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THE CONFLICT MINERALS EXPERIMENT

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In Section 1502 of Dodd-Frank, Congress instructed the SEC to draft rules that would require public companies to report annually on whether their products contain certain Congolese minerals. This unprecedented legislation and the SEC rulemaking that followed have inspired an impassioned and ongoing debate between those who view these efforts as a costly blunder and those who view them as a measured response to human-rights abuses committed by the armed groups that control many mines in the Congo.

This Article for the first time brings empirical evidence to bear on this controversy. I present data on the inaugural disclosures that companies submitted to the SEC. Based on a quantitative and qualitative analysis of these submissions, I argue that Congress's hope of supply-chain transparency goes unfulfilled, but amendments to the rules could yield useful information without increasing compliance costs. The SEC filings expose key loopholes in the regulatory structure and illustrate the importance of fledgling institutional initiatives that trace and verify corporate supply chains. This Article's proposal would eliminate the loopholes and refocus the transparency mandate on disclosure of the supply-chain information that has come to exist thanks to these institutional efforts.

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INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was a response to the 2008 financial crisis, but one of its most controversial provisions had nothing to do with the economic collapse.[1] In Section 1502, Congress instructed the Securities and Exchange Commission (the "SEC") to draft regulations requiring companies to disclose annually whether certain minerals for their products were originally obtained from mines controlled by armed groups in the Congo region of Africa.[2] This effort to bring supply-chain transparency to so-called conflict minerals (i.e., tin, tungsten, tantalum, and gold) has been ferociously criticized by business groups and staunchly defended by human-rights advocates.[3]

Much of the debate, though, has been based on conjecture. The heated back-and-forth that has filled op-ed pages and scholarly journals largely took place before the statute had been given any time to operate.[4] Both those who argued that the legislation was a costly mistake and those who defended it as a judicious counterweight to humanitarian atrocities implicitly or explicitly staked their claims on conceptions of what would be contained in the SEC-mandated filings. Neither side, however, had the benefit of actual compliance data to support its position.

Now, more than four years after the bill was signed into law, the SEC rulemaking is complete and companies have submitted their first regulatory filings: those pertaining to their use of conflict minerals during the 2013 calendar year.

[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[2] *Id.* § 1502, 124 Stat. at 2213 (codified at 15 U.S.C. § 78m(p) (2012)).

[3] *See infra* Part I.C.

[4] *See, e.g.,* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012); David Aronson, *How Congress Devastated Congo*, N.Y. TIMES (Aug. 7, 2011), http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html.

This Article closely analyzes these disclosures, and, in so doing, brings empirical evidence to bear on the conflict-minerals controversy. I present data on the scope and nature of compliance based on a quantitative review of the over 1,300 conflict-minerals filings and a qualitative review of each filing submitted by a company included in the S&P 500 Index (over 200 of these companies, which are among the largest in the U.S., submitted filings).[5]

The overall picture is not pretty. I argue that the filings do not contain sufficient information about conflict-mineral supply chains for the legislation to work as intended, and that this is the result of shortcomings in the original law, in the SEC rules that followed, and in the corporate compliance effort. While the evidence largely supports the critics, I contend that the filings also contain flickers of hope and suggest a set of reforms that would lead to more transparency without additional expense.

The data suggests that both the costs and benefits of the rule were grossly exaggerated by those debating its merits. Costs were likely much lower than estimated because far fewer companies actually filed reports than estimated and many filers complied in a largely superficial manner suggestive of minimal effort.[6]

Benefits likewise appear muted. The conflict-minerals rules borrow from the human-rights world the regulatory strategy of "naming and shaming," which, like the securities law trope, "sunlight is the best disinfectant," is the concept that exposure of reprehensible conduct eliminates it.[7] In this case, the rules are designed to inspire shareholder and consumer blowback against companies sourcing from militarized mines; those experiencing this reprisal are then expected to change their practices.[8] This logic, while appealing on its face, depends on the

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[5] For a description of the S&P 500, see *S&P 500*, S&P DOW JONES INDICES, http://us.spindices.com/indices/equity/sp-500 (last visited Dec. 16, 2014). The data on the scope of compliance includes, among other things, information on how many companies made filings pursuant to the rule and the size and type of companies that filed reports. *See infra* Part II.A. The data on the nature of compliance includes information on the steps companies took to meet their obligations. *See infra* Part II.B.

[6] *See infra* Part II.B.

[7] *See* Woody, *supra* note 4, at 1344. This is not the first time corporations have been the subject of naming-and-shaming efforts. *See generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). For a more general discussion of naming and shaming in the human-rights context, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 309 & n. 178 (2011); Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT'L L. 1079, 1082–86 (2013). The idea of using the securities laws to address social goals was given its most comprehensive and elegant defense in Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). The conflict-minerals provision is one of several social disclosure laws in Dodd-Frank. The statute also called for disclosures regarding mine safety, extractive industry practices, and pay disparities. *See* Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 584–85 & n. 319 (2012).

[8] *See* Dodd-Frank, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010)

ability of concerned individuals to discern which companies are "conflict free" and which are indirectly supporting human-rights violations through their activities. But this cannot be done through inspection of the first-year filings. The vast majority of companies reached the same conclusion (that they have not been able to determine the source of their minerals) and conducted their diligence in nearly the same way (the centerpiece of nearly every effort was a simple supplier survey). This is not the stuff of sell orders and picket signs.

The conflict-minerals rules resemble an elaborate firework that falls quietly to the ground rather than yielding an eye-catching display. This is problematic in and of itself, but also serves as a broader caution. Supply-chain transparency is a global concern. Other countries are looking into similar rules for conflict minerals and "name and shame" is seen as a way to address other ills in the supply chain, including deplorable working conditions, slavery, and child labor.[9] The failure of the conflict-minerals rules suggests that in their current form they should not serve as the template for future efforts.

An analysis of the filings provides insight into what and where things went wrong. Although it is tempting to lay blame for the underwhelming reports solely on botched rulemaking or perfunctory compliance, culpability appears to extend to all involved. The overarching problem with the reports is that reading them does not provide insight into which companies ought to be praised and which condemned. One probable explanation is that naming and shaming conflict-mineral users is inherently difficult. This form of regulation works best when there are clear wrongdoers; not when, as is the case here, singling out the offenders is tricky and dependent on cooperation of multiple parties, including the targets of the rules. The latter invites opacity.

There were also problems with how this regulatory approach was implemented. Rather than recognize and respond to the challenges of applying naming and shaming in this space, regulators created a prolix rule structure that maps poorly onto the name-and-shame goal. For example, information about where a company's conflict minerals are processed into commercially usable forms is central to discerning whether it is sourcing from militarized mines. But many companies reasonably interpreted SEC language to require that they report such data only when they could precisely identify the processing facilities linked to their individual products; companies plausibly claimed that they could not do so and

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(expressing Congress's concern about human-rights violations in the Congo); Woody, *supra* note 4, at 1344.

[9] *See* DALE NEEF, THE SUPPLY CHAIN IMPERATIVE: HOW TO ENSURE ETHICAL BEHAVIOR IN YOUR GLOBAL SUPPLIERS 26–27 (2004); Jamie D. Prenkert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 VAND. J. TRANSNAT'L L. 451, 483–84 (2014); Steven Nakasone, *Name and Shame is New Supply Chain Game*, RETAILING TODAY (Jan. 5, 2012), http://www.retailingtoday.com/article/name-and-shame-new-supply-chain-game. Several states are also considering, or have already approved, conflict-minerals regulation. *See* Prenkert & Shackelford, *supra* note 9, at 482–83; Nakasone, *supra* note 9.

chose not to reveal this information. Drafting oversights like this greatly contributed to the flimsy reports.

Finally, companies forced to comply with the rules showed little sympathy for their goals. Instead of responding in a manner responsive to the rules' intent of bringing supply-chain transparency to conflict minerals, they usually chose to read the rules literally and narrowly, seizing on opportunities—like the one just mentioned regarding processing facilities—to provide as little information as possible. Worse still, many corporate filers simply ignored clear requirements. The reports ultimately reveal shallow, almost cynical, compliance with poorly crafted rules built on a regulatory paradigm better suited to simpler contexts.

While all of this provides fodder for those who have sought the rules' repeal,[10] I argue that it is too early to abandon the experiment. Glimmers of light appear through the haze. Though companies claimed ignorance as to many things, a large number also claimed to have identified—even if they chose not to reveal—the facilities used to process the conflict minerals in their supply chain.[11] In addition, third-party audits coordinated through a nongovernmental institutional framework have certified a number of processing facilities as conflict-free, and these audits and certifications are ongoing.[12]

That these facilities can be identified and then sorted based on their conflict status makes them a bright spot in otherwise murky supply chains. Based on this information, companies can be named and shamed according to whether they use conflict-free processing facilities. I argue, therefore, that the conflict-minerals rules should be reoriented around such information. Companies should be clearly required to identify and provide the conflict status of the processing facilities in their supply chains. If they reveal facilities that are not conflict free, they should be free to explain why. The marketplace can then judge whether such justifications are reasonable or consist of hollow generalities. I also propose a set of supplemental changes that would eliminate redundancies and loopholes in the

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[10] *See, e.g.,* CHRIS N. BAYER, DODD-FRANK SECTION 1502: POST-FILING SURVEY 2014, at 40 (2014), *available at* http://www.payson.tulane.edu/sites/default/files/content/files/TulanePaysonS1502PostFilingSurvey.pdf (describing results of a survey of affected companies in which the most frequent recommendation by those surveyed was repeal); Ben Dipietro, *Investor Groups Back Conflict Minerals Law*, WALL ST. J. (May 31, 2013, 3:58 PM), http://blogs.wsj.com/riskandcompliance/2013/05/31/investor-groups-back-conflict-minerals-law (describing business groups seeking repeal); Benjamin Goad, *Wall Street Reform Rule Said to Increase Violence in Congo*, THE HILL (May 21, 2013, 7:58 PM), http://thehill.com/regulation/business/301075-wall-street-reform-rule-said-to-have-increased-congolese-violence (quoting Congressman Mick Mulvaney calling the rules "absurd" and arguing for repeal); John Kester, *SEC Should Not Handle Conflict Minerals Reports: Commissioner*, WALL ST. J. (Oct. 17, 2014, 4:15 PM), http://blogs.wsj.com/cfo/2014/10/17/sec-should-not-handle-conflict-minerals-reports-commissioner (quoting SEC Commissioner Daniel Gallagher Jr. as arguing for repeal).

[11] *See infra* text accompanying notes 154, 167–171.

[12] *See infra* text accompanying notes 46–50.

current rules and render the entire framework more cohesive. This proposal maintains Dodd-Frank's disclosure-based reform model, but re-engineers it to more effectively further the statute's humanitarian goals without increasing compliance costs.

Part I of this Article describes the conflict-minerals legislation, the SEC rules implementing it, and the controversy surrounding these congressional and regulatory efforts. Part II then provides data on the nature and scope of corporate compliance with the newly formed regulatory regime. In this Part, I also analyze the data and argue it suggests that the conflict-minerals rules have so far turned out to be far less costly than critics feared, but also far less illuminating than supporters hoped. Next, Part III examines potential explanations for why the rules have proven unremarkable. I argue that the lackluster results stem from poorly conceived legislation and regulation and from halfhearted compliance therewith. Finally, in Part IV, I suggest a set of reform proposals based on the idea that greater transparency surrounding the processing facilities in corporate supply chains would make the filings under the conflict-minerals rules much more useful.

I. LAWMAKING, LITIGATION, AND CONTROVERSY

A. The Conflict-Minerals Legislation and Implementing Regulations

Section 1502 of Dodd-Frank, which sets forth the legislative framework for the conflict-minerals rules, is a dense provision with an awkward structure. The core of the legislation consists of three parts: an introduction followed by two subsections.[13] The introduction instructs the SEC to write regulations mandating that companies annually disclose whether conflict minerals that are necessary to their products originate from the Democratic Republic of the Congo or an adjoining country. Where this is the case, the SEC is to require that companies submit a report pertaining to their use of such minerals.[14]

The subsections focus on the contents of this report. The first tells the SEC to require that companies include a description of the due-diligence measures they have undertaken to determine "the source and chain of custody" of the conflict minerals in their supply chain.[15] The SEC is also to mandate that these reports be independently audited.[16] The second subsection then goes on to list other things Congress wants to see. The SEC is instructed to call on companies to name their report's auditor and to describe (i) all of their products that are not conflict free,[17] (ii) "the facilities used to process the conflict minerals" in their products, (iii) "the

[13] *See* 15 U.S.C. § 78m(p)(1)(A)(i)–(ii) (2012).

[14] *See id.* § 78m(p)(1)(A). A company's products includes both things it manufactures itself and things that it contracts to manufacture. *Id.* § 78m (p)(1)(A)(ii).

[15] *Id.* § 78m(p)(1)(A)(i).

[16] *Id*.

[17] A product is not conflict free if it contains or may contain minerals sourced from mines controlled by armed groups in the Congo region. *See id.* § 78m(p)(1)(A)(ii).

country of origin" of such conflict minerals, and (iv) "the efforts to determine the mine or location of origin" of such conflict minerals "with the greatest possible specificity."[18] In addition to SEC reporting, the legislation also requires that this information be made available on the disclosing corporation's website.[19]

The key phrase, "conflict minerals," includes tantalum, tin, tungsten, and gold.[20] These materials are ubiquitous in our everyday lives. They are key components in electronics, including smartphones and computers, but can also be found in everything from household tools to jet engines.[21]

Though the law's drafting is somewhat muddled, Congress's ambition with respect to these commercial building blocks is clear. Basically, it wants companies, first, to figure out if their products contain conflict minerals and, second, to determine where those minerals come from. It also wants companies to report how they go about this exercise, and for those companies potentially sourcing conflict minerals from militarized mines to list the products in which such minerals are contained. The goal here seems to be a "bad actors" list of companies and their products that would provide the impetus for socially minded shareholders and customers to put pressure on companies to change their sourcing practices. The hope would be that this pressure, in turn, inspires companies to stop doing business with militia-controlled mines, which would lessen the funding available to armed groups and thereby temper the violence in the region. Such an approach is commonly referred to in the human-rights arena as "naming and shaming"—bad actors are brought to light in the hopes that they will change their behavior to avoid public condemnation.[22]

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[18] 15 U.S.C. § 78m(p)(1)(A)(ii).

[19] 15 U.S.C. § 78m(p)(1)(E).

