities of public issuers, indirect regulation through the 'shame' of public disclosure has the potential to accomplish the same objectives.").

[10] Todd Moss, *Foreword to* Laura E. Seay, CTR. FOR GLOBAL DEV., *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, (2012) *available at* http://www.cgdev.org/blog/what's-wrong-dodd-frank's-conflict-minerals-provision. *See also Costs and Consequences of Dodd-Frank, supra* note 1, at 2 (statement of Hon. Gary G. Miller, Chairman, H. Subcomm. on Int'l Monetary Policy & Trade) ("While it is puzzling to me that Section 1502 falls completely outside the scope of the Dodd-Frank Act, that legislation was passed as a result of the financial crisis to add stability to the financial system. Section 1502 does nothing to 'provide for financial regulatory reform, to protect consumers and investors, to enhance Federal understanding of insurance issues, or to regulate over-the-counter derivatives markets,' which were the stated purposes of the Dodd-Frank Act.").

[11] Moss, *supra* note 10. *See also* Letter from Randi Shroeder to Sec. & Exch. Comm'n (Oct. 21, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-341.htm ("Consumers need to know what they are buying when they buy it.").

[12] *Costs and Consequences of Dodd-Frank, supra* note 1, at 2 (statement of Hon. Gary G. Miller, Chairman, H. Subcomm. on Int'l Monetary Policy & Trade). Note that activist groups like the Enough Project had pushed for legislative solutions to harmful mineral sourcing years before Congress passed the Dodd-Frank Act. One such effort, centered on House Resolution 4128 never moved out of committees despite receiving support from business sectors and co-sponsorship. *See* Seay, *supra* note 8, at 12. § 1502's subsequent controversy helps explain why it may have been hidden within the Dodd-Frank Act.

[13] Moss, *supra* note 10; *see also* Karen Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1,315, 1,316 (2012) ("Buried in the voluminous Dodd-Frank . . . Act is an oft-overlooked provision requiring corporate disclosure of the use of 'conflict minerals.'").

[14] *See Costs and Consequences of Dodd-Frank*, *supra* note 1, at 4 (statement of Hon. Carolyn McCarthy, Ranking Member, H. Subcomm. on Int'l Monetary Policy & Trade); *see also* Paul Bork & Dean F. Hanley, *SEC Issues Long-Delayed Rule on Conflict Minerals*, FOLEY HOAG (Aug. 27, 2012), http://www.foleyhoag.com/publications/alerts-and-updates/2012/august/sec-issues-long-delayed-rule-on-conflict-minerals ("The SEC had been required to issue final rules by April 2011, and thus this rule-making is long overdue.").

stakeholders and industry representatives."[15] This feedback called for regulations ranging from "weakest possible enforcement"[16] of § 1502, to "robust"[17] and "forceful" rules.[18] The Commission issued its final conflict minerals rule (hereinafter SEC rule) on September 12, 2012, which mandated compliance beginning on January 1, 2013.[19] The first deadline for conflict minerals disclosures was June 2, 2014.[20]

Generally, the SEC rule requires Exchange Act reporting companies to make conflict mineral disclosures after conducting specific country of origin inquiries and due diligence.[21] In order to simplify the disclosure process, the SEC outlined a three-step plan that companies must follow to determine whether the rule even applies to them, and which actions need to be taken in order to comply with the relevant due diligence and disclosure requirements.[22]

A. Step One: Determining Who Must Comply

The SEC rule specifies three conditions that if met subject a particular company to the disclosure requirements. In developing these conditions, the SEC considered § 1502's "legislative background" and "statutory location."[23] First, the rule applies to any "issuer"[24] that "files reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act."[25]

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[15] Nat'l Ass'n of Mfrs. v. Sec. Exch. Comm'n, No. 13-cv-635, 2013 WL 3803918 (D.D.C. July 23, 2013).

[16] Letter from Lori G. Kechter, Adm'r, Outcry for Congo Campaign, to Meredith Cross, Director, Div. Corp. Fin., Sec. & Exch. Comm'n (Dec. 15, 2010), *available at* http://www.sec.gov/comments/s7-40-10/s74010-3.htm.

[17] Letter from Lieth Anderson, President, Nat'l Assoc. of Evangelicals, to Mary L. Schapiro, Chairwoman, Sec. & Exch. Comm'n (Feb. 17, 2012), *available at* http://www.sec.gov/comments/s7-40-10/s74010-501.pdf.

[18] Letter from Julia Westwater, to Sec. & Exch. Comm'n (Feb. 28, 2012), *available at* http://www.sec.gov/comments/s7-40-10/s74010-511.htm.

[19] Conflict Minerals Release, *supra* note 2, at 56,275.

[20] *First Conflict Minerals Filings Still Due June 2, 2014*, MAYER BROWN (May 6, 2014), http://www.mayerbrown.com/files/Publication/33567369-cb6a-4c2f-99b8-6ff58f68354a/ Presentation/PublicationAttachment/3f063ae5-0fd3-4bf9-81d4-ad5573e72c27/ UPDATE_First_Conflict_Minerals_Filings_Still_Due_0514.pdf.

[21] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, Pub. L. No. 111-203, 124 Stat. 1376, 2223 (2010); *see also* Conflict Minerals Release, *supra* note 2, at 56,275.

[22] Conflict Minerals Release, *supra* note 2, at 56,275. The SEC provided a flowchart to guide companies, using a series of questions and answers and highlighting where a Conflict Minerals Report must be included with a Form SD. *Id.* at 56,283.

[23] *See* Conflict Minerals Release, *supra* note 2, at 56,285.

[24] An issuer is any "person, company, government, political subdivision, agency, or instrumentality of government" that "issues or proposes to issue any security." Securities Exchange Act of 1934 § 3(a)(8)-(9), 15 U.S.C. § 78c(a)(8)-(9) (2014).

[25] Conflict Minerals Release, *supra* note 2, at 56,285. The SEC pointed out that the legislative histo-

These sections outline the quarterly, annual, and periodic reports typically associated with Exchange Act reporting companies.[26] Second, the rule applies to issuers that manufacture or contract to manufacture products.[27] Finally, if the manufactured products involve conflict minerals "necessary" to their functionality[28] or production,[29] the issuer is subject to the SEC rule.[30] If any issuer does not satisfy each of these conditions the SEC rule does not apply, and no further action is necessary with regard to conflict minerals disclosures. However, if an issuer *does* meet each of the conditions the SEC rule applies, and mandates compliance with the additional disclosure requirements. For purposes of this note, issuers satisfying these conditions are called "reporting companies" on account of their reporting duties to the SEC under §§ 13(a) or 15(d) of the Exchange Act and their disclosure obligations under the SEC rule.

B. Step Two: Making a Reasonable Country of Origin Inquiry

If a reporting company determines it satisfies the three conditions it must then turn to step two in the SEC rule's disclosure process: conducting a reasonable country of origin inquiry regarding its conflict minerals.[31] The

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ry only refers to "companies that file with or report to the Commission or that are listed on a United States stock exchange," but nevertheless stated that foreign private issuers or smaller reporting companies might be included. *Id*. at 56,287.

[26] Under § 13(a), issuers that have securities registered pursuant to § 12 (or sell their securities on national exchanges) are required to file "information and documents . . . to keep reasonably current" the information in their application or registration statements, as well as annual and quarterly reports. Securities Exchange Act of 1934 § 13(a), 15 U.S.C. § 78m(a) (2014). § 15(d) requires issuers that have filed registration statements (including under the Securities Act of 1933) to file supplementary and periodic information as the Commission prescribes. *See id.* § 78o(d). Thus, issuers that file reports under any of these Exchange Act sections (and that meet the other two qualifications) are subject to the SEC rule.

[27] Conflict Minerals Release, *supra* note 2, at 56,283, 56,290. The SEC did not define manufacture, but explained that activities like servicing, maintaining, or repairing products were not considered manufacturing. *Id.* at 56,290. Similarly, the SEC did not announce a single definition of contracting to manufacture, though it provided guidance by framing the question as depending on an issuer's degree of influence over the manufacturing process (including individual facts and circumstances surrounding the issuer's business and industry). *Id.* at 56,279, 56,290.