[20] Dodd-Frank, Pub. L. No. 111-203, § 1502(e)(4)(A)–(B), 124 Stat. 2218 (2010). Tantalum, tin, and tungsten are not specifically listed in the legislation. Rather it refers to the mineral ores from which they are extracted (coltan, cassiterite, and wolframite, respectively), as well as derivatives thereof. *See id.*; Conflict Minerals, 75 Fed. Reg. 80,948, 80,950 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249b). Though tantalum, tin, tungsten, and gold are commonly referred to as "conflict minerals" in commerce and in the debate, they are technically metals. *See* DEP'T OF COMMERCE, DEPARTMENT OF COMMERCE REPORTING REQUIREMENTS UNDER § 1502(D)(3)(C) OF THE DODD FRANK ACT WORLD-WIDE CONFLICT MINERAL PROCESSING FACILITIES 2 (2013), http://www.ita.doc.gov/td/forestprod/DOC-ConflictMineralReport.pdf [hereinafter COMMERCE REPORT]; ENOUGH PROJECT & GRASSROOTS RECONCILIATION GRP., A COMPREHENSIVE APPROACH TO CONGO'S CONFLICT MINERALS 3 (2009), *available at* http://www.enoughproject.org/files/Comprehensive-Approach.pdf [hereinafter A COMPREHENSIVE APPROACH]. Despite the "conflict" label attached to these materials, relatively small percentages come from the Congo: 15 to 20 percent of tantalum, 6 to 8 percent of tin, 2 to 4 percent of tungsten, and less than 1 percent of gold come from the region. A COMPREHENSIVE APPROACH, *supra* note 20, at 15.

[21] *See* Conflict Minerals, 75 Fed. Reg. at 80,950.

[22] *See* Katzenstein, *supra* note 7, at 1082–86.

This congressional intent is reflected in the SEC's regulations, which the agency finalized on August 22, 2012.[23] These rules add a great deal of nuance to the legislation's somewhat underdeveloped foundation. In fact, while Congress looks to have sacrificed clarity for brevity, the SEC made the opposite mistake and created a Byzantine and, at times, circular rule structure.

Just as the legislation instructs, under the SEC rules the first step is for companies to determine whether conflict minerals are necessary to their products.[24] If not, companies need not file anything.[25] If a company does make use of conflict minerals, however, it is required to conduct a so-called "reasonable country of origin inquiry" (an "RCOI") with regard to the conflict minerals in its products.[26] If the RCOI does not reveal the presence of conflict minerals from the Congo region, the company need only file a Form SD, which must "briefly" describe the company's RCOI process and its conclusion.[27] The company also needs to post this information on its website.[28]

If the RCOI reveals that the company is sourcing conflict minerals from the Congo region or gives the company reason to believe that this is the case, then the company is required to conduct due diligence "on the source and chain of custody" of such minerals.[29] If, based on its due diligence, the company determines that its minerals are *not* actually from the Congo region, then it must briefly describe its due-diligence efforts, its RCOI, and its conclusion both on a Form SD and its website.[30]

The SEC declined to give guidance on what specifically constitutes an RCOI.[31] It said only that such an inquiry need be in good faith.[32] The agency did say, however, with respect to due diligence, that such efforts must be audited[33] and conform to "a nationally or internationally recognized due-diligence framework."[34]

Currently, the only such framework in existence is the OECD's *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-*

[23] Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[24] *See* Form SD, OMB No.: 3235-0697, at Item 1.01(a), *available at* http://www.sec.gov/about/forms/formsd.pdf [hereinafter Form SD].

[25] *Id.* at Item 1.01(a)–(b).

[26] *Id.* at Item 1.01(a).

[27] *Id.* at Item 1.01(b). The SEC also set up a parallel process for companies that are using conflict minerals derived from recycled or scrap sources. It is not necessary to fully describe this added layer of complexity. Most importantly, products that solely contain minerals from recycled or scrap sources are considered conflict free. *Id.* at Item 1.01(c)(4).

[28] *Id.* at Item 1.01(b).

[29] Form SD, *supra* note 24, at Item 1.01(c).

[30] *See id.* at Item 1.01(c).

[31] Conflict Minerals, 77 Fed. Reg. 56,274, 56,311–12 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[32] Form SD, *supra* note 24, at Item 1.01(a).

[33] *Id.* at Item 1.01(c)(1)(ii).

[34] *Id.* at Item 1.01(c).

Affected and High Risk Areas (the "*OECD Guidance*").[35] Though the document is wordy and lengthy (over 100 pages including appendices), the guidance it offers boils down to a five-step due-diligence process.[36] The first is the most important, and has a number of subparts, while the remainder are more straightforward.

Step one instructs companies to "establish strong company management systems."[37] According to the *OECD Guidance*, this includes adopting a conflict-minerals policy and making it available to suppliers and the general public, setting up an internal conflict-minerals diligence team, establishing a system for mapping the conflict-minerals supply chain, incorporating a supply-chain policy in agreements with suppliers, and establishing a grievance mechanism for those wishing to report sourcing violations.[38]

The second step is to "identify and assess risk in the supply chain."[39] This means "assessing the due diligence practices" of the smelters and refiners of conflict minerals in the corporate supply chain by comparing their practices against those specified for such entities in the *OECD Guidance*.[40] Smelters and refiners are the key processing facilities for conflict minerals. It is at these locations where the mineral ores are transformed into commercially valuable forms.[41]

Third, companies are to "design and implement a strategy to respond to identified risks."[42] This includes reporting the findings of the risk assessment in step two to senior management, as well as implementing a plan to mitigate supply-chain risks.[43] A risk-mitigation plan would outline a procedure for dealing with suppliers or others in their supply chain that have shoddy supply-chain diligence or

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35 Conflict Minerals, 77 Fed. Reg. at 56,281 n.55; ORG. FOR ECON. COOPERATION & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2nd ed. 2013), *available at* http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf [hereinafter OECD GUIDANCE]. The OECD drafted this document over several years in collaboration with eleven African nations with the goal of "help[ing] companies respect human rights and avoid contributing to conflict through their mineral sourcing practices." *Id.* at 3. States are not legally bound to comply. *Id.* at 4. For additional background, see LEVIN ET AL., MINERAL SUPPLY CHAIN DUE DILIGENCE AUDITS AND RISK ASSESSMENTS IN THE GREAT LAKES REGION 8–9 (2013), *available at* http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/OECD_Mineral_Supply_Chain-Due_Diligence_Audits_and_Risk_Assessments_in_the_Great_Lakes_Region.pdf.

36 OECD GUIDANCE, *supra* note 35, at 17–19.

37 *Id*. at 17.

38 *Id.*

39 *Id.* at 18.

40 *Id.* at 42.

41 GOV'T ACCOUNTABILITY OFFICE, SEC CONFLICT MINERALS RULE: INFORMATION ON RESPONSIBLE SOURCING AND COMPANIES AFFECTED 1 (2013), *available at* http://www.gao.gov/assets/660/655972.pdf [hereinafter GAO REPORT].

42 OECD GUIDANCE, *supra* note 35, at 18.

43 *Id.* at 18.

are suspected of sourcing from militarized mines.[44] Companies can respond to these supply-chain risks by, for example, temporarily suspending trade until the issues are resolved or ending their relationship with the implicated party.[45]

Fourth, companies must "carry out an independent third-party audit" of the smelters and refiners in their supply chain.[46] While this seems like a lot to ask of individual companies, the OECD also advises that the audits can be centralized and coordinated through an institutional mechanism.[47] The key institutional mechanism for doing so is the Conflict-Free Smelter Program ("CFSP"), which is an industry-led effort that coordinates third-party audits of smelters and refiners and publicly shares its results on its website.[48] It is the key contribution of the Conflict-Free Sourcing Initiative ("CFSI"), an organization of industry members concerned about conflict minerals, which through this and other efforts described below has had a major impact on the nature of conflict-mineral compliance.[49] The OECD has blessed CFSI audits as an alternative to individual efforts.[50] Fifth and finally, as called for by the rules themselves, the *OECD Guidance* instructs companies to publicly report on their supply-chain due diligence.[51]

After compliance with all of the OECD steps, if companies are unable to rule out the possibility that their conflict minerals are from the Congo region, they must file a "Conflict Minerals Report" that includes a laundry list of items.[52] A company's report must describe its due diligence and include an independent auditor's certification thereof.[53] The auditor is to confirm (i) that the company inquiry conformed in all material respects to a "recognized due diligence framework" (meaning the *OECD Guidance* as it is the only one), and (ii) that the diligence that the company actually conducted matches what it described in its Conflict Minerals Report.[54]

Aside from a description of audited due diligence, the rules require, in language quite close to that of Section 1502 itself, that companies include a list of

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[44] *See id.*

[45] *Id.*

[46] *Id.* at 19, 47.

[47] *See id.* at 50–51.

[48] *See Conflict-Free Smelter Program*, CONFLICT-FREE SOURCING INITIATIVE, http://www.conflictfreesourcing.org/conflict-free-smelter-program/ (last visited Nov. 11, 2014); ORG. FOR ECON. COOPERATION & DEV., DOWNSTREAM IMPLEMENTATION OF THE OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 46 (2013), *available at* http://www.oecd.org/corporate/mne/DDguidanceTTTpilotJan2013.pdf [hereinafter OECD STUDY]. For an overview of CFSI audits, see LEVIN ET AL., *supra* note 35, at 43–48 tbl.5.

[49] *See About the Conflict-Free Sourcing Initiative*, CONFLICT-FREE SOURCING INITIATIVE, http://www.conflictfreesourcing.org/about/ (last visited Nov. 23, 2014).

[50] *See* OECD STUDY, *supra* note 48, at 47.

[51] OECD GUIDANCE, *supra* note 35, at 19.

[52] *See* Form SD, *supra* note 24, at Item 1.01(c).

[53] *Id.* at 1.01(c)(1).

[54] *Id.* at Item 1.01(c)(1)(ii)(A).

products "that have not been found to be 'DRC conflict free.'"[55] A product would fall into this category if a company could not determine that it did not contain conflict minerals from militarized mines.[56] This awkward double negative means that products must be listed, unless a company affirmatively determines that they are conflict free. The SEC did not prescribe that companies note the brand names or model numbers of their products; rather, it gave companies the flexibility to describe their goods however they deem appropriate.[57]

The overall list, however, must be labeled as that of products "having not been found to be 'DRC conflict free.'"[58] In addition, companies are required to note "the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determine the mine or location of origin with the greatest possible specificity."[59]

Finally, the rules include a ramp-up period. For the first four years for smaller companies, and the first two years for others, those companies that cannot reach a firm conclusion as to the source of their conflict minerals need not list their products as "having not been found to be 'DRC conflict free.'"[60] Rather they can list them as "DRC conflict undeterminable," and specify the efforts they are currently undertaking or plan to undertake to "mitigate the risk that its necessary

[55] *Id.* at Item 1.01(c)(2).

[56] *See id.* at Item 1.01(c)(2), (d)(4).

[57] *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,317–18, 56,323 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[58] Even though the labeling of company products as conflict free or not would seemingly be the centerpiece of the rules, it is only explicitly included in the instructions to Form SD. Rather than specify any particular label, the body of the rules only requires a *description* of products "that have not been found to be 'DRC conflict free.'" Form SD, *supra* note 24, at Item 1.01(c)(2). The instructions pertaining to a temporary safe-harbor discussed *infra* text accompanying notes 60–62, however, explain that, after a grace period during which the rules allow companies to claim "conflict undeterminable" status, "a registrant with products manufactured or contracted to be manufactured that are 'DRC conflict undeterminable,' must provide a description of those products as having not been found to be 'DRC conflict free[.]'" Form SD, *supra* note 24, at Instruction 2 to Item 1. That the requirement is only included with a discussion of the safe harbor implies that it relies on a more direct statement elsewhere, but one does not exist. It is also only by implication that companies with products that are not conflict free are required to label them in the above manner even during the grace period.

[59] Form SD, *supra* note 24, at Item 1.01(c)(2).

[60] The rules never explicitly state that "conflict undeterminable" is a required label during the two-year grace period, though the SEC clearly interprets them as saying as much. In the adopting release, the SEC says that the "final rule permits … issuers [unable to determine the source of their conflict minerals] to describe their products containing those conflict minerals as "DRC conflict undeterminable." Conflict Minerals, 77 Fed. Reg. at 56,321.

conflict minerals benefit armed groups."[61] In addition, during the ramp-up period, those companies taking advantage of this category need not have their due-diligence efforts audited.[62]

Working through these rules gives one the feeling of a character in an M.C. Escher drawing.[63] There are numerous orthogonal paths through the multi-layered structure, each with its own unique feature. Despite the complexity, however, the SEC remained true to Congress's instructions. At their core, the rules basically require that companies conduct diligence into their conflict-mineral supply chain and report not only on the nature of their diligence but on their findings, including the extent to which conflict minerals from militarized mines make it into their products.

B. The Conflict-Minerals Rules in Court

The ink was barely dry on the final rules when the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Business Roundtable challenged them in federal court.[64] They raised three primary arguments: that the SEC abused its discretion in failing to include a *de minimus* exception for those companies that make scant use of conflict minerals,[65] that the agency failed to conduct an appropriate cost-benefits analysis,[66] and finally, that the requirement to describe products as "having not been found to be 'DRC conflict free'" was a free-speech violation.[67]

The D.C. District Court found none of these arguments compelling.[68] But on appeal, the Circuit Court held that the requirement to label products as specified violates corporate free-speech rights.[69] The court imposed a heightened standard of

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[61] *See* Form SD, *supra* note 24, at Item 1.01(c)(1)(iii).

[62] *Id.* at Instruction 2 to Item 1. Also, for products that are deemed "conflict undeterminable," companies only need to provide facility and country of origin information "if known." *Id.* at Item 101(c)(2)(i). It is hard to see what this really adds, though, because companies would never be able to provide information they did not know.

[63] *See, e.g.*, *Relativity (M. C. Escher)*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Relativity_(M._C._Escher) (last visited Nov. 27, 2014).

[64] Christopher M. Matthews, *Business Groups Sue to Block "Conflict Minerals" Rules*, WALL ST. J. CORRUPTION CURRENTS (Oct. 22, 2012, 4:38 PM), http://blogs.wsj.com/corruption-currents/2012/10/22/business-groups-sue-to-block-conflict-minerals-rules/.

[65] *See* Nat'l Ass'n of Manufacturers v. SEC, 956 F. Supp. 2d 43, 61 (D.D.C. 2013), *rev'd in part*, Nat'l Ass'n of Manufacturers v. SEC, 748 F.3d 359 (D.C. Cir. 2014), *overruled by* American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

[66] *Id.* at 55.

[67] *See id.* at 73.

[68] *See id.* at 82.