[28] Factors bearing on functionality include whether the conflict mineral is necessary to the product's generally expected function or purpose (including any multiple generally expected functions), or, if a conflict mineral is a decoration or ornamentation, whether the decoration or ornamentation is the product's primary purpose. *Id.* at 56,279, 56,297.

[29] Factors bearing on production include whether the conflict mineral is contained in and intentionally added in the production process of the product or its components, or whether the conflict mineral is "necessary to produce the product." *Id.* at 56,297. Note that even trace amounts must be considered when determining whether conflict minerals are necessary to the functionality or production of a product. *Id.*

[30] 17 C.F.R. § 240.13p-1 (2013).

[31] Conflict Minerals Release, *supra* note 2, at 56,297. *But see id.* at 56,280 (exempting any conflict minerals that are "outside the supply chain" prior to January 31, 2013).

SEC rule does not help reporting companies by explaining what specific procedures would be sufficient. Rather, it merely maintains that this inquiry must be performed in good faith and be "reasonably designed" to ascertain whether the conflict minerals originated in covered countries or from recycled or scrap sources.[32] The inquiry is satisfied if a reporting company receives reasonably reliable representations from suppliers and processing facilities that indicate the conflict minerals either did not originate in the covered countries or came from recycled or scrap sources.[33] The reasonable inquiry does not depend on, and does not require, representations from *every* supplier, although warning signs warrant additional consideration by a reporting company.[34]

Depending on the results of the reasonable country of origin inquiry, reporting companies may not be required to proceed through step three of the SEC rule, and their disclosure obligations are limited to specific items on the SEC's new Form SD. For example, if a reporting company concludes that its conflict minerals *did not* originate in covered countries or that they *did* come from recycled or scrap sources, it need not proceed to step three of the SEC rule.[35] Similarly, reporting companies that either have "no reason" to believe that their conflict minerals may have originated in covered countries, or that "reasonably believe" their conflict minerals came from recycled or scrap resources, are not responsible for proceeding to step three.[36] In each of these cases a reporting company need only file the Form SD. This form must include a brief description of the reasonable country of origin inquiry undertaken, as well as the results of that inquiry.[37] A reporting company demonstrates through these disclosures its basis for concluding that it does not need to proceed to step three, which would ultimately require the filing of a much more complete Conflict Minerals Report (dis-

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[32] *Id.* at 56,312.

[33] *Id.* The SEC clarified it would "view an issuer as satisfying the reasonable country of origin inquiry standard if it seeks and obtains reasonably reliable representations indicating the facility at which its conflict minerals were processed and demonstrating that those conflict minerals did not originate in the Covered Countries or came from recycled or scrap sources. These representations could come either directly from that facility or indirectly through the issuer's immediate suppliers, but the issuer must have a reason to believe these representations are true given the facts and circumstances surrounding those representations. . . . An issuer would have reason to believe representations were true if a processing facility received a 'conflict-free' designation by a recognized industry group that requires an independent private sector audit of the smelter, or an individual processing facility, while it may not be part of the industry group's 'conflict-free' designation process, obtained an independent private sector audit that is made publicly available." *Id.*

[34] *Id.*

[35] *Id.* at 56,313. This means the reporting company will not need to proceed to the more intensive due diligence process, and will not be required to file a Conflict Minerals Report.

[36] Conflict Minerals Release, *supra* note 2, at 56,313.

[37] *Id.*

cussed below).[38]

However, a reasonable country of origin inquiry may require that a reporting company proceed to step three of the SEC rule. The reporting company would need to exercise due diligence and file a complete Conflict Minerals Report. For example, if a reporting company concludes that its conflict minerals did in fact originate in conflict countries and were not sourced from recycled or scrap materials, it is required to move to step three.[39] Additionally, if a reporting company "has reason" to believe its conflict minerals may have originated in covered countries and may not have come from recycled or scrap sources, it is required to move to step three of the SEC rule.[40]

C. Step Three: Exercising Due Diligence and Filing a Conflict Minerals Report

In step three, reporting companies are required to exercise due diligence on the source and chain of custody of the conflict minerals in their products.[41] The SEC rule instructs reporting companies to follow a nationally or internationally recognized due diligence framework.[42] For example, the Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidelines meet this standard.[43] OECD due diligence involves five general components: strong company management systems, identification and assessment of risks in supply chains, design and implementation of strategies to respond to identified risks, independent third-party audits, and annual reports on supply chain due diligence.[44] Though stringent and expensive, these measures are designed to help reporting companies discover the true origins of the conflict materials contained in or used to manufacture their products.

A reporting company's due diligence determinations lead to one of two possible outcomes. First, if a reporting company determines its conflict minerals are from scrap or recycled sources, or that its minerals did not

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[38] *Id.*

[39] *Id.* For certain minerals, like gold, some conflict mineral frameworks already exist. *Id.*

[40] *Id.*

[41] *See generally* 17 C.F.R. §§ 240.13p-1, 249b.400 (2013).

[42] Conflict Minerals Release, *supra* note 2, at 56,326.

[43] *Id.* While the SEC cited the OECD Guidelines as an acceptable standard, it clarified that any nationally or internationally recognized framework would satisfy the stringent due diligence requirement so long as it had "been established by a body . . . that has followed due-process procedures, including the broad distribution of the framework for public comment," and was "consistent with the criteria standards in GAGAS [Generally Accepted Government Auditing Standards] established by the GAO." *Id.*

[44] *See generally* OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2nd ed., 2013).

come from the covered countries, it need only file a Form SD.[45] Alternatively, if a reporting company cannot conclusively determine that its conflict minerals are not from covered countries or are from scrap and recycled sources,[46] it is required to file a Form SD with a Conflict Minerals Report as an exhibit.[47] This Conflict Minerals Report must contain: (1) a description of the measures taken by the reporting company in conducting its due diligence, (2) a certified independent private sector audit,[48] and (3) a description of products that "have not been found to be DRC conflict free."[49]

Because of the detail required by the Conflict Minerals Report, the SEC introduced a phase-in period to allow reporting companies to prepare to meet all of the requirements. For two years after the SEC rule's effective date, reporting companies need only describe their minerals as DRC conflict undeterminable in their reports if they are unable to determine the origin of their minerals (and whether they fund conflict).[50] Additionally, the conflict minerals reports do not need a separate independent private sector audit.[51]

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45 Conflict Minerals Release, *supra* note 2, at 56,283. This Form SD must include a description of the reasonable country of origin inquiry, due diligence measures, and the results of both investigations. *Id.*

46 Note that if because of a reasonable country of origin inquiry a reporting company had reason to believe its conflict minerals may not have come from a recycled or scrap source it still needs to exercise due diligence. At the time of the SEC's final rule release, however, the OECD's supplement for gold was the "only nationally or internationally recognized due diligence framework for any mineral from recycled or scrap sources." Issuers are required to provide Conflict Minerals Reports if they are unable to determine through due diligence that their conflict minerals did not come from recycled or scrap sources. Conflict Minerals Release, *supra* note 2, at 56,332-33.

47 *Id.* at 56,283.

48 This opinion or conclusion should highlight: (1) whether the issuer's plan for due diligence measures is "in conformity with the criteria set forth in the due diligence framework," and (2) whether the issuer's described due diligence measures are "consistent with the process undertaken." *Id.* Some issuers may qualify for a "DRC Conflict Undeterminable" exception, at least for reporting made less than two years (or less than four years if a smaller reporting company) after the rule's effective date. *See id.* at 56,288, 56,321.

49 "DRC conflict free" means that "the product does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups." *Id.* at 56,364. The conflict minerals report's description of the products involves disclosing the facilities used to process the conflict minerals, the minerals' country of origin, and the efforts used in determining the "mine or location of origin of those minerals with the greatest possible specificity." *Id.* at 56,320-21. Note that the third requirement, describing products that have not been found to be DRC conflict free, has been stayed through the end of litigation in the *National Association of Manufacturers, et al. v. SEC, etc. al.* case. The United States Court of Appeals for the District of Columbia Circuit recently ruled this provision in violation of a reporting company's First Amendment rights. *See* In the Matter of Exchange Act Rule 13p-1 and Form SD: Order Issuing Stay, Exchange Act Release No. 72,079, 79 Fed. Reg. 26,297 (May 7, 2014) [hereinafter Order Issuing Stay]; *see generally* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014). The stay does not apply to other portions of the rule. Order Issuing Stay, *supra* note 49, at 26,297.

50 Conflict Minerals Release, *supra* note 2, at 56,322.

51 *Id.* at 56,283.

Reporting companies must complete the three steps in order to comply with the SEC rule. They must first determine whether the SEC rule applies. This means reporting companies must determine whether they are § 13(a) or § 15(d) Exchange Act reporting issuers that manufacture or contract to be manufactured products involving conflict minerals necessary to the production or manufacture of those products. If so, the reporting companies must then conduct a reasonable inquiry into their products' countries of origin. Finally, reporting companies must exercise due diligence according to the results of the reasonable country of origin inquiries.

III. THERE ARE "NO BURDENS" ON INDUSTRY? COMPLIANCE COSTS FOR REPORTING COMPANIES

While the SEC was able to simplify the conflict minerals disclosure process to three steps, the SEC rule imposes significant economic and administrative burdens on reporting companies, suppliers, and manufacturers. For those companies handling thousands, if not millions, of parts and products, making any determination as to the origin of the minerals in each part proves a truly "Herculean" task.[52] For example, Boeing's defense business alone handles over 190 million parts per year.[53] In 2010, these parts came from over 8,000 "direct" suppliers, and this does not account for any of Boeing's "commercial" business.[54] To complicate matters, many of Boeing's "first-tier direct suppliers" have thousands of direct suppliers themselves, resulting in a direct and indirect supply chain "numbering in the tens of thousands."[55]

A company like Boeing faces huge administrative and economic costs in adequately performing its reasonable country of origin inquiry and due diligence requirements. This process requires additional staff, an audit

[52] *Costs and Consequences of Dodd-Frank*, *supra* note 1, at 17.

[53] Letter from Benedict S. Cohen, Chief Counsel for Gov't Operations, The Boeing Co., to Mary L Schapiro, Chairman, Sec. & Exch. Comm'n (Oct. 17, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-436.pdf [hereinafter Cohen Oct. 17].

[54] For example, each new 787 Dreamliner plane contains 3.5 million parts. *Id.*

[55] *Id.* Proponents of § 1502 maintain an unfounded assumption that costs will be "minimal," citing "first-tier" suppliers as the only concern with regard to conflict minerals due diligence. Letter from Mark B. Taylor, Senior Researcher, Fafo Inst. for Applied Int'l Studies, to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Oct. 17, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-332.pdf. To provide some context on the varying tiers involved in a supply chain, the National Association of Manufacturers submitted an example supply chain path to the SEC: (1) mining, (2) negociant, (3) comptoir, (4) trader, (5) ore benefication, (6) smelting, (7) refining, (8) metal sold to company A, which makes a metallic catalyst, (9) catalyst is sold to company B, which uses it to manufacture a polymeric coating, (10) company C purchases the coating and uses it to coat a part, (11) part is sold to company D, which uses it to make a larger part, (12) larger part is sold to company E, which uses it to make an assembly, and (13) assembly is sold to company F, an auto company, which uses it in manufacturing a car. Letter from Franklin J. Vargo, to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n (July 26, 2011) *available at* http://www.sec.gov/comments/s7-40-10/s74010-280.pdf.

company, legal and accounting help, and the purchase of "software for data management."[56] Proponents claim that these are "one-time cost[s]," which do not "require changes in the legal obligations of all suppliers of every company, only those sourcing particular minerals."[57] This oversimplifies the systems and costs that must be put in place, however, especially where reporting companies interact with more than just a few suppliers.

Preliminary estimates indicated that compliance with the SEC rule, including the implementation of due diligence measures, would be expensive across entire industries. The SEC predicted the initial financial costs in establishing compliance programs would reach at least $3 billion for reporting companies, with possible "ongoing compliance" costs of $600 million thereafter.[58] These appraisals seem conservative when compared to other recognized estimates.[59] For example, a Tulane study estimated implementation costs would total $7.93 billion:

Almost half of the total cost—$3.4 billion—would be met with in-house company personnel time, and the rest—$4.5 billion—would comprise outflows to 3rd parties for consulting, IT systems and audits. Comparing the costs to the issuers vs. the suppliers, the bulk of the total costs—$5.1 billion or 65%—would be incurred by the suppliers [a group that the SEC analysis did not adequately consider, and which is discussed *infra*], while the smaller portion of the total—$2.8 billion or 35%—would be carried by the issuers.[60]

Some advocates of the conflict minerals disclosure scheme claim that these costs represent "no 'burden' on industry."[61] Others, to their credit, recognize the very real costs for reporting companies (even as they minimize them when compared to the human rights costs that would continue should conflict mineral mining and supply chains be perpetuated).[62] Really, the costs extend beyond individual reporting companies to entire industries. The sheer number of companies involved (including both U.S. and foreign suppliers) could total well over 860,000.[63] Reporting companies and indus-

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[56] *Costs and Consequences of Dodd-Frank*, *supra* note 1, at 17.

[57] Taylor, *supra* note 55.

[58] Woody, *supra* note 13, at 1,333.

[59] One of the most dramatic estimates came from the National Association of Manufacturers, which predicted compliance costs would range between $8 billion and $16 billion. *Id.*

[60] Chris Bayer, *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in View of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*, LAW PROFESSOR BLOGS 3 (Oct. 17, 2011), http://lawprofessors.typepad.com/files/ tulane-study.pdf; *see also* Woody, *supra* note 13, at 1,333.

[61] Letter from Ann Shannon, Co-Founder, A Thousand Sisters Campaign, to Sec. & Exch. Comm'n (Dec. 15, 2010), *available at* http://www.sec.gov/comments/s7-40-10/s74010-1.htm.

[62] One "minimizing" statement came from Hewlett-Packard, which claimed, "in front of several other titans of the electronics industry," that compliance with the conflict minerals rules would cost those companies "less than one cent per product." Woody, *supra* note 13, at 1,333.

[63] Conflict Minerals Release, *supra* note 2, at 56,352.

tries will have to adjust to bear the cost of this new disclosure process.

IV. WHAT INTERNATIONAL EFFECTS? POTENTIAL BURDENS FOR FOREIGN SUPPLIERS

The compliance costs do not end with reporting companies, as foreign suppliers will need to do their own due diligence in order to provide reporting companies with the information they need for their conflict minerals reports. These costs will extend to suppliers located in both covered countries and in other foreign locations.

A. Effects on the Covered Countries

Compliance costs will also land on the "upstream" minerals industry (or suppliers and producers further up the supply chain), especially in the covered countries.[64] The complexity of supply chains and the "lack of reliable information about the source of these minerals" will only result in more challenges.[65] The variety of costs incurred relative to the set-up and implementation of "on the ground due diligence systems" in the DRC or adjoining countries will be particularly expensive,[66] because they are imposed on some of the "least developed and poorest countries of the world."[67] The mining in these countries is generally performed by "artisanal or small scale miners" struggling to make ends meet in tough economic conditions.[68] Additionally, trading companies, transporters, and concentrate treatment facilities[69] (all of which engage in contracts throughout mineral supply chains) will have to incur costs related to increased levels of "administration and auditing."[70] The costly measures include change of custody tagging, audits and risk assessments, mitigation implementation, and other ancillary requirement costs.[71] Because of these costs, and the potential ramifications of U.S. companies turning to other regions for their minerals, many fear a "*de*

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[64] Letter from Kay Nimmo, Manager of Sustainability & Regulatory Affairs, ITRI Ltd., to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Feb. 25, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-83.pdf [hereinafter Nimmo Feb. 25].

[65] Vargo, *supra* note 55. Recall the path, submitted by Vargo, of the complex supply chain path involved in just one manufacturing process discussed *supra* note 55: "[C]omplex supply chains do not have traceability of conflict minerals built in. . . . [We should] recognize that the needed reporting and information infrastructure on the ground in the [DRC] and capacity to provide fully validated supply chains for affected minerals does not yet exist." *Id.*

[66] Nimmo Feb. 25, *supra* note 64.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] These ancillary costs include logbooks, database redesigns, and even government management schemes. Nimmo Feb. 25, *supra* note 64.

facto embargo" will result in the covered countries.[72]

The SEC rule also interferes with existing anti-conflict measures, and threatens businesses and suppliers that are not responsible for funding conflict. The Minister for Energy and Minerals of the United Republic of Tanzania, for example, submitted a comment to the SEC emphasizing that "the mining industry in Tanzania is well regulated and has not been tainted with illegal minerals produced from the DRC."[73] In an effort to assure the SEC that Tanzanian minerals were "not financing, and have never financed the DRC conflict,"[74] the Minister articulated a fear that many others have expressed: the conflict minerals rules result in "disproportionate share[s] of the compliance burden," as well as an end to the responsible sourcing of materials from the region.[75] This fear led some to ask for an implementation of § 1502 that would, where possible, minimize any "disruption to those members of the local population and the private sector in the region" that were not contributing to conflict.[76] However, the SEC rule threatens even the responsible sourcing of minerals in the covered countries, steering reporting companies elsewhere in search of minerals.