[69] Nat'l Ass'n of Manufacturers v. SEC, 748 F.3d at 373 (D.C. Cir. 2014), *overruled by*, American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

review on this mandate because, unlike traditional securities regulation, the labeling provision at issue here was not aimed at preventing consumer deception.[70] According to the court, the rule failed the elevated review because the SEC did not provide evidence that it could have accomplished its goal of connecting company products with conflict minerals through less restrictive means.[71] The court noted that companies could have been permitted, for example, to use their own language to describe products that contain conflict minerals rather than words specifically dictated to them.[72]

The Circuit Court is rehearing the case,[73] but this is how the law currently stands. In addition, to be consistent with this ruling while it remains good law, the SEC has stayed the requirement that companies, when appropriate during the phase in period, describe their products as "conflict undeterminable."[74] Despite overbroad headlines,[75] the court's determination and the SEC's conforming redaction have little practical significance. Firms must still list all products that contain conflict minerals that may have originated from militarized mines—that portion of the rule remains in place—but they need not use any particular label to describe them. Rather, companies are free to take the court up on its suggestion and use their own language to describe their list of products.

C. The Conflict-Minerals Rules and Policy Controversy

As is often the case when rules are challenged, this litigation was policy-driven. While the conflict-minerals rules have been subject to numerous critiques, the primary point of contention has involved their potential compliance costs. In its final rules, the SEC estimated initial costs to be $3 to $4 billion with yearly costs thereafter ranging between approximately $200 and $600 million per year.[76] And others had estimated that costs would be even higher.[77] The National Association

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[70] *See id.* at 371–72.

[71] *Id.* at 372.

[72] *Id.* at 372–73.

[73] Jenna Greene, *D.C. Circuit to Give Second Look At SEC's Conflict-Minerals Rule*, NAT'L L. J. (Nov. 24, 2014), http://www.nationallawjournal.com/id=1202677128135/DC-Circuit-to-Give-Second-Look-At-SECs-ConflictMinerals-Rule-#ixzz3KZIBnHVk.

[74] Daniel M. Gallagher & Michael S. Piwowar, Commissioners, U.S. Sec. & Exch. Comm'n, Joint Statement on the Conflict Minerals Decision (Apr. 28, 2014), *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994#.VBYPV_k7tcY.

[75] *See, e.g.,* Jonathan H. Adler, *D.C Circuit Finds SEC's Conflict Mineral Disclosure Rule Violates First Amendment*, WASH. POST VOLOKH CONSPIRACY (April 14, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/15/d-c-circuit-finds-secs-conflict-mineral-disclosure-rule-violates-first-amendment/.

[76] *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,354 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[77] *See, e.g.,* CHRIS N. 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

of Manufacturers, for instance, estimated initial costs ranging from $8 to $16 billion.[78] The sheer number of companies required to comply was one driver of these estimates. The SEC thought that approximately 6,000 companies would file Form SDs and that 75% of those companies would file Conflict Minerals Reports.[79] Supply-chain complexity was the other source of cost concerns. Many companies are numerous steps removed from the actual mining of the conflict minerals in their products.[80] The SEC and others predicted that for these companies to ascertain the source of such minerals, they would have to undertake a great deal of costly sleuthing.[81] Some also argued that despite companies' best efforts, accurate and comprehensive tracking might prove elusive.[82]

Another prominent concern had to do with unintended consequences. The *New York Times* and *Wall Street Journal* both ran op-eds expressing the worry that the legislation was causing a *de facto* embargo of the Congo region.[83] This possibility was even the subject of a congressional hearing in 2013.[84] The editorials

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AND CONSUMER PROTECTION ACT 35 (2011), *available* at http://www.payson.tulane.edu/sites/default/files/3rd_Economic_Impact_Model-Conflict_Minerals.pdf; Letter from Nat'l Ass'n of Manufacturers to the SEC, Initiatives under the Dodd-Frank Act, Special Disclosures Section 1502 (Conflict Minerals), File No. S7-40-102, 24–27 (Mar. 2, 2011), available at http://www.sec.gov/comments/s7-40-10/s74010-183.pdf [hereinafter NAM Letter].

[78] *See* NAM Letter, *supra* note 77, at 24–27.

[79] *See* Conflict Minerals, 77 Fed. Reg. at 56,338 n.748.

[80] *See generally* JOHN PRENDERGAST & SASHA LEZHNEV, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN (2009), *available at* http://www.enoughproject.org/files/minetomobile.pdf (outlining the conflict-mineral supply chain).

[81] Conflict Minerals, 77 Fed. Reg. at 56,350–54 (analyzing the potential cost of the rules).

[82] *See, e.g.,* RESOLVE, TRACING A PATH FORWARD: A STUDY OF THE CHALLENGES OF THE SUPPLY CHAIN FOR TARGET METALS USED IN ELECTRONICS 1, 3, 5 (2010), *available at http:*//www.resolv.org/site-eiscm/files/2011/02/Tracing_a_Path_Forward-A_Study_of_the_Challenges_of_the_Supply_Chain_for_Target_Metals_Used_in_Electronics.pdf; OECD STUDY, *supra* note 48, at 59–60; IPC—Ass'n Connecting Elec. Indus., Comments on SEC Proposed Rule on Conflict Minerals, 3, 10 (March 2, 2011), *available at* https://www.sec.gov/comments/s7-40-10/s74010-131.pdf.

[83] *See* Aronson, *supra* note 4; *Africa and 'Obama's Embargo': A Provision of Dodd-Frank Boomerangs on the Continent's Poor*, WALL ST. J. (July 18, 2011), http://online.wsj.com/news/articles/SB10001424052748703956604576109773538681918 [hereinafter *Obama's Embargo*]. *See also* 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, 351 (2012–13) (describing a potential boycott of the Congo region); Laura E. Seay, *What's Wrong with Dodd-Frank 1502?* 14 (Ctr. for Global Dev., Working Paper No. 284, 2012) *available at* http://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf (outlining *de-facto* embargo argument).

[84] Kevin J. Kelley, *US Congress: Conflict Minerals Law Fuels War in DR Congo*, EAST AFRICAN (May 25, 2013, 3:04 PM), http://www.theeastafrican.co.ke/news/US-

argued that companies had stopped sourcing from the region because that was easier than figuring out whether minerals mined from there came from lawful or militarized operations.[85] According to these critics, legitimate local miners, who are often poor individuals and families, have thus been unintended victims of Section 1502.[86]

A final critique focused on the administrative and procedural side of the legislative mandate rather than its substance. Much has been written about the propriety of delegating human-rights rulemaking to the SEC for inclusion in securities-law filings, which typically include solely information related to the finances and financial prospects of reporting firms.[87] The SEC Chairwoman herself criticized the legislation for assigning to the SEC, an expert in financial regulation, the task of drafting rules aimed to shame companies into acting in conformity with a social goal.[88]

Supporters of the rules counter all of these concerns. They argue that while the SEC may not be perfectly suited for this task, it can, nevertheless, do much to further human-rights goals.[89] They also contend that concerns about costs, feasibility, and unintended consequences are overstated.[90] Rather, they see the conflict-minerals rules as a reasonable response to rampant human-rights abuses.[91]

With equal passion on both sides, it is easy to get caught up in the wrangling and forget that the debate has taken place without the most important piece of information—the corporate filings themselves. The cost and feasibility of compliance, whether companies are abandoning the region, what the consequences

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Congress--Conflict-minerals-law-fuels-war--in-DR-Congo-/-/2558/1862724/-/12iws3sz/-/index.html; Memorandum from the FSC Majority Committee Staff to the Members of the Committee on Financial Services, (May 16, 2013), *available at* http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/052113_Monetary_Policy_and_Trade_Subcommittee_Hearing.pdf.

[85] *See* Aronson, *supra* note 4; *Obama's Embargo*, *supra* note 83.

[86] *See* Aronson, *supra* note 4; *Obama's Embargo*, *supra* note 83.

[87] *See, e.g.,* Woody, *supra* note 4, at 1342, 1345; Goad, *supra* note 10.

[88] *See* Mary J. White, Chairwoman, U.S. Sec. & Exch. Comm'n, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School: The Importance of Independence (Oct. 3, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VBYovvk7tcY.

[89] *See, e.g.,* Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 115–18 (2013).

[90] *See, e.g.,* John Bradshaw, *Conflict Mineral Law is Helping Congolese*, WALL ST. J. (July 23, 2011), http://online.wsj.com/articles/SB10001424053111903461104576458751122272110; Dipietro, *supra* note 10; *Myth Buster: The Conflict Minerals Provision*, GLOBAL WITNESS (June 2, 2014) http://www.globalwitness.org/library/myth-buster-conflict-minerals-provision.

[91] *See, e.g.,* Goad, *supra* note 10; *Blood Money and Conflict Minerals*, BLOOMBERG VIEW (Jul. 2, 2014, 1:00PM EDT), http://www.bloombergview.com/articles/2014-07-02/blood-money-and-conflict-minerals.

are of relying on a securities regulator to enact human-rights legislation—the companies' first-year disclosures shed tremendous light on all of these issues.

Insights from company filings also have wider implications. U.S. states, including California, Maryland, and Massachusetts, have adopted or are considering adopting conflict-minerals regulations[92] and both the E.U.[93] and Canada have issued proposed rules on the matter.[94] Moreover, conflict minerals are not the only thing potentially buried in corporate supply chains—sweatshops may be there too. One of the reasons for the rancor over conflict minerals may be that the rules could serve as precedent for the use of securities laws to forcefully bring transparency to corners of the supply chain that companies might wish to keep shadowy.[95] The content of the corporate filings tells a great deal about whether Section 1502 and the SEC rules animating them should serve as the model for a raft of new measures or be dismissed as folly.

II. EMPIRICAL ANALYSIS OF THE SEC FILINGS

This section illuminates the first-year compliance effort. The first part discusses the scope of compliance. It provides statistics on such things as how many companies filed Form SDs, how many filed Conflict Minerals Reports, and which industries were represented. The second drills down on the content of the filings themselves. I present a narrative description and summary statistics detailing how S&P 500 companies went about meeting their compliance obligations.[96]

A. The Scope of the Compliance Effort

As mentioned above, the SEC predicted that nearly 6,000 companies would file conflict-minerals disclosures on Form SD.[97] It turns out, however, that

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[92] Prenkert & Shackelford, *supra* note 9, at 482–84.

[93] *Proposal for a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict-Affected and High-Risk Areas*, COM (2014) 111 final (May 3, 2014); Ian Weekes, *Conflict Minerals: New EU Rules Simpler Alternative to US Regulation*, THE GUARDIAN (Mar. 26, 2014), http://www.theguardian.com/sustainable-business/blog/eu-regulations-conflict-minerals-trade (describing the EU proposal).

[94] *The Conflict Minerals Act*, Bill C-486, 2013-62, H.C. Bill C-486 (Can.).

[95] *See generally* INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, "KNOWING AND SHOWING": USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE (2013), *available at* http://accountabilityroundtable.org/wp-content/uploads/2013/10/ICAR-Knowing-and-Showing-Report4.pdf (setting forth a proposal for human-rights disclosures in securities filings).

[96] Supporting data for the statistics presented in this Part are on file with the author.

[97] *See supra* text accompanying note 79.

only 1,319 companies did so.[98] The SEC, therefore, overestimated by about 350%. The agency also predicted that 75% of those companies (about 4,500) would file Conflict Minerals Reports in addition to their Form SDs.[99] This time the SEC was close—77% of filers included this report as an exhibit (1,020/1,319). Its initial error, however, means that the SEC still missed the mark on the total number of Conflict Minerals Reports actually filed by well over 300%. The table below summarizes this information.

Table 1: Actual Filings Compared to SEC Estimates

	Number of Form SDs	Number of CMRs
SEC Estimate	5,994	4,496
Actual Number	1,319	1,020
Percent Overestimate	354%	341%

Most agreed on the industries that would fall within the rules' scope. Ernst & Young issued a representative prediction that the most heavily impacted would be "electronics and communications, aerospace, automotive, jewelry, and industrial products."[100] Unlike the SEC's numerical estimates, Ernst & Young's projection is consistent with the data. There are two ways a review of the filings can help to assess which industries were most affected. The first is to look at the raw numbers. The table below sorts companies by SIC code (a commonly used system of categorizing companies by industry) and shows which codes generated the most filings.[101] It reveals that semiconductor manufacturers bore the brunt of the conflict-minerals rules (turning in 118 filings) and that some other top categories were also related to electronics. The automotive industry shows up on the table too, as do communications and industrial products.[102]

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[98] The filing deadline was June 2, 2014. *See* Form SD, *supra* note 24, at General Instructions B.1–2. All filing statistics are as of August 8, 2014.

[99] Conflict Minerals, 77 Fed. Reg. 56,274, 56,356 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[100] ERNST & YOUNG, CONFLICT MINERALS: WHAT YOU NEED TO KNOW ABOUT THE NEW DISCLOSURE AND REPORTING REQUIREMENTS AND HOW ERNST & YOUNG CAN HELP 1 (2012), http://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf. *See also* 77 Fed. Reg. at 56,284–85.

[101] *See Division of Corporate Finance: Standard Industrial Classification (SIC) Code List*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/info/edgar/siccodes.htm (last visited Dec. 12, 2014).

[102] Other notable SIC codes related to these categories include: (i) for electronic, 3672 (printed circuit boards) with 13 filers; (ii) for automotive, 3711 (motor-vehicle and passenger-car bodies) with 13 filers; (iii) for communications, 3661 (telephone and telegraph apparatus) with 16 filers; (iv) for industrial products, 3533 (oil and gas field

Table 2: Top Industries by SIC Code

SIC Code & Definition	Number of Filers	Percent Filing[103]
3674 (Semiconductors & Related Devices)	118	93%
3845 (Electromedical & Electrotherapeutic Apparatus)	48	76%
3714 (Motor Vehicle Parts & Accessories)	31	83%
3663 (Radio & TV Broadcasting & Communications Equipment)	29	69%
3841 (Surgical & Medical Instruments & Apparatus)	26	56%
7372 (Services – Prepackaged Software)	24	14%
2834 (Pharmaceutical Preparations)	23	13%
3576 (Computer Communications Equipment)	23	77%
3690 (Miscellaneous Electrical Machinery, Equipment & Supplies)	22	83%

Counter to Ernst & Young's prediction, jewelers and aerospace companies are absent. The conflict-minerals rules' bearing on them becomes evident, however, when the data is parsed in another way. The sheer number of filings is revelatory, but so too is the percentage of companies within each SIC code that filed. If a high percentage of companies in an industry make conflict-minerals disclosures, it is safe to say that the industry is heavily impacted. There were only seven filings with jewelry-related SIC codes, but every public company with such a code filed.[104] Similarly, 24 out of 25 public companies in the four aerospace-related SIC-codes filed.[105]

Percentages also indicate that not all of the industries in table two were truly the most impacted. As shown in the table, some had a high percentage of

machinery) with 12 filers and 3560 (general industrial machinery and equipment) with 9 filers.