B. Effects on Foreign Countries in General

Aside from the "chilling effect[s]"[77] in the covered countries, costs for businesses that are not involved in obtaining or treating DRC minerals throughout the supply chain will nevertheless be significant.[78] The SEC rule

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[72] Woody, *supra* note 13, at 1,346. "Congolese activists and others have continually asserted that this regulation will lead, and has already led, to an embargo of Congolese minerals, a drastic cost that would outweigh any purported benefits of the regulation. Indeed, with major American corporations shying away from using Congolese minerals, certain mines in Congo have suspended operations, forcing many Congolese out of work." *Id.* at 1345-46.

[73] Letter from William M. Ngeleja, Minister for Energy and Minerals, United Republic of Tanzania, to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n (May 23, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-258.pdf. The Minister clarified that the Government of Tanzania "welcome[d] the intention behind [Dodd-Frank] section 1502," distancing itself from any "strategic or self-interested objectives . . . [involving] conflict around DRC." *Id.* However, the Government's concern involved the impact of the regulations on Tanzania's mining industry and the fear that "compliance costs . . . *could be as great for a manufacturer sourcing their minerals from Tanzania as they would be from the DRC*." *Id.* (emphasis added).

[74] *Id.*

[75] *Id.*

[76] Letter from Kay Nimmo, Manager of Sustainability & Regulatory Affairs, ITRI Ltd., to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Oct. 19, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-338.pdf [hereinafter Nimmo Oct. 19].

[77] Letter from David Hirschmann, President and CEO, Ctr. For Capital Markets Competitiveness, U.S. Chamber of Commerce, and Myron Brilliant, Senior Vice President, Int'l Affairs, U.S. Chamber of Commerce, to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n (Feb. 28, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-87.pdf.

[78] Nimmo Feb. 25, *supra* note 64.

could affect "nearly every manufacturing sector and facet of the supply chain," causing negative results for those countries and businesses with minerals sourced outside of the covered countries.[79]

First, the conflict minerals provisions do not provide effective dividing lines between minerals that are conflict free and those that are not. For example, the term "conflict minerals" involves *all* cassiterite, wolframite, gold, and tantalum, thus placing a "reputational taint" across entire industries, even when minerals do not come from covered countries.[80] This reputational taint affects consumers and investors, who might become confused when businesses claim they indeed use "conflict minerals," even if they are legitimately "DRC conflict free."[81]

Second, as reporting companies engage in due diligence, they will not be able to rely on supplier statements (including warranties) that products are conflict free, thus extending the burden of expensive and difficult due diligence to suppliers. This means that foreign companies will need to rise to the applicable due diligence standards "despite not facing any similar requirements in their home jurisdiction."[82] Recalling the concerns of the Minister of Tanzania, a disproportionate share of the compliance burden might fall on these foreign companies. Furthermore, despite any overlap or mutuality cost efficiencies that might emerge where foreign suppliers fill supply contracts with more than one reporting company, this overlap nevertheless exacts costs that would not be applicable but for § 1502 and the SEC rule.[83] A similar theory posits that suppliers can determine the source of their minerals once and then spread the costs of determining the source across many issuer firms.[84] Even so, this bottom-up approach yields increased costs to reporting companies buying from these suppliers and ignores the current supply agreements already in force.[85] These are costs that foreign suppliers may be unwilling or unable to manage.

The overarching theme is that the costs imposed by the conflict minerals rule extend beyond U.S. reporting companies. In the words of one commentator, the "cost issue is not with reporting, but with the requirements for due diligence and audits."[86] Because foreign suppliers may be unwilling or

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[79] Hirschmann, *supra* note 77.

[80] Letter from John Crawley, CEO, Niotan, Inc., to Mary L. Schapiro, Chairwoman, Sec. & Exch. Comm'n (Mar. 21, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-200.pdf.

[81] *Id. But see* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (violation of First Amendment to force companies to describe their minerals as not having been found to be "DRC conflict free").

[82] Woody, *supra* note 13, at 1,342.

[83] Conflict Minerals Release, *supra* note 2, at 56,352 n.835.

[84] *Id.* at 56,352.

[85] *Id.*

[86] Letter from Griffin Teggeman to Sec. & Exch. Comm'n (Dec. 16, 2010), *available at* http://www.sec.gov/comments/s7-40-10/s74010-4.pdf.

unable to assume the additional burdens, these requirements will ultimately raise prices for the manufacture and production of products.[87]

V. DOES THE SEC RULE WORK? FIRST YEAR REPORTS ARE WEAKER THAN EXPECTED

The first year of conflict minerals reporting, with Form SD's and Conflict Minerals Reports filed at the beginning of June 2014, illustrates the costs and difficulties of complying with the SEC rule. Some have considered these filings "a mixed bag, to put it gently," because reporting companies provided no "concrete information on the use of conflict minerals in their products."[88] Others have considered a majority of the reports "vague" as they dance around the "hot-potato language and ambiguities of not knowing what's exactly in the business' supply chain."[89] The poor response rates from reporting issuers and their suppliers show that there are significant burdens to overcome before reporting companies will be prepared to face the full requirements of the SEC rule outside of the phase-in period.[90]

First, the total number of reports actually filed was dramatically less than expected. Only 1,315 reporting companies filed disclosures with the SEC, a low number considering that 6,000 reporting companies were expected to file with the SEC.[91] Of the 1,315 reporting companies that filed their reports, most were unable to determine the origin of their conflict minerals.[92] Many reporting companies received inadequate information about

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[87] Manufacturers, distillers, purifiers, and other key supply chain service providers may also be unwilling or unable to comply with due diligence burdens. Those that are willing will bake due diligence expenditures into their prices.

[88] Jofi Joseph, Global Risk Insights *Funding War: U.S. Companies Disclose Conflict Mineral Use,* OILPRICE.COM (July 17, 2014), http://oilprice.com/Energy/Energy-General/Funding-War-U.S.-Companies-Disclose-Conflict-Mineral-Use.html.

[89] Jim Leinaweaver, *Companies' Conflict Mineral Reports Are Mixed as SEC Deadline Passes,* THE GUARDIAN (June 2, 2014), http://www.theguardian.com/sustainable-business/2014/jun/02/sec-conflict-mineral-deadline-reports-mixed-apple-intel-hp.

[90] "[M]ultinational corporations often rely on a large multitude of third-party suppliers and previously lacked incentive to closely track supplies sourcing. However, we can expect more detailed and more accurate reports in coming years as companies adjust to the new expectations of transparency and disclosure."

Joseph, *supra* note 88.

[91] *Let's Talk: Governance: First-Year Conflict Mineral Reporting Reveals Insights and Surprises,* EY CTR. FOR BD. MATTERS, June 2014, at 1, 2, *available at* http://www.ey.com/Publication/vwLUAssets/EY-lets-talk-governance-june-2014/$FILE/EY-lets-talk-governance-june-2014.pdf.

[92] *Id.* at 1. "[N]early 98 percent of companies . . . recently indicated they could not fully determine whether their products or components contained . . . conflict minerals . . . ." *Conflict Minerals Compliance Clock Ticks Away – Time's Up,* PR NEWSWIRE (July 25, 2014), http://www.virtual-strategy.com/2014/07/25/conflict-minerals-compliance-clock-ticks-away-times.

their minerals from suppliers in the supply chain.[93] The average number of suppliers surveyed by reporting companies in preparation for their conflict minerals reports was 2,500.[94] Review of the 184 S&P companies that filed conflict minerals reports showed that only half of the reporting companies were able to "identify some portion of smelters as conflict-free and only 27% provided a list of smelters and refiners" in their conflict minerals reports.[95] Additionally, only four companies obtained an independent private sector audit of their conflict minerals report, meaning an overwhelming majority of reporting companies relied on the phase-in period.[96]

While some reporting companies did a better job of including "significant detail" in their filings, these companies did so for pragmatic reasons, not because of the new disclosure requirements.[97] For example, Apple Inc. and Intel Corp. included tables in their conflict minerals report listing the smelters and refiners where conflict minerals in their products were processed, as well as the countries of origin for those minerals.[98] Both conflict minerals reports outlined the companies' conflict minerals programs in detail, specifying all actions taken and alleging conformity with the OECD guidelines.[99] Intel specified what actions it planned on taking in the future to identify the source of its unidentifiable minerals.[100] But the reporting companies who provided such detail did so because it "furthers the principles laid out in their corporate responsibility statements and facilitates a bond with those consumers who prioritize such issues."[101] Much of this detail was provided in a "public-facing way," tailored more towards consumer preferences than required disclosure.[102]

With a few exceptions, the first round of filed conflict minerals reports proved inconclusive with regard to the origin and processing facilities of the conflict minerals in the reporting companies' products. And the phase-in

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[93] "Many of these companies have complex supply chains and reported difficulties in tracing the origin of the [conflict minerals] in their products given insufficient supplier responses to their inquiries. Many companies reported that suppliers did not respond to questionnaires or did not provide complete or adequate responses. For this reason, many of the [conflict minerals reports] did not include the type of detail that may have been expected."

EY CTR. FOR BD. MATTERS, *supra* note 91, at 1.

[94] *Id.* at 4. Note, however, that the number of suppliers surveyed ranged from 5 to almost 40,000. *Id.*

[95] *Id.* at 3.

[96] *Id.* at 2.

[97] Joseph, *supra* note 88.

[98] *See* Apple Inc., Conflict Minerals Report (Form SD) (May 30, 2014); Intel Corp., Conflict Minerals Report (Form SD) (May 22, 2014).

[99] Apple Form SD, *supra* note 98; Intel Form SD, *supra* note 98.

[100] Intel Form SD, *supra* note 98.

[101] *Id.* Additionally, these reporting companies "recognize that supply chain transparency is not only an inevitable cost of doing business in the 21st century, but if properly handled, can also represent a growth opportunity." *Id.*

[102] Leinaweaver, *supra* note 89.

period's allowance of a DRC conflict undeterminable designation means that reporting companies must still face an uphill battle in order for subsequent conflict minerals reports to be complete and accurate.

VI. "UNCONSCIONABLE?" THE DIFFICULTIES OF IMPOSING A REGULATORY FRAMEWORK ON FOREIGN COMPANIES THROUGH CONTRACTS

What do these weak first-round disclosures and all the compliance costs mean for reporting companies and their suppliers in future years? As the phase-in period ends and reporting companies are expected to provide better conflict minerals disclosures, reporting companies will need to make more detailed reports, which will drive up compliance costs. Covered countries may provide the cheapest available minerals, but reporting companies will still need to increase product costs to "recoup the higher costs" of minerals obtained from compliant suppliers.[103] More likely, however, the high compliance costs will provide incentives for issuers to choose only suppliers that obtain their minerals from outside the covered countries.[104] Yet, other foreign suppliers will still incur compliance costs, and potentially suffer from the reputational taint that follows from being tagged as "conflict minerals."

In light of § 1502's intended purpose and the SEC rule's strict requirements, reporting companies face the difficult decision of how best to navigate the three steps. Proponents of § 1502 argue that conflict mineral disclosures "shed . . . light" on the "life-and-death" issues involving the funding of conflict in covered countries.[105] This transparency is intended to produce a "nation of consumers" and investors who feel a "responsibility to ensure that . . . economic activity" does not support conflict.[106]

Since the disclosures are designed to change consumer and investor preferences, reporting companies must decide how to comply, especially as the phase-in period concludes. First, reporting companies can choose to continue their sourcing, including in covered countries, but with the added due diligence requirements and conflict minerals reports. Second, they may

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[103] Conflict Minerals Release, *supra* note 2, at 56,351.

[104] *Id.*

[105] 156 CONG. REC. S8, 318 (daily ed. May 17, 2010) (statement of Sen. Dick Durbin).

[106] *Id.* At least one nonprofit group has provided a "consumer action guide," so that consumers will "understand what actions companies are (or are not) taking to contribute to the creation of a clean minerals trade in Congo. . . . Use your consumer power to make more responsible purchasing decisions. Send messages to companies you purchase from, reminding them how important conflict-free from Congo is to you." Conflict Minerals Company Rankings, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/conflict-minerals-company-rankings (last visited March 30, 2014).

choose to use alternative minerals that do not fund conflict.[107] Moreover, they might consider changing "product configuration[s]" to eliminate their need for conflict minerals altogether.[108] In fact, compliance with the SEC rule may also prompt companies to include "conflict-free" notions as part of their company branding.[109] Accounting firms are already encouraging companies to engage in "strategic" supply chain processes in order to gain new customers.[110] Some organizations are "passing resolutions to purchase only from companies that are conflict-free, including U.S. universities that have responded to student involvement in the Conflict-Free Campus Initiative."[111] Several companies have even made significant progress in eliminating conflict minerals from their supply chains.[112]

Given the compliance costs discussed above, and absent any product reconfigurations, reporting companies will seek to improve their supply chains, in some cases becoming more "aggressive" in enforcing their sourcing policies.[113] While there is no explicit penalty for companies that do not comply with the SEC rule, manufacturers and producers will be concerned

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[107] David C.W. Wagner, *Breaking the Nexus Between Armed Conflict and Consumer Products: Where's the App for That?*, 26 TEMP. INT'L & COMP. L.J. 103, 110 (2012).

[108] *10 Minutes on Conflict Minerals,* PRICEWATERHOUSECOOPERS LLC, May 2013, *available at* http://www.pwc.com/en_US/us/10minutes/assets/pwc-10minutes-conflict-minerals.pdf. "One company, Cisco, has already received a shareholder's resolution asking for a feasibility study to determine whether the minerals can be removed from Cisco's entire supply chain altogether. This question posed by Cisco's shareholders will not be the last as more socially responsible investors examine their portfolios and the conflict minerals reports filed in 2014 and beyond."

Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 391–92 (2013).

[109] *See generally* PRICEWATERHOUSECOOPERS LLC, *supra* note 108 (compliance with conflict minerals disclosure process will influence a company's brand by maximizing the benefits and minimizing the risks).

[110] *Id.*

[111] PRICEWATERHOUSECOOPERS LLC, *supra* note 108.

[112] *See generally* Sasha Lezhnev & Alex Hellmuth, *Taking Conflict Out of Consumer Gadgets: Company Rankings on Conflict Minerals 2012,* THE ENOUGH PROJECT, Aug. 2012, *available at* http://www.enoughproject.org/files/
CorporateRankings2012.pdf (identifying and ranking various electronics companies making progress in tracing, auditing, and certifying the minerals in their products).

[113] *See* PRICEWATERHOUSECOOPERS LLC, *supra* note 108 (because compliance with the conflict minerals rules will not be easy, no company can achieve compliance on its own; companies will need to pay attention to peer groups, optimize supply chains to ease the burdens of compliance, and use their purchasing power to provide leverage when negotiating with suppliers); *see also Conflict Minerals: What You Need to Know About the New Disclosure and Reporting Requirements and How Ernst & Young Can Help*, ERNST & YOUNG, 2012, *available at* http://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf (recommending that reporting companies design detailed programs to ensure compliance, including segmenting suppliers into risk tiers, and execute and sustain due diligence processes).

about consumer and investor attitudes toward mineral sourcing.[114] Making conflict mineral disclosures will prompt changes in company behavior, in many cases causing cancelled or breached contracts if reporting companies change their foreign suppliers immediately.