[103] This column shows, by SIC code, the percentage of public companies traded on major exchanges that filed conflict-minerals disclosures.

[104] The following jewelry-related SIC codes are included in the above calculation (with filers out of potential filers in parenthesis): 3910 (jewelry, silverware & plated ware) (1/1); 3911 (jewelry, precious metal) (1/1); and 5944 (retail jewelry stores) (3/3). In addition, two unlisted companies with the SIC code 5944 filed.

[105] The following SIC codes are included in the above calculation (with filers out of potential filers in parenthesis): 3760 (guided missiles, space vehicles, and parts) (3/4); 3812 (search, detection, navigation guidance, aeronautical systems) (11/11); and 3726 (aircraft parts and auxiliary equipment) (10/10).

filers, while others were simply large industries with a small group of affected firms. For example, 93% of semiconductor makers and 83% of automobile-part makers submitted filings, but only a small percentage of software service providers and pharmaceutical-related companies did so. For these industries, therefore, the rule was not a widespread concern.

On the other hand, surveying the data more broadly reveals a couple of other industries that the rules' greatly affected. There are a variety of SIC codes related to measurement and control instruments. While such devices are used in a wide range of industries—including some of those that Ernst & Young mentions (namely, electronics, industrial products, and aerospace)—the number of filings produced in this area and the high percentage of these companies that filed stands out. Pooling together the four most notable related SIC codes reveals 52 filings out of 57 companies.[106] The other industry that stands out is retail department stores. Pooling the most impacted SIC codes shows that 31 out of 39 filed.[107]

Also notable is the range of industries affected. Sixty percent of SIC codes had at least one filing.[108] As seen above, in some cases a high percentage of companies within an industry submitted disclosures; in other cases, it was only a small fraction of those doing business in the space.

Finally, during the rulemaking process, commentators expressed special concern for smaller companies.[109] Because of their size, compliance costs likely loom proportionally larger for each small firm subject to the rules.[110] While summary statistics cannot reveal proportionate costs, organizing filers by size does illuminate the extent to which the rules impacted these firms. A showing that they filed in disproportionate numbers would exacerbate cost concerns. Fortunately, the table below suggests that this was not the case. Based on the sample, larger firms actually filed at a slightly higher rate.

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[106] The following SIC codes were included in this calculation (with filers out of potential filers in parenthesis): 3829 (measuring and controlling devices) (10/11); 3825 (instruments for measurement and testing of electricity and electrical signals) (14/16); 3826 (laboratory analytical instruments) (15/15); and 3823 (industrial instruments for measuring, display, and control) (13/15).

[107] This calculation includes the following SIC codes (with filers out of potential filers in parenthesis): 5311 (retail department stores) (6/6); 5600 (retail apparel and accessory stores) (5/7); 5621 (retail women's clothing stores) (10/13); and 5651 (retail family clothing stores) (10/13).

[108] While I have used the more commonly referenced 4-digit SIC codes, there are also 2-digit SIC codes, which group companies into much broader categories. Seventy-three percent of 2-digit SIC codes were represented.

[109] *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,286–87, 56,359–60 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[110] *See id.*; Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation,* 39 J. CORP. L. 347, 381–83 (2014).

Table 3: Filers Sorted by Company Size

	S&P SmallCap 600[111]	S&P MidCap 400[112]	S&P 500[113]
Filers	194	134	182
Percent Filing	32%	34%	36%

In the end, the most surprising thing the data reveals is the SEC's vast miscalculation regarding the number of likely filers. Otherwise, the data mostly confirms predictions about where the compliance burden would most heavily fall. It also quells some concerns about smaller firms. Compliance may cost such companies proportionally more, but at least the rules do not unintentionally single them out.[114]

B. The Content of the Compliance Effort

1. The Content of Form SDs

Over 200 firms in the S&P 500 submitted a Form SD. Since the vast majority—88%—supplemented this basic filing with a Conflict Minerals Report as well, the Form SDs themselves were generally pithy references thereto, consisting of one or two sentences.[115] When companies determined that they were justified in only filing Form SDs, they included more detail pursuant to the rules' requirements. For these companies, the forms averaged about 3.75 pages.[116]

In principle, Form-SD-only filers are those that do not source conflict minerals from the Congo region. More specifically, companies were permitted to stop with this form if (i) they determined, based on their RCOI, that their conflict

[111] This is an index of 600 smaller companies. *S&P SmallCap 600*, S&P DOW JONES INDICES, http://us.spindices.com/indices/equity/sp-600. (last visited, Dec. 16, 2014).

[112] This is an index of 400 midsized companies. *S&P MidCap 400*, S&P DOW JONES INDICES, http://us.spindices.com/indices/equity/sp-400 (last visited, Dec. 16, 2004).

[113] *See supra* note 5.

[114] Some noted that smaller companies would be affected as members of the supply chain of larger companies. *See* Conflict Minerals, 77 Fed. Reg. 56,274, at 56,359. The data does not reveal whether smaller firms were disproportionally impacted in this way.

[115] Of the 207 S&P 500 firms that filed conflict-minerals disclosures only 25 filed only a Form SD. Fifty-two of the remaining 182 Form SDs were only one sentence long.

[116] Because it includes both cover pages and exhibit lists, this is a generous page-number calculation.

minerals did not originate from the area;[117] (ii) their RCOI gave them no reason to believe that the area was the source of their conflict minerals;[118] or (iii) after conducting due diligence, they determined that conflict minerals that, based on their RCOI, they had reason to believe originated from the Congo region did not actually come from there.[119]

The second category was almost universally relied upon as the justification for only filing a Form SD. Only two companies claimed to have affirmatively determined that they did not source from the Congo region.[120] In addition, not a single S&P 500 firm filed a Form SD, but declined to file a Conflict Minerals Report, based on the final category. Taking the filings at face value, this means that due diligence never convinced a company that it was not sourcing from the Congo when its RCOI pointed in the opposite direction.

According to the rules, firms relying on either of the first two categories as the basis for stopping at the Form SD stage were required to briefly describe their RCOI and their conclusion as part of the form.[121] As the above paragraphs suggest, the reported conclusion was almost always that the company had no reason to believe conflict minerals in its products came from the Congo region.[122] Companies described an RCOI that generally consisted of a survey of their suppliers.[123] Firms varied on the detail they provided about these surveys and the extent to which they described what suppliers actually said in response that led companies to believe their supply chain did not involve the Congo. Hershey, for instance, which uses tin in its decorative containers, merely noted that it surveyed its suppliers and, based on the survey, had no reason to believe its tin comes from the Congo region—and ended the discussion at that.[124] Altria Group, however, whose e-cigarettes and related chargers contain a small amount of tin and gold, provided far more detail.[125] It explained that its conclusion was based on a certification by its sole supplier that the conflict minerals in the products it supplies

[117] *See* Form SD, *supra* note 24, at Item 1.01(b).

[118] *See id.*

[119] *See id.* at Item 1.01(c).

[120] *See* Meadwestvaco Corp., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); Mohawk Industries Inc., Specialized Disclosure Report (Form SD), at 2 (Jun. 2, 2014).

[121] Form SD, *supra* note 24, at Item 1.01(c).

[122] *See, e.g.,* Clorox Co., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); Hershey Co., Specialized Disclosure Report (Form SD), at 2 (June 2, 2014).

[123] Rather than conducting a survey, some companies already had, or were able to obtain, supplier certifications regarding the countries of origin of their conflict minerals. *See, e.g.,* Altria Group Inc., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); Newmont Mining Corporation, Specialized Disclosure Report (Form SD), at 7 (May 31, 2014); LyondellBasell Industries NV, Specialized Disclosure Report (Form SD), at 2 (May 31, 2014).

[124] Hershey Co., *supra* note 122, at 2.

[125] Altria Group Inc., *supra* note 123, at 2.

did not originate from the Congo.[126] Altria also explained that the supplier was able to certify as much by obtaining similar certifications from its sub-suppliers and crosschecking smelter information against CFSI's conflict-free list.[127]

In describing their RCOI, around 40% of companies did not reveal their survey response rate. And a number of those that supplied the information, failed to hear back from everyone. Norfolk Southern, a railroad company, only filed a Form SD even though it had a response rate of just 80%,[128] and Patterson Companies, a health-care products supplier, did the same with a response rate of just 45%.[129] In doing so, firms like Norfolk Southern and Patterson took advantage of SEC guidance permitting companies to declare that they have no reason to believe they are sourcing conflict minerals from the Congo even with incomplete information in this regard.[130]

2. The Content of the Conflict Minerals Reports

Conflict Minerals Reports are required of companies that, after conducting due diligence, have been unable to rule out the Congo region as a potential source of their conflict minerals.[131] As noted above, almost nine out of ten S&P 500 companies that filed a Form SD also filed such a report. The average length of the report was about 5.5 pages. Although there was a wide range—with the shortest being one page and the longest being thirty-five—more than 80% were between 2 and 6 pages.[132] Thus, even though Chairwoman White had expressed concern about "information overload," the actual reports were usually brief, particularly as securities-law filings go.[133]

The key reporting requirement for firms is to describe their due-diligence efforts, the substance of which must conform to the *OECD Guidance*.[134] Almost every company noted in its report that it constructed its due diligence in adherence with this framework. About 80% of firms also broke down their diligence description into the five steps outlined therein; company responses are detailed below and in a table at the conclusion of this section.

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[126] *Id.*

[127] *Id.*

[128] Norfolk Southern Corp., Specialized Disclosure Report (Form SD) (June 2, 2014).

[129] Patterson Companies, Inc., Specialized Disclosure Report (Form SD), at 3 (June 2, 2014).

[130] *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,312 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[131] *See* Form SD, *supra* note 24, at Item 1.01(c); *supra* text accompanying note 52.

[132] Much of the difference in length is attributable to whether the firm chose to disclose smelter and refiner information. *See infra* text accompanying note 167.

[133] White, *supra* note 88.

[134] *See* Form SD, *supra* note 24, at Item 1.01(c); *supra* text accompanying notes 33–35.

The first OECD step, "establish strong company management systems," includes a number of instructions for companies:[135]

Adopt and disseminate a conflict-minerals policy.[136] About three out of four companies established such policies and made them available on their websites. Some included the text in their filings; most only noted that the policy was accessible online.

Set up a conflict-minerals diligence team.[137] Almost 90% of companies reported creating some type of internal cross-functional team to manage their reporting obligations. For example, on its compliance team, the giant aluminum company, Alcoa, included its chief legal officer, among other executives, as well as representatives from each unit involved with products potentially containing conflict minerals.[138]

Establish a system for mapping the conflict-mineral supply chain.[139] Almost all companies followed essentially the same procedure for understanding their supply chain. They identified the suppliers of their conflict minerals and sent them each a survey.[140] The survey was almost always based on a template created by CFSI.[141] This template includes a number of questions about company diligence and policies.[142] Most importantly, it asks whether the supplier's goods contain conflict minerals, where they originate from, and in what facility they are processed.[143] To assist suppliers, it even includes a list of over 200 known smelters.[144]

Almost 75% of companies also followed up with suppliers that provided answers that were incomplete or internally inconsistent, as well as those that did not respond at all. About half of companies included information on their ultimate

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135 *See* OECD GUIDANCE, *supra* note 35 at 17.

136 *See id.*

137 *See* OECD GUIDANCE, *supra* note 35 at 17.

138 Alcoa Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014).

139 *See* OECD GUIDANCE, *supra* note 35 at 17.

140 The OECD and others have noted that companies typically only have a relationship with their direct suppliers. *See, e.g.,* OECD STUDY, *supra* note 48, at 59–60; IPC, *supra* note 82, at 2. The filings are consistent with this observation. Only five companies explicitly noted engaging with indirect suppliers: EMC Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 2–3 (June 2, 2014); Home Depot Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Intuit Inc., Conflict Minerals Report (Form SD exhibit 1.02) at 2 (June 2, 2014); Kohl's Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (May 30, 2014); Macy's Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014).

141 The template is publicly available. *Conflict Minerals Reporting Template*, CONFLICT-FREE SOURCING INITIATIVE http://www.conflictfreesourcing.org/conflict-minerals-reporting-template/ (last visited Nov. 25, 2014).

142 *Id.* at Tab 2, "Instructions."

143 *Id.*

144 *Id.* at Tab 5, "Standard Smelter Names."

response rate.[145] Based on those that provided this figure, which likely skews the numbers higher, the average was 71%. There was a great amount of variability, however, with a reported low of 21%, a high of 100%, and a standard deviation of 24%.

Seventy companies provided further insight into their supply chain by disclosing the number of conflict-mineral suppliers therein. The range was extraordinary wide, with a high of 40,312 reported by Caterpillar and a low of 2 reported by Intuit.[146] The average number was 2,265; the median was 510 (because of the wide range and Caterpillar's astonishing figure, which was three-times larger than the next highest, the median is likely the better summary of the data).

Incorporate a supply-chain policy in agreements with suppliers.[147] Companies were less than diligent about including language in supplier agreements. Only about one-half reported doing so.[148] And companies often were not forthcoming about what the language actually said. When companies did include this information, they frequently described the language as calling on suppliers to furnish Dodd-Frank mandated information on conflict minerals when requested.[149] A dozen companies went further, though, and included language requiring their suppliers to be conflict free.[150]

Establish a grievance mechanism.[151] Many companies ignored the OECD instruction to set up a grievance procedure. Less than half reported compliance with this seemingly ministerial requirement.

"Inconsistent" would be the best way to describe firm compliance with the first OECD step and its five subparts. It is also an appropriate description of their responses to the remaining requirements. The second step requires companies to assess risks in their supply chain by analyzing the due-diligence practices of their smelters and refiners.[152] This overlaps with step four, which requires an independent audit of those same facilities, an assessment that would include a review of their due diligence.[153] About 30% of companies failed to address these

[145] This figure does not include companies that listed a response rate in terms of total spend or some other accounting metric rather than as a percentage of those surveyed.

[146] *See* Caterpillar Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 1 (May 30, 2014); Intuit Inc., *supra* note 140, at 1.

[147] *See* OECD GUIDANCE, *supra* note 35, at 17.

[148] Sixteen percent noted, however, that they were planning to do so in the future.

[149] *See, e.g.,* Lam Research Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Medtronic Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (May 29, 2014); Zimmer Holdings Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014).

[150] *See, e.g.,* Ecolab Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 2 (June 2, 2014); Jabil Circuit Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Sigma-Aldrich Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 1 (May 30, 2014).

[151] *See* OECD GUIDANCE, *supra* note 35, at 17.

[152] *Id.* at 18, 42.