A. Supplier Contracts at Issue

Legislative history, recommendations of accounting firms, and issuer behavior since the promulgation of the rules all indicate that secure supply lines require supplier cooperation.[115] Reporting companies will make this point clear and will demand it in contract negotiations. Although manufacturers will "generally be able to exercise control only over Tier 1 suppliers," this is no easy task.[116] Even large companies have recognized that they lack any power to "unilaterally impose new contract terms and flow-down requirements on . . . suppliers."[117] Generally, reporting companies will only be able to negotiate new conditions or commitments when existing contracts are renewed or new contracts are entered into.[118] Since normal supply contracts run anywhere from three to five years,[119] some of these contracts will extend past the effective date of the SEC rule. If that is the case, what can U.S. reporting companies do when their suppliers refuse to modify an existing contract or immediately comply with due diligence procedures?

The SEC attempted to solve this problem by introducing the phase-in period. For two years after the effective date, the SEC rule permits reporting companies that are unable to determine the origin of their minerals to

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[114] *See* Narine, *supra* note 108, at 351 ("This 'name-and-shame' law, which does not actually make it illegal to source minerals from the Congo, aims to provide transparency to consumers and investors so that they can make informed choices about the companies with which they choose to do business. On the surface, this makes sense in an era in which companies are hyper-vigilant about their reputations.").

[115] "Virtually no company can achieve compliance on its own. [Companies] will need to rely on [their] suppliers, who will likely need to turn to their own suppliers to gather information about the origin of materials . . . [used in their] products." PRICEWATERHOUSECOOPERS LLC, *supra* note 108.

[116] Vargo, *supra* note 55. Some analysis on contractual relations between producers and their suppliers has been provided in the context of the phase-in period envisioned by the final version of the SEC rule: "It is important to understand the complexity of a modern supply chain in order to understand why a phase-in is critical to achieve the intent of the legislation and for companies to be able to reasonably comply with it. . . . [M]anufacturers and those contracting to manufacture will generally be able to exercise control only over Tier 1 suppliers, with whom they are in privity of contract which experience shows diminishes substantially as one moves further down the supply chain to the raw materials producers." *Id.*

[117] Letter from Benedict S. Cohen, Chief Counsel for Gov't Operations, The Boeing Co., to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Oct. 18, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-436.pdf [hereinafter Cohen Oct. 18]. Note also that there is the possibility that reporting companies may have far more bargaining power (leverage) when pressuring small foreign suppliers to comply at least where these suppliers need contracts to survive.

[118] Vargo, *supra* note 55; *see also* Cohen Oct. 18, *supra* note 117.

[119] Cohen Oct. 18, *supra* note 117.

describe those minerals as "DRC conflict undeterminable" in their Conflict Minerals Report.[120] These reports do not need a separate independent private sector audit report as would normally be required.[121] Thus, the phase-in period provides reporting companies with some measure of flexibility, at least for two years. A phase-in period is especially helpful for smaller companies where compliance costs are great and there is a lack of "leverage to pressure suppliers . . . to certify" the source of their minerals.[122] Additionally, the phase-in period is appropriate because it allows companies more time in adapting "these broader global initiatives to their individual facts and circumstances."[123] However, this relatively short delay will not resolve problems with costs.[124] The phase-in period only addresses issues of timing, merely pushing back *when* expenses have to be incurred for due diligence. When the window expires, reporting companies must be compliant with regulations. Moreover, reporting companies may still have contracts with their suppliers that extend beyond the limited phase-in period.

B. Contract Choices for U.S. Reporting Companies

Reporting companies are responsible for complying with the SEC rule's three step procedures by the applicable deadlines, leaving them with very few compliance options in the meantime.[125] First, they will attempt to modify or create new contracts with provisions extending the costs of due diligence to suppliers.[126] By imposing these requirements, reporting companies will make due diligence inquiries easier, more accurate, and certainly more comprehensive. The benefits of such requirements are not lost on reporting companies or their accounting advisors: they create more responsive mineral procurement processes, streamline supplier bases, and reward manufacturers (particularly those dealing with thousands of products) with timely, detailed, and accurate information.[127]

Second, where contractual limitations cannot be set because a foreign supplier will not agree to comply with due diligence requirements, reporting companies will try to establish a system of "centralized control."[128] This

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[120] Conflict Minerals Release, *supra* note 2, at 56, 281.

[121] *Id.* at 56,283.

[122] *Id.* at 56,288 n.122.

[123] *Id.*

[124] *See, e.g.*, *Costs and Consequences of Dodd-Frank, supra* note 1, at 15.

[125] This is why companies have been encouraged to "comply by the deadlines—start now." PRICEWATERHOUSECOOPERS LLC, *supra* note 108.

[126] As indicated *supra*, note 5, this situation prompted initial research for this note.

[127] PRICEWATERHOUSECOOPERS LLC, *supra* note 108.

[128] *See* Kevin Zheng Zhou & Dean Xu, *How Foreign Firms Curtail Local Supplier Opportunism in China: Detailed Contracts, Centralized Control, and Relational Governance*, 43 J. INT'L BUS. STUDIES 677, 679 (2012). While Zhou and Xu focus their analysis on supply-side opportunism in China, they do

system consists of a "vertical control structure," where powerful buyers seek to control a smaller supplier's behavior by "influencing the latter's product design, production processes, and quality control procedures" outside of any contractual provisions.[129] However, suppliers will be cautious about establishing any pattern or form of course of dealing or performance that might result in future unintended obligations.[130] More likely, the SEC rule's requirements, and the contract provisions that result, will delay reporting companies from developing the vertical control structures they would like to see implemented. Additionally, smaller reporting companies that do not command the same type of leverage as larger ones will not benefit from any vertical control benefits.

Reporting companies will begin to obtain minerals from alternative suppliers (and breach existing contracts when necessary) if their foreign suppliers will not accept new contract terms or submit to vertical control structures.[131] After all, the freedom to contract includes the freedom to breach, especially where a breach would be more efficient for a company's business outlook.[132]

C. Foreign Courts and American Contracts

Because of "today's globalized markets," reporting companies will not be able to rely on American courts and contract law to enforce conflict minerals contract provisions with their suppliers.[133] First, uncertainties about contractual obligations between parties are "assessed differently according to the law applicable" in other countries.[134] If a foreign court scrutinizes a reporting company's contract with a foreign supplier, contract terms might be subject to unfamiliar court doctrines and ultimately evaluated differently than in the United States. Second, the "place of jurisdiction" in intercompa-

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so in the context of sourcing "from local suppliers in emerging markets." *Id.* at 677. This analysis, then, overlaps much of the buyer-supplier interactions involving the covered countries of the conflict mineral rules, especially if their markets could be considered emerging.

[129] *Id.* at 679.

[130] "A contract for sale of goods may be made *in any manner sufficient to show agreement*, including conduct by both parties which recognizes the existence of such a contract." U.C.C. § 2-204 (2013) (emphasis added). "'Agreement' . . . means the bargain of the parties in fact, as found in their language or *inferred from other circumstances, including course of performance, course of dealing, or usage of* trade." U.C.C. § 1-201 (2013) (emphasis added). More on first-year contracts class to come.

[131] While this paper focuses on foreign suppliers, contractual disputes may also arise between American companies and their first tier American suppliers. These suppliers, by virtue of their not filing reports with the SEC, may not be required to abide by the conflict minerals rule.

[132] Remember that the prospect of new customers buying conflict-free products may be a powerful motivation in making business decisions. *See* PRICEWATERHOUSECOOPERS LLC, *supra* note 108.

[133] Thomas Dietz, *Contract Law, Relational Contracts, and Reputation Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry*, 37 LAW & SOC. INQUIRY 25, 25 (2012).

[134] *Id.* at 26.

ny agreements is not always clearly accepted by all parties.[135] Finally, it is doubtful whether judgments will be enforced in foreign states, meaning court decisions in one jurisdiction might be "undone" by the judicial and enforcement processes in another.[136]

One important critique of § 1502 revealed a flaw in enforcement: the DRC's government (and perhaps other governments in the region) might not have the infrastructure to enforce the principles embodied in contracts and agreements along supply chains.[137] § 1502 and the SEC rule's institutional framework might not be able to function "without much state support,"[138] leaving contracts looking more like "communication documents"[139] than enforceable obligations. Even in countries with stronger "state enforcement bodies,"[140] reporting companies may find themselves in expensive litigation as a result of an intentional contract breach.