[153] *Id.* at 19, 47.

requirements. Remaining companies were able to identify at least some of these facilities, and addressed these steps by referring to audits done in connection with CFSI's conflict free smelter program.[154] They reported crosschecking the names of the smelters or refiners identified by their suppliers against CFSI's list of those that are conflict free. If smelters or refiners were not on the list, companies by and large did not investigate the facility's due-diligence practices or hire independent auditors to do so.[155]

Step three is where companies were required to establish and implement plans to transition existing suppliers to conflict-free sourcing or abandon them.[156] Less than 30% of companies reported that they had outlined a plan.[157] Of those, none reported taking any remedial action.[158] Since step five—publicly reporting on conflict-mineral diligence—is redundant with the rules themselves, all companies that at least filed something complied with this requirement.[159]

The SEC mandated several other compliance steps beyond the due-diligence reporting. A key requirement was that companies list all products that they had not determined to be conflict free (although, thanks to the Circuit Court holding, they were not required to provide any particular label for this list of products).[160] Some companies ignored this rule or provided a general description of their business. But about 70% did include some type of product list. Most produced a list at a high level of generality, describing their products as "apparel" or "household products," rather than including brand names.[161] Some firms housed in generic-sounding parent companies included these bland descriptions and left out important identifying information. TJX Companies, for instance, the parent of

[154] *See supra* text accompanying note 48.

[155] The biggest exception was Intel, which reported inspecting 29 processing facilities. *See* Intel Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 2 (May 22, 2014).

[156] *See* OECD GUIDANCE, *supra* note 35, at 18; *supra* text accompanying notes 42–45.

[157] This statistic does not include companies that merely reported escalation measures with respect to companies that failed to respond when surveyed regarding their use of conflict minerals.

[158] A handful of companies, in fact, reported that they had adopted policies, but found no instances requiring attention. *See, e.g.,* Boeing Co., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Emerson Electric Co., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); Microsoft Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014).

[159] OECD GUIDANCE, *supra* note 35, at 19.

[160] *See* Form SD, *supra* note 24, at Item 1.01(c)(2), *supra* text accompanying notes 69–75 (discussing the Circuit Court holding).

[161] *See, e.g.,* Best Buy Co. Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); Nordstrom Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); TJX Companies Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 1 (June 2, 2014). As noted *supra* text accompanying note 57, the SEC did not require the listing of brands. Nevertheless, 12 companies did so.

low-cost departments stores TJ Maxx and Marshalls noted that its "apparel" may contain conflict minerals, but never mentioned the names of its stores.[162]

One question raised by the Circuit Court opinion was how companies would note the conflict status of their products now that they were not forced to use the labels "not…'DRC conflict free'" or "conflict undeterminable."[163] The vast majority of companies took advantage of this freedom. About 80% chose to give no conclusion as to their products' conflict status. Often, company products that contain conflict minerals were listed near the beginning of the report. Towards the end, companies then had language indicating that, despite their due diligence, they were unable to determine the conflict status or origin of their products.[164] About 20% of companies, however, were a bit bolder and listed their products as "conflict undeterminable" even though not mandated. Finally, only one firm, Intel, claimed to have a conflict-free product.[165]

The rules also required that companies list the smelters and refiners of the conflict minerals in products not found to be conflict free, as well as the countries of origin of those minerals.[166] About 70% of companies failed to provide smelter and refiner information. Many did not list these processing facilities even though they had identified at least a portion of those in their supply chain.[167] Some gave no reason for omitting the names,[168] but many claimed that even though they could identify such facilities, they could not link particular minerals to particular products. According to these companies, when they polled their suppliers, they would get a response at the "company level," meaning that they were told all of the smelters and refiners that the supplier used.[169] In many cases, however, suppliers apparently did not take the additional step of informing companies which of these facilities processed the minerals that made it into the company's specific products. Companies, therefore, could not match conflict minerals from a particular smelter

[162] TJX Companies Inc., *supra* note 161, at 1.

[163] *See supra* text accompanying notes 69–75.

[164] Although unusual, some companies gave no conclusion at all. *See, e.g.,* Procter & Gamble Co., Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014).

[165] Intel Corp., *supra* note 155, at 4, 7–8.

[166] Form SD, *supra* note 24, at Item 1.01(c)(2).

[167] As noted *supra* text accompanying note 154, about 70% of companies reported checking their processing facilities against the CFSI conflict-free list. Out of the 134 that claimed to have done so, however, only 50 actually listed their facilities—less than 40%.

[168] *See, e.g.,* Allegion plc, Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014); Berkshire Hathaway Inc., Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014); Broadcom Corp., Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014).

[169] *See, e.g.,* Danaher Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 2 (June 2, 2014); Harley-Davidson Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (June 2, 2014); Honeywell International Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (June 2, 2014); Lockheed Martin Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); Reynolds America Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); TJX Companies Inc., *supra* note 161, at 3; Whirlpool Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (May 30, 2014).

or refiner with their particular goods, and, based on this, claimed not to have enough information to include facilities in their filings.[170]

On the other hand, about 30% of filers did list the processing facilities in their supply chains, sometimes with the caveat that, for the reason noted above, they could not be sure that their products actually contained conflict minerals from those included.[171] In addition, some companies that included facility information chose only to list those that appeared on the CFSI conflict-free list, omitting others without explanation.[172]

Country-of-origin disclosure was even scarcer. Eighty percent of companies failed to provide this information. As with facilities, some companies provided no explanation for the omission.[173] Others claimed that they could not determine the country of origin for the conflict minerals in their products. While some left it at that,[174] others provided details as to why. When smelters and refiners process conflict minerals, ores from different regions are combined and the location of origin becomes impossible to track.[175] Thus, the only way to trace the source of a conflict mineral in a product is to identify the smelter from which it came. If, for example, a particular smelter only processed minerals from Asia, then a company downstream from the smelter could know that is where its raw materials came from. Since companies could not match smelters to products, they claimed to be unable to match products to countries as well.[176]

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[170] *See, e.g.,* sources cited *supra* note 169.

[171] *See, e.g.,* Ecolab Inc., *supra* note 150, at 3 n.1(a); KLA-Tencor Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (June 2, 2014); Garmin Ltd., Conflict Minerals Report (Form SD exhibit 1.02), at 6 (June 2, 2014); Micron Technology Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 4 n.6 (May 30, 2014).

[172] *See, e.g.,* Kroger Co., Conflict Minerals Report (Form SD exhibit 1.02), at 2 (June 2, 2014); Goodyear Tire & Rubber Co., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); Xerox Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (May 29, 2014).

[173] *See, e.g.,* Covidien plc, Conflict Minerals Report (Form SD exhibit 1.02) (May 30, 2014); Ingersoll-Rand plc, Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014); Sigma-Aldrich Corp., *supra* note 150; Teradata Corp., Conflict Minerals Report (Form SD exhibit 1.02) (May 30, 2014); Thermo Fisher Scientific Inc., Conflict Minerals Report (Form SD exhibit 1.02) (May 30, 2014); VF Corp., Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014).

[174] *See, e.g.*, Johnson & Johnson, Conflict Minerals Report (Form SD exhibit 1.02), at 5 (May 30, 2014); PVH Corp., Conflict Minerals Report (Form SD exhibit 1.02) (June 2, 2014); Stanley Black & Decker Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (June 2, 2014).

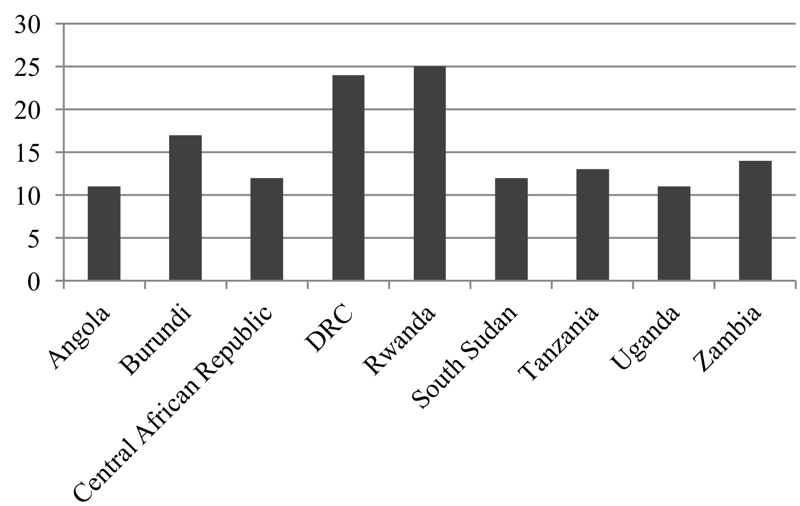
[175] Conflict Minerals, 77 Fed. Reg. 56,274, 56,321 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400); PRENDERGAST & LEZHNEV, *supra* note 80, at 6.

[176] *See, e.g.,* Danaher Corp., *supra* note 169, at 2; Honeywell International Inc., *supra* note 169, at 5; Medtronic Inc., *supra* note 149, at 3; Lockheed, *supra* note 169, at 4; TJX Companies Inc., *supra* note 161, at 3. Although companies stopped at this point, there is an additional layer of complexity in that even if a particular smelter is matched to a particular

As with facilities, despite these obstacles, some companies included a list of countries, sometimes with a qualification to reflect their uncertainty about the exact match to their products.[177] Curiously, of the filers that provided country-of-origin information, some did not include any from the Congo region.[178] If none of their facilities sourced from there, however, the companies would not have had to file a Conflict Minerals Report in the first place.

The histogram below summarizes the country-of-origin information for companies reporting sourcing from the Congo area. It is a small sample because so few companies listed specific countries therein, but Rwanda and the DRC stand out as the ones noted most frequently. They are cited 40% more than Burundi, the next most commonly mentioned.

Figure 1: Country-of-Origin Information of Conflict Minerals



product, country-of-origin information may still prove out of reach. Smelters often process minerals from more than one region. PRENDERGAST & LEZHNEV, *supra* note 80, at 6. In this case, even if a company identifies one of its smelter, the company cannot know for sure if minerals from a particular country processed in that smelter made it into its specific products. After the metals are liquefied, melded together, and then apportioned to different manufacturers, who is to say which country's minerals ended up in which company's products.

[177] *See, e.g.,* Cerner Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Garmin Ltd., *supra* note 171, at 6; Micron Technology Inc., *supra* note 171, at 6.

[178] *See, e.g.,* McKesson Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4–5 (June 2, 2014); Sandisk Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (May 30, 2014).

The rules' attention to country of origin includes one additional requirement—this one relates to process rather than results. Companies were required to describe their efforts to "determine the mine or location of origin [of their conflict minerals] with the greatest possible specificity."[179] This aspect of the rule was essentially shrugged off. More than one-half of filers ignored it. Those that did address it frequently referenced their due diligence and RCOI descriptions as their efforts to determine this information.[180]

Finally, the rules called for all companies using the "conflict undeterminable" category to list the steps they were taking or planned to take to improve their diligence and to mitigate the risk that they source from militarized mines.[181] Despite no longer having to choose any particular label, almost 90% of companies had a section on this. Many referenced specific OECD requirements, like updating their supplier contracts, as things they planned to do.[182] Many others contained platitudinous language about continuing to "engage with" their suppliers on the conflict-minerals issue.[183] The following table summarizes the contents of S&P 500 Conflict Minerals Reports.

Table 4: S&P 500 Company Compliance Steps in Conflict Minerals Reports

Conflict-Minerals Rules Compliance Steps	Percent of Companies Taking Step Listed
Requirement to Describe Due Diligence	-
Noted *OECD Guidance*	98%
Described Due Diligence in Terms of *OECD Guidance's* 5 Steps	82%
Step 1	-
Enacted Conflict-Minerals Policy	85%
Made Conflict-Minerals Policy Publicly Available	75%

179 Form SD, *supra* note 24, at Item 1.01(c)(2).

180 *See, e.g.,* L Brands, Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); Newell Rubbermaid Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 6 (May 30, 2014); Zimmer Holdings Inc., *supra* note 149, at 4.

181 *See* Form SD, *supra* note 24, at Item 1.01(c)(1)(iii).

182 *See, e.g.,* Agilent Technologies, Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 6 (June 2, 2014); Autodesk Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 4 (June 2, 2014); C.R. Bard, Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 2 (June 2, 2014); Garmin Ltd., *supra* note 171, at 7.

183 *See, e.g.* Autodesk Inc., *supra* note 182, at 4; Cummins Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 6 (May 30, 2014); Harley-Davidson Inc., *supra* note 169, at 7.

Created Internal Conflict-Minerals Team	87%
Surveyed Suppliers	99%
Reported Response Rate	47%
Used CFSI Template for Survey	92%
Followed up on Incomplete/Inconsistent Responses & Nonresponses	73%
Conducted Site Visits of Suppliers and Processing Facilities[184]	4%
Amended Supplier Agreements	51%
Put in Place a Grievance Procedure	47%
Steps 2 and 4	-
Incorporated Results of CFSI Smelter Audits	73%
Conducted Own Processing Facility Audit	0%[185]
Step 3	-
Reported Findings to Senior Management	55%
Adopted a Risk Management Plan	29%
Step 5	-
Reported on Due Diligence	100%
Other Requirements	-
Listed Future Risk-Mitigation Efforts	87%
Described Products Not Found to be Conflict-Free	71%
Listed Processing Facilities	31%
Listed Countries of Origin	20%
Described Efforts to Determine Country of Origin with Specificity	40%
Conflict-Status Categorization	-
Conflict Free	1%
Not Conflict Free	0%
Conflict Undeterminable	21%
"Unable to Determine" or No Specific Conclusion	77%

What stands out in the above chart is the frequency of low compliance percentages. While in some cases companies may have good—or at least

[184] Apple, General Electric, Intel, and Qualcomm reported visiting smelters. *See* Apple, Conflict Minerals Report (Form SD exhibit 1.02), at 2 (May 29, 2014); General Electric Co., Conflict Minerals Report (Form SD exhibit 1.02), at 7 (June 2, 2014); Intel Corp., *supra* note 155, at 2; Qualcomm Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 6 (June 2, 2014).

[185] Intel was the only company to do so. *See* Intel Corp., *supra* note 155, at 2.

defensible—reasons for omitting information, the end result is a set of Conflict Minerals Reports that reveal quite little about conflict-mineral supply chains.

C. What the SEC Filings Reveal About the Conflict-Minerals Rules

The nature of compliance provides particular insight into the costs and benefits of the conflict-minerals rules. For most companies, compliance appears to have involved little cost. Due diligence essentially boiled down to sending out a survey created by a third party and checking certain results against a third-party-generated list. Companies also took procedural steps, like setting up a conflict-minerals policy, an internal team, and a grievance mechanism. No doubt all of this takes some time, particular for those companies with a wide range of products and a complex supply chain, but the burden appears relatively insubstantial. That the final work product—the filings themselves—were brief and devoid of detail further supports the idea that little effort went into compliance with these rules.