When reporting companies breach their contracts, the policies and rules behind conflict minerals disclosures may conflict with what would otherwise be enforceable contract provisions. For example, conflict of laws between jurisdictions will promote the inefficient and "dirty" results of forum shopping.[141] Foreign-supplier plaintiffs will "naturally" seek a jurisdiction where they think their cases can be "most favorably presented."[142] Foreign litigation will not come cheap for reporting companies, and it may result in a determination preventing the much needed gathering of information for proper conflict minerals disclosures. This is particularly true where, branded with all the negative connotations breach implies, a reporting company has unlawfully terminated a binding contract to find a conflict-minerals-compliant supplier.

Contract breaches, like the costs of supply chain due diligence, will travel upstream, meaning second-, third-, and fourth-tier suppliers will face contract breaches and disputes with one another.[143] While it may take time for flow down requirements to reach upstream sources, these provisions

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[135] *Id.*

[136] *Id.*

[137] For example, large firms have operated with "impunity in weak or fragile states because these host states do not have the power or will to respect their own citizens' rights or to enforce labor or environmental laws." Narine, *supra* note 108, at 365. Of course, this very argument has also led some commentators to suggest that because these large transnational corporations have such "power and influence" they should have "commensurate responsibility regarding social issues." *Id.*

[138] Dietz, *supra* note 133, at 27.

[139] *Id.* at 33.

[140] *Id.*

[141] Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM J. INT'L L. 314, 314 (1997).

[142] *Id.*

[143] "[S]maller, less sophisticated and capable participants at all points in the supply chain will face converse challenges in attempting to familiarize themselves with and resource the new requirements." Cohen Oct. 18, *supra* note 117.

will result in contract disputes further removed from the final manufacturers of minerals. These disputes even involve "confidential commercial agreements,"[144] wherein certain information pertaining to suppliers has been contractually protected.[145]

Regardless of the parties, contracts enforced in or subject to the laws of foreign jurisdictions may result in unfavorable judicial determinations for reporting companies trying to force conflict minerals due diligence expenses on their foreign suppliers. Even where reporting companies have succeeded in securing foreign supplier's cooperation with the SEC rule, subsequent foreign litigation and upstream breaches increase the total costs of conflict minerals disclosures. These increased costs and the subsequent contract provisions that follow show that the SEC rule is not the best solution to the problem of conflict minerals.

VII. THE BEST SOLUTION? GREATER INTERNATIONAL INVOLVEMENT IS NEEDED TO EFFECTUATE THE PURPOSES OF § 1502

Congress and the SEC underestimated the true costs of the conflict minerals provisions, which will damage contract relations with foreign suppliers. The added expense of foreign litigation, damages determinations and payments, injunctions preventing business interactions, and the concomitant costs on litigating suppliers were not adequately considered and weighed by Congress or the SEC.[146] The SEC, whenever it engages in its rulemaking capacity, is required to consider whether an action will "promote efficiency, competition, and capital formation."[147] Interestingly, the SEC admitted that it was not able to assess or quantify how effective § 1502 would be in achieving its intended results.[148] Furthermore, it noted that "the social bene-

[144] Jim Low, *Conflict Minerals: Time to Develop a Compliance Strategy*, FIN. EXECUTIVE, Oct. 2012, 13, 14.

[145] One commentator suggested revisions to the conflict minerals rule, providing that "due regard shall be given to confidential information of suppliers and the independence of supply chain auditors,. . . and request should be limited to that which is necessary to satisfy the requirements under the rules." Letter from Andreas Lackner, President & CEO, Global Tungsten & Powders, to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n (Oct. 13, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-330.pdf.

[146] "A House Financial Services Committee memo said that Section 1502 was added to the Dodd-Frank Act during the House-Senate conference negotiations, without the benefit of a legislative hearing on the proposal. As a result, Congress did not examine how Section 1502 would be implemented, whether it would help end the conflict in the DRC, and what its effects would be on the DRC, the companies that use these minerals to manufacture goods used by consumers and other manufacturers, or the broader economy."

Jim Hamilton, *SEC Conflict Minerals Regulations Could Do More Harm than Good*, CORPORATE SECRETARY'S GUIDE, *available at* 2013 WL 3178378.

[147] Exchange Act Release No. 34-63547, 75 Fed. Reg. 80,948, 80,970 (2010).

[148] Conflict Minerals Release, *supra* note 2, at 56,335. *But see* Nat'l Ass'n of Mfrs. v. SEC, 748

fits are quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve."[149]

If private contracting still has any place as the best policy in enforcing private dealings, the SEC and Congress should realize that the conflict minerals disclosure scheme may not work as well as originally intended. As long as the SEC rule collides with contracts, the resulting conflicts of law, judicial decisions, and general disagreement between reporting companies and foreign suppliers may only prove that due diligence and conflict minerals disclosures are more taxing and controversial than originally anticipated. At least one author was correct then, when he characterized § 1502 as a "step forward," but only to the extent it is a "band-aid on an arterial wound."[150]

Given § 1502's intended social benefits, the growing desires of a consumer body bent on buying clean products, and the blooming recognition of the ability and responsibility to curb human rights abuses, the "arterial wound" may only be healed through greater international efforts in ending the conflict minerals trade. When contracts and a U.S. regulatory scheme cannot achieve those ends, the international stage can fill the gaps.

The "obvious"[151] solution must involve "commitment, not just by the United States, but also by the entire international community."[152] Most important, "large market[]" players, especially governments and large businesses, must recognize the roles they play in funding conflict, and the potential they have to eradicate that conflict.[153] This includes enacting legislation "similar to section 1502 to widen the circle of responsibility."[154] One possible measure would be a "tagging and tracing" program, enabling both businesses and authorities to easily identify the origins of certain min-

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F.3d 359, 369–70 (2014) (though holding the SEC's cost analysis was reasonable, noted, "Here, the rule's benefits would occur half-a-world away in the midst of an opaque conflict about which little reliable information exists, and concern a subject about which the Commission has no particular expertise. Even if one could estimate how many lives are saved or rapes prevented as a direct result of the final rule, doing so would be pointless because the costs of the rule—measured in dollars—would create an apples-to-bricks comparison. . . . What the Commission did not do, despite many comments suggesting it, was question the basic premise that a disclosure regime would help promote peace and stability in the Congo. . . . If the Commission had found that disclosure would fail of its essential purpose, then it could not have adopted *any* rule under the Association's view of §§ 78w(a)(2) and 78c(f). But promulgating some rule is exactly what Dodd-Frank required the Commission to do.").

149 Conflict Minerals Release, *supra* note 2, at 56,335.

150 Wagner, *supra* note 107, at 104. Wagner's thesis centered around two insufficiencies in the § 1502 implementation: (1) the conflict minerals rule is not feasible because of implementation that is too quick and that does not take into account the difficult security situation in the eastern DRC or the problems of smuggling, and (2) the rule places the heaviest burden on those whom the provision originally seeks to protect (creating a de facto embargo).

151 *Id.* at 128.

152 *Id.*

153 *Id.* at 139.

154 *Id.* at 139-40.

erals.[155] International players can also provide financial assistance and technical support for enforcing laws, punishing smuggling, and targeting other "networks" that continue to fund conflict.[156] Furthermore, foreign courts need to be prepared to enforce contract provisions that reflect an international consensus in pursuing such provisions. In order to ensure that efforts like § 1502 will not be "counterproductive," any action must be regarded as "credible," demonstrating "comprehensive support" by governments, the international community, and "affected issuers."[157]

Because of the need for comprehensive support, the unreliability and uncertainty of foreign courts, and the expensive and controversial results of § 1502 and the SEC rule, the best solution is to heed those who originally advocated for more delays.[158] Delaying the implementation of conflict minerals due diligence and disclosure procedures will allow other key international players to catch up with the United States. Such delays will ultimately solve several problems confronting § 1502 and its humanitarian objectives.

First, where international standards make conflict minerals due process and disclosures the norm, contractual terms outlining such processes will be more enforceable, in line with predictable court determinations and contract interpretations in foreign jurisdictions. Issuers and suppliers will be able to enter contracts with mutual understanding and agreement on essential conflict minerals terms.

Second, a delay and subsequent international commitment would solve administrative, legislative, and economic problems affecting the DRC and the adjoining region—the very areas where conflict minerals are sourced. For example, the problems of unsupportive governments,[159] which are often

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[155] Wagner, *supra* note 107, at 130.

[156] *Id.* at 139-40.

[157] *Id.* at 140. "Section 1502 has potential. Implemented correctly, *and supplemented by intelligent foreign assistance by . . . the international community,* section 1502 could help transform [the covered countries region]. . . . Transformation starts by accepting responsibility. In some ways, section 1502 does that by recognizing the link between violence in the eastern DRC and consumer products sold in the United States. But acknowledging a link is not enough. . . . Businesses must also accept that, in a globalized world, they too have a responsibility to ensure their actions do not contribute to human rights violations."

Id. at 140 (emphasis added).

[158] While many of these calls for delay came during the SEC's rule—making process the comments of one African spokesperson might be easily applicable to a more generalized delay: "We ask for the SEC to delay their requirements to also enable US companies to *delay their decision to stop the Congo minerals trade*." Nimmo Oct. 19, *supra* note 76.

[159] "The conflict minerals crisis in DRC is multi-faceted, complex, and unlikely to be resolved through due diligence efforts alone. . . . Lasting solutions require long term investments of time, energy, and resources. . . . Efforts like Dodd-Frank's disclosure and reporting requirements are a promising start, but they need to be implemented in conjunction with more comprehensive measures. . . . Unfortunately, the lack of competent governance in DRC will most likely pose a significant challenge to the implementation of any restructuring measures."

plagued by corruption[160] or lack of enforceability resources, can be mitigated.[161] Additionally, international support would ensure no de facto embargos emerge, especially where countries and their mining activities are currently unconnected with any funding of conflict. Moreover, other legislative and regulatory bodies—both in and outside of the United States—might be a better fit for tackling conflict minerals regulation.[162]

Third, a delay and international catch-up can help spread the costs across all interested and involved investors and consumers—not just companies who are required to make periodic disclosures.[163] When due diligence and disclosure are commonly accepted and enforced and the entire

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Emily Veale, *Is There Blood on Your Hands-Free Device?: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo*, 21 CARDOZO J. INT'L & COMP. L. 503, 543 (2013).

[160] While transparency is a "lofty and laudable goal[]," the "extraterritorial information-forcing measures . . . do not target corruption directly, . . . but rather depend upon stakeholders with the incentives and capacity to utilize disclosed information to police and guard against official misconduct." Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1,043, 1,050 (2010). Firger's article discusses "transparency-based regulation," which has solved some otherwise "intractable problems" in certain regions plagued by corrupt governments, but which has created "new problems for which there are no easy answers." *Id.* at 1,077. "The strength of disclosure-based regulations . . . depends upon properly incentivized stakeholders who can make use of disclosed information to police misconduct." *Id.* at 1,077-78. Interestingly, Firger points out that "disclosure and investor protection," which the Exchange Act reporting requirements are founded upon, "are at their weakest where information-forcing measures target secondary actors and where stakeholders' incentives are not aligned." *Id.* at 1,094.

[161] For example, "uniform standards, made enforceable through legislation in all of the CACMC [conflict afflicted conflict minerals countries], are a good first step" in ending problems of corruption and collusion where weak governance constitutes an "endemic problem." Wagner, *supra* note 107, at 130.

[162] *See* Woody, *supra* note 13, at 1,351 (the SEC is not "concerned with international human rights or diplomacy issues and should not have its resources tapped to regulate section 1502"); *see also* Lynn, *supra* note 9, at 330 ("[T]he new Specialized Corporate Disclosure provisions of . . . Dodd-Frank . . . were borne out of discrete public policy concerns, rather than concerns that shareholders or potential investors in public issuers were being misled or kept in the dark about the level of involvement of public issuers in the use of conflict minerals, mine safety issues, or the payments to governments made by companies in extractive resource industries. As a result, these Specialized Corporate Disclosure provisions represent a historic shift away from the SEC's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.").

[163] Some conflict-minerals-rule commentators discussed their experiences with similar conflict measures and the subsequent benefits of working in a multi-stakeholder environment: "We have undertaken to directly address our concern[s] through *active participation in . . . multi-stakeholder forum[s]*. . . . In our experience, sustainability requires not only due diligence and high standards on the part of entrepreneurs, but also recognition of the need for transition in difficult social and economic circumstances. It requires *progressive imp*rovement *and constructive engagement among participants in the . . . supply chain*."

Letter from Stewart Murray, Chief Exec., London Bullion Mkt. Ass'n, to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Aug. 5, 2011), *available at* http://www.sec.gov/ comments/s7-40-10/s74010-293.pdf (emphasis added).

global community supports and pays for those standards, the costs will be more fairly and equitably allocated.

While delays certainly permit the continuation of human rights abuses, they will enable subsequent international involvement to better achieve the goals of ending such abuses. So far, the European Union has at least proposed a system of self-certification for responsible trading from conflict zones.[164] But final regulations at the EU and in other countries may still take time, especially if "[s]upport by EU Member States through their own policies and instruments" is to be realized.[165] An American "band-aid" will not suffice, especially where unintended consequences continue to drive up costs on reporting companies, suppliers, consumers, and even those in the covered countries themselves. Furthermore, this "band-aid" may not pass muster in foreign courts, where conflict minerals requirements are not standards already applicable—by legislation or otherwise.

VIII. CONCLUSION

While the goals of Dodd-Frank § 1502 and its accompanying SEC conflict minerals rule are admirable and desirable, this legislative activity cannot currently achieve and sustain its intended goals.[166] The labor- and cost-intensive conflict minerals disclosure process undoubtedly necessitates the cooperation of suppliers.[167] Many suppliers failed to provide the information needed to make adequate disclosures in recently filed reports. Better information will be required from reporting companies in their contracts with suppliers. Awkwardly, the costs involved in gathering and supplying this information will taint relations with suppliers, leading to controversial contract terms and breaches. This tension will only drive additional unforeseen negative consequences, including de facto embargos and upstream supply chain disputes.[168] Until the international community demonstrates

[164] Proposal for a Regulation of the European Parliament and of the Council, EUR. PARL. DOC. (COM 111) (2014), *available at* http://trade.ec.europa.eu/doclib/docs/2014/march/ tradoc_152227.pdf.

[165] Press Release, European Comm'n, EU Proposes Responsible Trading Strategy for Minerals from Conflict Zones (Mar. 5, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-218_en.htm.

[166] *See, e.g.*, Veale, *supra* note 159, at 526-27 ("A System of SEC regulation does not adequately combat human rights abuses tied to the minerals trade. . . . Public disclosure laws, like those in Dodd-Frank, should be considered the first step of a larger, more comprehensive, scheme of legislation. Specifically, such a scheme would include public disclosures of due diligence, as in Dodd-Frank, along with distribution of foreign assistance tied to the Congolese government's cooperation in achieving specific goals."). Also note this warning from a former Chief Counsel of the Division of Corporation Finance at the SEC: "Before utilizing this approach in the future, Congress . . . should carefully evaluate how the Specialized Corporate Disclosure provisions have been implemented and whether they have achieved their intended effect without being unduly burdensome on public issuers and their investors." Lynn, *supra* note 9, at 355.

[167] EY CTR. FOR BD. MATTERS, *supra* note 91, at 8.

[168] "Overly burdensome regulations could make the cost of compliance with Section 1502 outweigh

greater commitment to solving the conflict minerals trade, legislative schemes like § 1502 and the SEC conflict minerals rule will not succeed in ending the abuses they aim to prevent.[169]

the benefits, and decrease company incentives to source conflict-free minerals from the Eastern Democratic Republic of the Congo. . . . The four minerals that will be regulated—tin, tantalum, tungsten and gold—are used in everyday goods like tin cans, light bulbs, ballpoint pens, and sewing thread. Thousands of companies will bear the cost of implementing Section 1502, and *the Congolese people will face further economic hardship if companies are not able to access these minerals*."

Letter from David M. Sindelar, Chief Exec. Officer, Viasystems Grp., Inc., to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Aug. 9, 2012), *available at* http://www.sec.gov/comments/s7-40-10/s74010-577.pdf (emphasis added).

[169] *See* Wagner, *supra* note 107, at 104:

> "To be effective, a system for transparently tracking the mineral supply chain must be implemented not just in the DRC, but in neighboring countries as well. The United States and the international community must work . . . to increase institutional controls over the mining industry, increase transparency . . . and help . . . crack down on smuggling."