It is true that the rule contemplates some trickle-down costs. As noted above, companies required to file these reports are often many levels removed from the actual mines.[186] Thus, for a company's suppliers to provide meaningful information when requested, these firms must poll their own suppliers. To illuminate an entire supply chain, this process would have to continue all the way to the source, which necessarily adds expense.

But compliance often did not follow this idealized conception. In describing their survey results, many companies noted that numerous suppliers responded with inconclusive answers.[187] A survey reply along the lines of, "we don't know," entails little cost and eliminates expenses further up the chain. And answers like this should be expected. Unless suppliers are themselves subject to the SEC rules or otherwise contractually obligated to follow up, there is nothing that says they have to assist in a company's diligence efforts. They might do so to maintain good relations with customers that push them, but buyers have little reason to exert much force. From a risk-averse company's perspective, no answer is better than one that links minerals to conflict mines. Thus, while costs extend past the actual filers, it is easy to overstate how far they reach.

Finally, costs in the aggregate must be lower than anticipated, at least by the SEC, because, as noted above, the agency overestimated the number of filers

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186 *See supra* note 80 and accompanying text.

187 *See, e.g.*, Ball Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014) ("We have elected not to present smelter and refiner names that have been identified by suppliers in this report due to the number of nonresponders and incomplete responses that were received to our survey"); Caterpillar Inc., *supra* note 145, at 1 ("The majority of suppliers surveyed either provided an incomplete or inconclusive response or did not provide any response."); Costco Wholesale Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 1 (June 2, 2014) ("a number of suppliers failed to respond."); Qualcomm Inc., *supra* note 184, at 5 ("The vast majority of our direct suppliers reported unknown countries of origin for their necessary conflict minerals.").

by around 350%.[188] Given the perfunctory effort and unexpectedly small number of filers, the true costs of compliance were likely far less than critics warned.

As might be expected, the lower costs appear to be accompanied by lower benefits. There were certainly no bombshells. Not a single company admitted sourcing from a militarized mine; no products or companies could be singled out as conflict-mineral offenders. Meanwhile, scant few appeared worthy of praise—conflict-free declarations were almost nonexistent.[189] Naming and shaming requires that activist consumers and shareholders be able to distinguish between good actors and bad, so that they can take action against the latter. But the information in the reports does not provide sufficient information to get such campaigns off the ground. The filings lack the type of specifics that could inspire investors to reallocate their money or consumers to reassess their purchasing habits. Almost every company fell into the category of having a reason to believe they were sourcing from a country in the Congo region, but being unable to tell whether their minerals were really from there, or despite being from there, were actually conflict free. Disclosures such as these provide paltry basis for change.

It could be argued that despite their inconclusiveness, the reports are still of some use, because activists can use them to differentiate among companies based on how diligently they complied. The compliance effort itself can be used as a measuring stick even if the substance of the filings provides little basis on which to discriminate.[190] There is certainly some truth to this, but sorting companies based on compliance is a high cost, partly subjective, endeavor. The benefits also pale in comparison to true naming and shaming. It is much less salient to criticize a company for cursory compliance than it is to identify it as sourcing from a mine linked to human-rights abuses. Compliance-based sorting is also only beneficial in

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[188] *See supra* text accompanying notes 98–99.

[189] *See supra* note 165 and accompanying text. Arguably, those companies that chose only to file a Form SD could be described as conflict free. This has a few problems, though. The first is that such companies were not the target of the rules. The idea was to encourage responsible sourcing from those involved in the region rather than celebrate those with no connection. Second, 23 out of the 25 S&P 500 companies that only filed a Form SD claimed they were entitled to do so because they lacked a reason to believe that the conflict minerals they used were from the Congo. *See supra* text accompanying note 120. Under SEC rules, they were allowed to make such a claim, so long as none of their survey responses, or other information at their disposal, indicated otherwise. *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,312–13 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400). But this is not the same as being certified as conflict free. It is a claim based on supply-chain ignorance rather than knowledge of conflict-free sourcing. As noted *supra* text accompanying notes 128–130, some companies claimed they lacked a reason to believe that they were sourcing from the Congo despite limited knowledge of their supply chain. Finally, neither of the S&P 500 firms that actually established that their supply chain did not involve the Congo were from heavily impacted industries like electronics, where such a declaration would be most meaningful.

[190] Global Witness, for example, makes this argument. *See Myth Buster*, *supra* note 90.

extreme cases. Because many companies complied in an almost identical fashion, this metric is only useful to call out those that turned in a truly excellent effort and those that all but ignored the rule.

Finally, benefits from this approach exist only on the margin. There are ways companies can demonstrate their commitment to conflict-free sourcing other than through careful compliance. They can, for instance, join industry organizations committed to this goal. In fact, before the conflict-minerals rules went into effect, the Enough Project had ranked electronics companies based on activities like this.[191] While compliance may be a cleaner signal, the fact remains that it is only its added benefit that matters—the extent to which this tells us something we did not already know. If achieved, the true hope of the conflict-minerals rules—to allow us to sort companies based on where they source—would have greatly expanded our awareness.

The calm that greeted the public dissemination of the reports supports the conclusion that they lack the content necessary to bring about the intended social change. A few complained about the lack of substance,[192] but there has been no ranking effort and no semblance of public outrage. The press noticed the revelation, completely unrelated to conflict minerals, that a few companies were using a gold refinery in North Korea in violation of the U.S. embargo.[193] But companies are claiming that this was simply a reporting error.[194]

All of this suggests that the results of the conflict-minerals rules are a faint shadow of the controversy that has surrounded the initiative ever since Congress approved the original legislation over four years ago. This is a troubling conclusion, not only for those concerned with conflict minerals and the human-rights abuses related thereto, but also for those looking at the regulation as a model for future supply-chain transparency efforts. If there is a silver lining, however, it is that the data at least provides a starting point for an investigation into what went wrong.

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[191] *See generally* ENOUGH PROJECT, GETTING TO CONFLICT FREE: ASSESSING CORPORATE ACTION ON CONFLICT MINERALS (2010), *available at* http://www.enoughproject.org/files/publications/corporate_action-1.pdf.

[192] *See, e.g.*, Joe Mont, *First Conflict Minerals Reports Lack Substance, If Filed at All*, COMPLIANCE WEEK (June 10, 2014), http://www.complianceweek.com/news/news-bulletin/first-conflict-minerals-reports-lack-substance-if-filed-at-all-0; Elena Popina, *Intel, HP Seen as Exceptions in Conflict-Mineral Reports*, BLOOMBERG BUSINESSWEEK (June 3, 2014), http://www.businessweek.com/news/2014-06-02/intel-hp-seen-as-exceptions-in-conflict-mineral-reports; *As June 2nd Conflict Minerals Deadline Approaches, Global Witness Warns That First Reports Lack Substance*, GLOBAL WITNESS (May 29, 2014), http://www.globalwitness.org/library/june-2nd-conflict-minerals-deadline-approaches-global-witness-warns-first-reports-lack.

[193] *See* Jamila Trindle, *U.S. Companies Still Puzzling Over North Korean Gold Question*, FOREIGN POLICY (June 5, 2014), http://www.foreignpolicy.com/articles/2014/06/05/us_companies_still_puzzling_over_north_korean_gold_question.

[194] *Id.*

III. Why the Conflict-Minerals Filings Proved Unilluminating

A review of the filing data suggests that the conflict-minerals rules have so far been a disappointment. This conclusion leads to two related questions: what explains the lackluster first-year filings and what, if anything, should be done to lay the groundwork for better results in the future? In this Part, I address the former question. I argue that the flawed and incomplete disclosures can be attributed to difficulties inherent in the naming-and-shaming approach to regulation, a failure to draft rules that maximize this approach's potential despite such difficulties, and a halfhearted corporate compliance effort. This theory of regulatory failure, along with information gleaned from the filings themselves, then informs the reform proposals I present in the Part that follows.

A. The Difficulty of Naming and Shaming Conflict-Mineral Users

The central shortcoming of the conflict-minerals filings is that they fail to provide the information necessary to name and shame companies sourcing from militarized mines. This is likely because a number of factors conspire against successful naming and shaming in this arena. The approach works best when the culpable can be clearly identified and separated from the rest, and when the latter face severe public sanction.[195] The use of conflict minerals does not present the ideal circumstances for either.

Parties are easier to single out for undesirable conduct when the wrongful behavior can be identified without the cooperation of those same parties. Those fearful of being named and shamed have a large incentive to make the relevant information difficult to obtain. Naming and shaming conflict-mineral users through self-reporting was thus destined for resistance.

And those with nothing to hide must be convinced that it is worth their while to prove as much to the public. It helps, therefore, if compliance is cheap and easy. But this is not the case with conflict minerals. The diligence necessary to trace a supply chain back to the mine and determine whether it is controlled by an armed group is costly and difficult.[196] Naming and shaming also works better if the rewards for coming clean are significant. This incentivizes parties to undertake the necessary steps to clear their name. The benefits that would accrue to conflict-free companies, though, are uncertain. Undoubtedly, there are shareholders and customers who are deeply concerned about the humanitarian crisis in the region

[195] *See* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 1014 (2008) (naming and shaming has more "resonance" when the activity "arouses international outrage").

[196] Tracing ultimately depends on accurate recordkeeping at multiple levels in the supply chain, including not only suppliers, sub-suppliers, and smelters, but also by intermediaries that transport the minerals from the mines to the processing facilities. *See generally* PRENDERGAST & LEZHNEV, *supra* note 80.

and who are committed to ethical sourcing.[197] But conflict minerals do not appear to be a top social issue. The legislation did not stem from a public outcry; nor has one greeted the leaden filings.[198] If people are not clamoring for the elimination of conflict minerals, then companies are less likely to undertake costly efforts to avoid their use.

The basic approach—relying on companies to name and shame themselves when there are high costs and low benefits for doing so—is an inherently weak starting point. This likely provides part of the answer for why the reports are unsatisfying. Weak starting points, however, are commonplace in extraterritorial contexts such as this, where more hardline alternatives—like embargos or direct intervention—present a host of more significant problems. The challenge then is to recognize and respond to the difficulties inherent in the naming-and-shaming approach. As discussed below, lawmakers did poorly in this regard.

B. Shortcomings in the Implementation of Naming and Shaming

Even though naming and shaming presents difficulties in this context, the rules could have been drafted so as to provide a great deal more illumination. The manifold gaps in the reports suggest that the rules failed to perceive and take steps to mitigate the incentives for minimal compliance and failed to structure the compliance obligations in a way that maximizes transparency.

One way to incentivize compliance is to severely penalize failure to do so. This would tilt the corporate cost-benefits analysis more in favor of the rules. But neither Congress nor the SEC included any specific fines for delinquent or evasive companies. Failure to make the appropriate conflict-minerals filing or to include the required content is subject to the same sanction as any other missed reporting obligation. The basic penalty is a $100 per day of tardiness.[199] Rather innocuous.

The penalties escalate for more culpable conduct, but these are unlikely to be triggered. For example, missing reporting obligations could lead to a suspension of trading.[200] But the SEC only has authority to pursue this action to protect investors[201]—and their wellbeing as traditionally conceived is not implicated here.

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[197] *See* John Bagwell, *Congo Activism in the Face of the Chamber of Commerce's Lawsuit*, RAISE HOPE FOR CONGO (Oct. 26, 2012), http://www.raisehopeforcongo.org/blog/post/congo-activism-face-chamber-commerce%E2%80%99s-lawsuit-0 (discussing a shareholder proposal at Cisco related to conflict minerals); Dipietro, *supra* note 10 (discussing support for the conflict-minerals rules from socially conscious investing groups); *List of Initiatives*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/initiatives/list-initiatives (last visited Nov. 24, 2014) (discussing support for the rules on college campuses).

[198] *See* Woody, *supra* note 4, at 1325–27.

[199] Securities Exchange Act of 1934 § 32(b), 15 U.S.C. § 78ff(b) (2011).

[200] 15 U.S.C. 78l(j).

[201] *Id.* For a broader discussion of penalties available to the SEC for failure to meet reporting obligations, see 1 BRENT A. OLSON, 1 PUBLICLY TRADED CORPORATIONS:

The final rules also make clear that the filings are subject to so-called Section 18 liability.[202] This cause of action, however, which is triggered by material misstatements, is rarely used because of its strict requirements.[203] While fraud liability under Rule 10b-5 still looms,[204] firm conduct so far does not rise to this level.

It is also highly questionable whether the SEC would expend resources ferreting out and bringing enforcement proceedings against defiant companies. As noted above, the Chairwoman herself expressed regret over her agency's mandated involvement with these rules.[205] Commissioners of the SEC have also made their dissatisfaction clear.[206] All of this sends a signal to companies that compliance with the conflict-minerals rules is low on the agency's radar. Indeed, it is hard to picture an agency that sees itself as the investor's guardian devoting its limited resources to the pursuit of companies that fail to draft meaningful human-rights disclosures. The absence of stricter penalties and the hints of SEC indifference likely contributed to an impression that noncompliance would be tolerated.

Not only did the rules fail to signal the importance of compliance, they also lacked key transparency requirements for the companies to comply with. One problem that becomes evident in the filings is the level of generality at which the companies described their products. If the rules are at least partially aimed at consumers, then they need to be able to tell which particular goods are problematic. But the high-level descriptions found in company filings make this difficult.[207] The vexing ambiguity can be traced back to the SEC's reluctance to provide specific guidance to companies on how to describe their products.[208]

Asking companies to disclose the facilities and countries of origin of their conflict minerals also proved problematic. The key miss was to frame the rule in such a way as to suggest that this information only need be provided if the companies could actually link specific minerals to specific products. As noted above, the structure of corporate supply chains and the nature of the information provided to downstream companies prevented many filers from making a clean

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GOVERNANCE & REGULATION § 6:28 (2d ed. 2014); ROBERT J. WILD, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE SECURITIES AND CORPORATE GOVERNANCE COMPLIANCE PROGRAM § 1:154 (2013).

[202] Conflict Minerals, 77 Fed. Reg. 56,274, 56,304 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400).

[203] *See id.* at 54,349 n.813; DAY PITNEY LLP, CONFLICT MINERALS PROVISION OF THE DODD-FRANK ACT MAY RESULT IN SECTION 18 CIVIL LIABILITY 1–2 (2012), *available at* http://www.daypitney.com/news/docs/dp_4294.pdf.

[204] 17 C.F.R. § 240.10b-5 (2013).

[205] *See supra* note 88 and accompanying text.

[206] *See* Kester, *supra* note 10.

[207] Anything that drives up the transaction costs of discovering which companies and products are problematic dampens the efficacy of the rules. *See* Schwartz, *supra* note 110, at 376 (discussing a transaction-cost boundary on market forces).

[208] *See supra* text accompanying note 57.

connection, giving them plausible grounds for leaving this information out.[209] Failure to appreciate how this central disclosure requirement fit with the pragmatics of supply-chain diligence is thus a big reason why the filings are so thin.

This same oversight also undermined the sorting ability of the rule. Even though most companies chose not to use the "conflict undeterminable" label, almost all of them nevertheless concluded that they were unable to determine the conflict status of their products.[210] This is perfectly understandable given the above. If companies could not link specific minerals to specific products, then the conflict status of such products would be undeterminable. It, therefore, appears that a subtle wording choice not only explains the omission of key supply-chain information, but also why so many of the companies' conclusions were essentially identical.[211]

What also stands out from reading the reports is that they are muddled, redundant, and difficult to compare. Much of this can be traced back to the structure of the rules. One of the rules' key features is the distinction between two concepts—the reasonable country of origin inquiry and due diligence.[212] In the SEC's eyes, the latter is supposed to be a more in depth version of the former.[213] But in practice the concepts essentially merge. It would not be efficient for companies to conduct two rounds of inquiry; it makes sense for them to ask for all of the information at once. And this is what they did. The same CFSI survey was used to shed light on all of the relevant sourcing information.[214]

The merging of the two concepts led companies to repeat themselves in their filings. It also made filings challenging to compare, as some companies listed an activity as part of its RCOI while others listed the same thing as part of its due diligence. Compliance would have been more streamlined had the SEC never invented the RCOI concept.

This ephemeral distinction is also the conceptual undergirding of another core redundancy—the two-tiered reporting structure. The idea was that companies would report on their RCOI in the Form SD[215] and their due diligence in the

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[209] *See supra* text accompanying notes 169–170.

[210] *See supra* text accompanying notes 164–165.

[211] The universality of this conclusion also suggests that companies did not view the chance of being one of the first to be certified as conflict free to be worth the expense of the prerequisite audit.

[212] *See* Form SD, *supra* note 24, at Item 1.01(a) (pertaining to the RCOI); *id.* at Item 1.01(c) (pertaining to due diligence); *supra* text accompanying notes 26–54.

[213] *See* Form SD, *supra* note 24, at Item 1.01(c).

[214] Also, as noted earlier, although the rules left open the possibility that companies could reverse the conclusion of their RCOI in their due diligence, this never occurred. *See supra* text accompanying notes 120–121. This further suggests the merger of these two inquiries in practice.

[215] Form SD, *supra* note 24, at Item 1.01(a)-(b).

Conflict Minerals Report.[216] Since these two investigations have collapsed into one, there is no need to have two separate reports. One filing that discusses a company's supply-chain inquiry would suffice.

Yet more redundancy is built in via the requirement that companies describe their efforts to uncover the "mine or location of origin [of their conflict minerals] with the greatest possible specificity."[217] This obligation seems to be completely swallowed by a company's duty to describe their due diligence into "the source and chain of custody of [the company's] conflict minerals."[218] Perhaps there is an abstract distinction in that companies are to go into more depth in describing this singled-out aspect of their diligence, but this did not play out in the reports and it is difficult to conceptualize how it could.

Finally, the *OECD Guidance* is itself a source of confusion and duplication. As noted above, step two of the guidance, identify and assess supply chain risk, and step four, perform audits of smelters in the company supply chain, focus on understanding company processing facilities.[219] In practice, most firms addressed both steps by referencing the results of the CFSI audits.[220] To signal compliance with each, some firms noted twice in their reports that they consulted the CFSI audit list.[221] The final OECD step—publicly report on due diligence—is completely redundant with the regulations themselves.[222] Out of an abundance of caution, however, some firms listed this step and reported meeting it by filing the Conflict Minerals Report.[223]

The failure to give the rules teeth and the drafting oversights that allowed companies to avoid providing key information stand out as the central problems with implementation of the naming-and-shaming approach. The sloppiness in the rules, however, is troubling in its own right because it bred reports that suffered from the same flaw. By paving the way for disclosures that were difficult to absorb and compare, the regulations undermined the very market processes on which they depend for their efficacy.

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216 *Id.* at Item 1.01(c).

217 *Id.* at Item 1.01(c)(2).

218 *Id.* at Item 1.01(c).

219 *See supra* text accompanying notes 152–153.

220 *See supra* text accompanying note 154.

221 *See, e.g.*, EMC Corp., *supra* note 140, at 6; Macy's, Inc., *supra* note 140, at 4; Western Digital Corp., Conflict Minerals Report (Form SD exhibit 1.02), at 5-6 (June 2, 2014).

222 OECD GUIDANCE, *supra* note 35, at 19.

223 *See, e.g.*, Ford Motor Co., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (May 28, 2014); Google Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); Under Armour, Inc., *supra* note 187, at 4.

C. Reluctant Compliance

The final explanation for the opaque filings has to do with the behavior of the regulated entities. Companies responded to the rules' flawed incentive structure in the way one would expect: they put forth an uninspired compliance effort. Firms interpreted language in the rules in ways that frustrated their transparency goals, they simply failed to comply with the enumerated requirements, and many failed to file at all.

For the most part, companies took full advantage of the flexibility granted to them in how to describe their products. Firms were not required to list their goods at the highest level of generality; they did so because they could. And in so doing, companies made it more difficult for activist consumers to single out products for boycott. Firms also overwhelming embraced a narrow reading of the requirement to report facility and country-of-origin information with respect to their products. The claim that they could not link specific minerals to their goods may be true, but failing to include this information when they had it at their disposal certainly runs counter to the spirit of transparency that motivated the rules. More firms could have acted like the few that provided this data with a caveat to reflect their uncertainty.

While it is perhaps unsurprising that companies largely chose to hue to the letter of the law rather than its spirit, in this case there was also a high level of noncompliance. Table 4 illustrates just how spotty the overall compliance effort was. Only about one-half of companies complied with the OECD instructions to set up a grievance mechanism and alter their supplier contracts.[224] And only 30% said they set up a risk management plan.[225] Moreover, companies unable to determine the conflict status of their minerals were required to report on what they will do better in the future. Many listed action items that were clearly required in year one, implicitly acknowledging a compliance gap.[226] The enthusiasm with which companies dove into the rules' loopholes projects an air of cynicism and their failure to comply with even ministerial requirements of the *OECD Guidance* reflects a sort of casualness not usually seen in SEC filings.

And all of this says nothing of those who filed nothing. As mentioned above, far fewer companies filed reports than the SEC anticipated.[227] The agency arrived at its figure by adding up companies within industries most likely to have products containing conflict minerals.[228] Although the SEC could have made some

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[224] *See* Table 4, *supra* Part II.B.2.
[225] *See* Table 4, *supra* Part II.B.2.
[226] *See supra* text accompanying note 182.
[227] *See* Table 1, *supra* Part II.A.
[228] The SEC's estimate of 5,994 total filers comes from aggregating the estimates of three different types of filers: domestic issuers (which file Form 10-Ks), foreign private issuers (which file Form 20-Fs), and Canadian issuers that utilize the Multijurisdictional Disclosure System (which file Form 40-Fs). *See* Conflict Minerals, 75 Fed. Reg. 80,948, 80,966 & n.176 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249b)

adjustments, the approach is reasonable, and it is hard to see how this logic could have led the agency so far astray.[229] The most obvious explanation seems to be that companies failed to comply.[230]

While the above analysis supports the claim that corporations are to blame for the unsatisfying first-year filings, it also reveals that the full answer is more complex. They simply responded to the incentives baked into the naming-and-shaming approach by taking advantage of ambiguities and oversights in the rules implementing it. Thus, while we may want corporations to act like saints, their shortcomings here can be seen as a reasonable, if not eminently rational, response to the incentive structure regulators created.

IV. SUPPLY-CHAIN TRANSPARENCY THROUGH REFORM

The first-year filings failed to provide the information necessary for the conflict-minerals rules to work as intended. Knowing this, there are a spectrum of alternatives available to Congress and the SEC. In this Part, I analyze and ultimately reject the two extreme options—maintain the status quo and repeal the rules. Rather, I argue that the information contained in the filings, together with the theory of regulatory failure just described, suggest how the rules can be reformed in a way that sheds a great deal more light on the conflict-mineral supply chain without increasing compliance costs.

A. Maintain the Status Quo?

At this point, one potential avenue would be to do nothing, to maintain the status quo. There are several potential arguments for this approach—all of which are addressed below—but the main one is that the conflict-minerals rules need to be given time to work. It could be argued that over time companies will improve their compliance efforts and the international institutional framework necessary for conflict-free sourcing and proper due diligence will continue to improve. Sticking with what we have, therefore, makes sense.

(estimating 5,551 10-K filers); *id.* at 80,967 & n.179 (estimating 377 20-F filers); *id.* at 80,967 & n.182 (estimating 66 40-F filers).

[229] Even though the final rules were narrower than those proposed, the SEC did not revise its estimate. *See, e.g.,* Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 204.13p-1 & 249b.400) (eliminating the requirement that mining companies file conflict-minerals disclosures).

[230] The data analyzed herein sheds little light on which companies are flaunting the rules by failing to file conflict-minerals disclosures. The only hint comes from the analysis of filers by industry SIC code. *See* Table 2 *supra* Part II.A. and text accompanying notes 104–107. Where a high percentage of companies in a particular industry filed, it may be the case that the non-filers are violating the rules. Follow-up with these companies is likely the only way to tell whether their conduct is justified.

While it would be nice if this were true, such hopes appear fanciful. There is little reason to suspect that the corporate response or the institutional structure would significantly improve if the current rules were left in place. In coming years, corporations would be faced with the same incentive to shirk that they faced this year. And the muted response to their subpar first-year reports would give them no reason to try harder. In fact, their resolve in token compliance would have been strengthened because their suspicion that nobody would call them out on their behavior would have been proven right.

A potential counterargument is that things will be different in coming years because the rule itself becomes more stringent once the ramp-up period expires. According to this logic, the stricter requirements would provide more transparency even if companies remain uncooperative.

Looking at how the rules would change, however, shows that this is a false hope. Substantively, the expiration of the ramp-up would mean that corporate due-diligence efforts would have to be audited.[231] While this would surely improve the quality of the reports somewhat, the results would likely be insignificant. An audit means that companies would have to check all of the boxes in the *OECD Guidance*. Companies would be forced to put in place risk management plans and grievance mechanisms.[232] But changes like these do not address the core problems in the rules. More uniform adherence to these procedural technicalities would do little to improve supply-chain transparency.

There is also a distinct possibility that the Circuit Court holding gets overruled.[233] The ruling is under reconsideration, and there is even the possibility of Supreme Court review after that.[234] If the rules were returned to their original form, would this render them effective?

A decision to overrule would mean the return of the SEC's labeling regime in the mandated reports. Companies would be required to list their products as "not…'DRC conflict free'" or "conflict undeterminable." Adding such labels, however, would do little to improve corporate filings. Even though the majority of companies did not use any particular label in this year's version, it was clear that almost all of them would have chosen "conflict undeterminable." Forcing them to actually say this changes nothing.

Assuming the rules were restored to their original form, when the ramp-up period expired, this "conflict undeterminable" category would become unavailable. All of the companies that today fall into this category would thus be forced to say they are "not…'DRC conflict free.'" While this label has more of a negative

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[231] Form SD, *supra* note 24, at Item 1.01(c)(1)(ii)(A); *id.* at Instruction 2 to Item 1.01.

[232] OECD GUIDANCE, *supra* note 35, at 17–18.

[233] *See* Yin Wilckzek, *In Strategic Move, SEC Petitions for Rehearing of Conflict Minerals Case*, BLOOMBERG BNA (June 6, 2014), http://www.bna.com/strategic-move-sec-n17179891084/.

[234] *See* Hunton & Williams LLP, *When Can Companies Be Forced to Say What They Don't Want To Say?*, LEXOLOGY (Oct. 9, 2014), http://www.lexology.com/library/detail.aspx?g=dc7c1399-3c5f-4657-b3df-59572dc5dfc4.

connotation, firms would be permitted to explain that they are choosing it because it is the only option for those that have not been able to definitively establish that they are conflict free.[235] These explanations should negate any impact of the change. The bottom line is that so long as the nature of corporate compliance remains unchanged, it does not matter what company products are labeled in their reports.

If things are allowed to continue as they are, the other side of the equation—the institutional framework supporting conflict-free sourcing—is also unlikely to improve. The key is the CFSI audit program. If the number of smelters certified as conflict-free grows, then more companies would be able to report that they are conflict free and there would be more choices for those firms that aspire to join them.[236] But the notion that this program would grow with the current rules in place is dubious. CFSI audits are expensive for the smelters and refiners.[237] It is possible that those firms that think the expense worthwhile have already gone through the process. Also, firms may have borne the expense expecting there to be more demand from U.S. firms for conflict-free minerals. Given the nature of compliance, this appears to have been a miscalculation. The filings contain little to suggest corporations are significantly altering their sourcing practices.[238] Such a tepid reaction to the rules must give pause to those smelters and refiners considering whether to go through the costly process. Moreover, audits must be renewed annually.[239] In light of the above, processing facilities that are currently certified as conflict free may question whether it is worth the effort and expense to maintain their status. While Section 1502 may have provided a jolt to the audit effort, if nothing is done to the current rules, it would likely face headwinds in the future.

[235] Conflict Minerals, 77 Fed. Reg. at 56,322 n.562.

[236] At last count, there were 128 certified smelters and refiners: 22 CFSI-certified tin facilities*, Conflict-Free Tin Smelters*, CFSI, http://www.conflictfreesourcing.org/tin-conflict-free-smelters/ (last updated Dec. 15, 2014); 41 CFSI-certified tantalum facilities, *see Conflict-Free Tantalum Smelters*, CFSI, http://www.conflictfreesourcing.org/tantalum-conflict-free-smelters (last updated Dec. 17, 2014); 9 CFSI-certified tungsten facilities, *Conflict-Free Smelter Program Tungsten Smelter List*, CFSI, http://www.conflict freesourcing.org/tungsten-conflict-free-smelters/ (last updated Dec. 13, 2014); and 56 CFSI-certified gold facilities, *Conflict Free Gold Refiners*, CFSI, http://www.conflict freesourcing.org/gold-conflict-free-smelters/ (last updated, Dec. 10, 2014).

[237] *Despite Mounting Costs, Conflict-Free Minerals Catch On*, MONITOR GLOBAL OUTLOOK (July 7, 2014), http://www.monitorglobaloutlook.com/Briefings/2014/07/conflict-minerals (describing costs of up to $1 million per year).

[238] *Cf.* Christoph Vogel & Ben Radley, *In Eastern Congo, Economic Colonialism in the Guise of Ethical Consumption?*, WASH. POST (Sept. 10, 2014), http://www.washington post.com/blogs/monkey-cage/wp/2014/09/10/in-eastern-congo-economic-colonialism-in-the-guise-of-ethical-consumption/ ("almost no corporate stakeholder . . . has visibly engaged in eastern Congo to help Congolese actors comply with regulations, improve labor security, or increase decent livelihoods.").

[239] LEVIN ET AL., *supra* note 35, at 44 tbl.5.

There is also one further argument that could be made for the status quo, which is that the rules are actually working. One could claim that although the reports have proven to be unhelpful, the specter of compliance has already led to important changes. There have been claims, for instance, that the mere presence of the legislation has led to a two-tiered market in certain conflict minerals, with those traceable to conflict-free mines going for much more than the rest.[240] The discount applied to untraced minerals aligns with the rules' goal of decreasing the funding available to Congolese militant groups.[241]

Even if this is so, however, the lack of substance in the reports changes everything. Now that it is evident that companies are not taking the rules seriously, the price discrepancy—and any other positive changes along these lines—should evaporate. The increased price of traceable minerals can be viewed as a bubble. Like overzealous stock-market investors predicting a market shift, it looks as though intermediaries in the conflict-mineral supply chain predicted that U.S. companies would demand conflict-free minerals to comply with the rules. Anticipating their ability to pass on the cost, they bid the prices up. But the reports give scant indication that companies are moving in this direction. That being the case, the disappointing reports should cause the price of conflict-free minerals to decline like stock prices when subpar earning are announced.

The status quo, therefore, has little appeal. Most likely, companies would continue to go through the motions without providing much illumination, and in so doing they would stall any momentum for change that Section 1502 had originally engendered.

B. Repeal the Conflict-Minerals Rules?

Another socially minded Dodd-Frank rule, the requirement that companies disclose the pay ratio of their executives versus their rank-and-file employees, is under congressional reconsideration.[242] Perhaps the conflict-minerals rules should be next. There are two arguments for repeal—that the rules are ineffective and that they do more harm than good.

One could argue that since the conflict-minerals filings are not yielding the type of information that would lead to market pressure and reformed sourcing, they

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240 FIDEL BAFILEMBA ET AL., THE IMPACT OF DODD-FRANK AND CONFLICT MINERAL REFORMS ON EASTERN CONGO'S CONFLICT 2, 8 (2014), *available at* http://www.enoughproject.org/files/Enough%20Project%20-%20The%20Impact%20of%20Dodd-Frank%20and%20Conflict%20Minerals%20Reforms%20on%20Eastern%20Congo%E2%80%99s%20Conflict%2010June2014.pdf; *but see* LEVIN ET AL., *supra* note 35, at 38 n. 138 (citing field research indicating that uncertified minerals sometimes go for higher prices).

241 *See id.* at 2.

242 Emily Chasan, *Legislators Take Aim at Dodd-Frank Pay-Ratio Rule*, WALL ST. J. BLOG (June 20, 2013, 3:15 AM), http://blogs.wsj.com/cfo/2013/06/20/legislators-take-aim-at-dodd-frank-pay-ratio-rule.

should be rescinded. Even though countless dollars and hours have been spent on drafting and compliance, these costs are sunk and therefore irrelevant.

Repeal is likely better than maintaining the status quo, where money would continue going toward compliance with little coming in return. But such a response is premature. Rather than look at the conflict-minerals rules as an all-or-nothing proposition, these rules can be seen as version 1.0. An improved iteration can be produced based on the results of this one. As I argue below, while the filings shed little light on conflict-mineral supply chains, they do provide insight into how the rule itself can be salvaged. If the rules are adjusted and evidence shows that they are still not working, then further reform or even repeal may be the best solution.

There is also an argument that the rules should be repealed because they are actually worsening conditions in the Congo. As I noted earlier, some have lamented that these rules have caused a *de facto* embargo of the region, which has plunged local conflict-free miners deeper into poverty.[243]

The idea that the rules are having this unintended consequence is worrisome. But it is also contestable. The Enough Project, for instance, claims that they have seen "electronics companies … expanding [their] minerals sourcing from the Congo."[244] In discussing the *de facto* embargo, a leading critic acknowledges that, "as with most data in the … Congo," displacement figures "are extremely difficult to verify" and "[t]here are no polls or surveys showing … reliable figures on how many miners are out of work" as a result of Dodd-Frank.[245]

There is also a problem with causation. A lot has happened in the Congo that might explain any movement away from Congolese minerals or displacement of local miners.[246] In 2010, for instance, the Congolese president issued a ban on mining in two of the country's provinces.[247] Moreover, there have been an astounding number of international efforts, aside from Dodd-Frank, aimed at cutting off funding from militarized mines in the region.[248] These efforts might also explain any decreased demand for Congolese minerals.[249]

In addition, the idea that there is a *de facto* embargo attributable to Dodd-Frank conflicts with the data in the disclosures. Nothing therein suggests that

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[243] *See supra* notes 83–86 and accompanying text.

[244] BAFILEMBA ET AL., *supra* note 240, at 3. *See also Myth Buster*, *supra* note 90 ("Major international companies have recently begun to engage in responsible sourcing programs in some areas of Congo.").

[245] Seay, *supra* note 83, at 14 n.33.

[246] *See generally* BAFILEMBA ET AL., *supra* note 240.

[247] Seay, *supra* note 83, at 13.

[248] *See* DOMINIC JOHNSON, NO KIVU, NO CONFLICT? 9–12 (April 2013), *available at* http://goodelectronics.org/news-en/new-report-from-pole-institute-about-conflict-minerals-from-congo/at_download/attachment.

[249] *See* KEN MATTHYSEN & ANDRÉS ZARAGOZA MONTEJANO, 'CONFLICT MINERALS' INITIATIVES IN DR CONGO: PERCEPTIONS OF LOCAL MINING COMMUNITIES 8 (2013), *available at* http://www.ipisresearch.be/publications_detail.php?id=426.

companies are abandoning the region.[250] If there is really some semblance of a *de facto* embargo and Section 1502 is to blame, it is not because U.S. companies are leaving the Congo, it is because intermediaries have anticipated that they will, and have adjusted their practices accordingly. Once it becomes clear that companies are not actually demanding conflict-free minerals, the pressure to abandon the region should dissipate. In a strange twist, because the rules in their current form are ineffective, it makes little sense to blame them for a *de facto* embargo or adverse effects on individual and family mines.

Finally, even if Dodd-Frank or other transparency efforts are decreasing demand for Congolese minerals, the answer is not necessarily to dismantle such initiatives. Another alternative is to complement these programs with others that provide assistance to displaced miners. Indeed, human-rights groups and scholars that have raised concerns about Dodd-Frank's potential *de facto* embargo have pointed to programs such as these—rather than repeal—as the right solution.[251]

C. Reforming the Conflict-Minerals Rules

The first-year filings were a failure in that they did not produce information capable of being used to name and shame companies. But they made two contributions that are essential to a well-grounded reform proposal. They revealed what companies were able to uncover about their supply chain even with minimal effort and they provided the basis for identification of the problematic aspects of the regulatory framework. An understanding of what companies can ascertain and a theory of where the current rules missed the mark are the key precursors to reform.

1. Getting the Incentives Right

The first thing that needs to be addressed is the incentive problem at the heart of the rules. Companies naturally resist revealing negative—or even potentially negative—information about themselves, but this is necessary for the rules to work.[252] As noted above, one way to combat this predilection is to provide for specific and large penalties for noncompliance with these rules.[253] Companies

[250] In fact, some companies acknowledged the risk of a *de facto* embargo and pledged not to contribute. *See, e.g.,* Microchip Technology Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 5 (June 2, 2014); Seagate Technology plc, Conflict Minerals Report (Form SD exhibit 1.02), at 9 (May 30, 2014); Uroplasty, Inc., Conflict Minerals Report (Form SD exhibit 1.02), at 3 (June 2, 2014); *cf.* Ken Tysiac, *Conflict Minerals Rule Poses Compliance Challenge*, J. OF ACCOUNTANCY (Apr. 2013), *available at* http://www.journalofaccountancy.com/Issues/2013/Apr/20127083.htm ("So far, it appears that companies are trying to source their minerals without causing harm to the entire region.").

[251] *See* BAFILEMBA ET AL., *supra* note 240, at 14–15; Seay, *supra* note 83, at 25.

[252] *See supra* Part III.A.

[253] *See supra* text accompanying notes 199–204.

would be inclined to put more effort into their due diligence if they suspected real penalties for failure to do so. Along the same lines, companies seem to be under the impression that, when it comes to conflict minerals, the SEC is not inclined to pursue the remedies currently at its disposal.[254] The agency has a built in mechanism to reverse this impression: it frequently signals its enforcement priorities to the securities bar and can include conflict minerals the next time that it does so.[255]

2. Disclose or Explain

The substance of the rules also needs to be changed. The overarching framework should be one where firms are required to disclose key aspects of their supply chain and, where they lack the necessary information, are provided the opportunity to explain the gap and detail any anticipated steps to close it.

The entire effort starts with the firm's products, which must be clearly disclosed. The discretion given to companies today to describe their products as they see fit should be eliminated.[256] For consumers to better discern what is happening on a product-by-product basis, they need specific brand information. The SEC should, therefore, require that companies include it.

The next step is to mandate that companies link these clearly identified products to the smelters and refiners in their supply chain. One thing that becomes clear in the reports is the importance of these processing facilities to the conflict-free effort. Even though companies avoided disclosing their smelters and refiners, many acknowledged that they could identify them.[257] This is crucial because, thanks to the CFSI audit program, companies need go no further to determine that their products are conflict free. The processing facility is the place where top-down and bottom-up diligence converge. The CFSI audit determines whether the supply chain reaching this point is conflict free.[258] Since conflict minerals cannot enter the supply chain after processing, once companies identify that their products are only incorporating materials from conflict-free smelters or refiners, they can declare their goods to be conflict free as well.

A key argument against the rules has been that it is almost impossible for companies to determine the conflict status of their products.[259] While it is perhaps not feasible for companies to reach all the way to the mines on their own, the CFSI audit program means they do not have to. Supply-chain transparency is therefore

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[254] *See supra* text accompanying notes 205–206.

[255] *See, e.g.*, Christian Bartholomew et al., *Weil Gotshal Discusses SEC Speaks 2014: Charting a New Course for Enforcement Efforts*, CLS BLUE SKY BLOG (Apr. 1, 2014), http://clsbluesky.law.columbia.edu/2014/04/01/weil-gotshal-discusses-sec-speaks-2014-charting-a-new-course-for-enforcement-efforts/.

[256] *See supra* note 57 and accompanying text.

[257] *See supra* text accompanying note 154.

[258] *See* BAFILEMBA ET AL., *supra* note 240, at 7; BAYER, *supra* note 77, at 28.

[259] *See supra* note 82 and accompanying text.

possible, but the rules need to be specifically structured around the only realistic way to achieve it.

This means that the requirements should be changed so that companies are clearly required to reveal smelter information. All that needs to be done to close the loophole in the current rules is to require that companies list all smelters and refiners in a particular product's supply chain regardless of whether they can determine if minerals from a particular processing facility made it into the particular product. The rules should further instruct firms to organize their list according to the type of mineral processed in each facility. Firms would thus be required to describe each product that incorporates conflict minerals, the particular conflict minerals in each product, and the smelters or refiners that potentially processed each of those minerals.

Not all companies would be able to provide smelter and refiner information. Their suppliers might be unwilling to disclose or unwilling to take the steps necessary to make such data available.[260] To address this, the rules should give companies unable to provide this information the opportunity to explain why and what steps they are taking to improve their ability to provide it in the future. Future plans, for instance, might include switching suppliers or including contractual language in future supply agreements mandating that suppliers provide processing-facility information.

In addition, the key piece of information is whether the smelters and refiners that a company lists have been CFSI-certified as conflict free. Corporations should therefore be required to disclose whether this is the case. Since CFSI makes their results publicly available, all companies that have identified their smelters and refiners, should also be able to provide their conflict status.[261]

Since only 128[262] out of over 300 smelters and refiners have been audited,[263] large companies with diverse product lines likely source from both audited and unaudited processing facilities. To accommodate these companies, the rules should provide firms that have unaudited facilities in their supply chain the opportunity to explain why and if they have any plans to change their sourcing practices.[264]

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[260] Many companies with gold in their supply chain would have difficulty identifying their processing facilities. A large portion of the world's gold is sold through the Shanghai Gold Exchange or commingled therewith. This market, however, does not keep records with regard to where its gold is processed or sourced. *See* COMMERCE REPORT, *supra* note 20, at 2.

[261] *See Conflict-Free Smelters & Refiners*, CFSI, http://www.conflictfreesourcing.org/conflict-free-smelter-refiner-lists/ (last visited, Dec. 16, 2014).

[262] *See supra* note 236.

[263] The exact number is unknown. The GAO counted 287, but said there are believed to be almost 500. GAO REPORT, *supra* note 41, at 3–4. The Commerce Department identified over 300. *See* COMMERCE REPORT, *supra* note 20, at tables 1–4.

[264] Companies that have both certified and uncertified smelters in their supply chain—

The same disclosure rules should apply for more detailed information as well, including the country and mine of origin of a company's conflict minerals, and whether mines in a corporation's supply chain are under the control of armed groups. Many companies declined to reveal country-of-origin information based on a narrow reading of the rules rather than ignorance.[265] Moreover, CFSI-certified smelters and refiners must have provided both country and mine-of-origin information to the CFSI auditor.[266] And to certify the smelter, the auditor must have been able to verify ownership of the mines. This shows that information all the way back to the mine is available at least with respect to some products for some firms. It is just a question of getting it into the reports. If companies are able to obtain this information, they should sort it by smelter. If they are unable to, then just as above, they should be given the opportunity to explain why and what, if anything, they are doing to further future efforts to obtain this information.[267]

All of this required information should be presented in a flowchart or outline depending on the complexity of a company's supply chain. A flowchart would start with a particular product. It would then list the conflict minerals therein, processing-facility information (along with audit status), country-of-origin information, and mine-of-origin information (with ownership status). As shown in the example below, the flowchart would clearly show the lineage of each mineral in each product. Many companies would likely have blanks in this diagram. In a narrative accompanying it, companies would be free to explain them and describe what steps, if any, they are taking to better their understanding. An outline would follow the exact same organization and provide the exact same opportunity for explanation.

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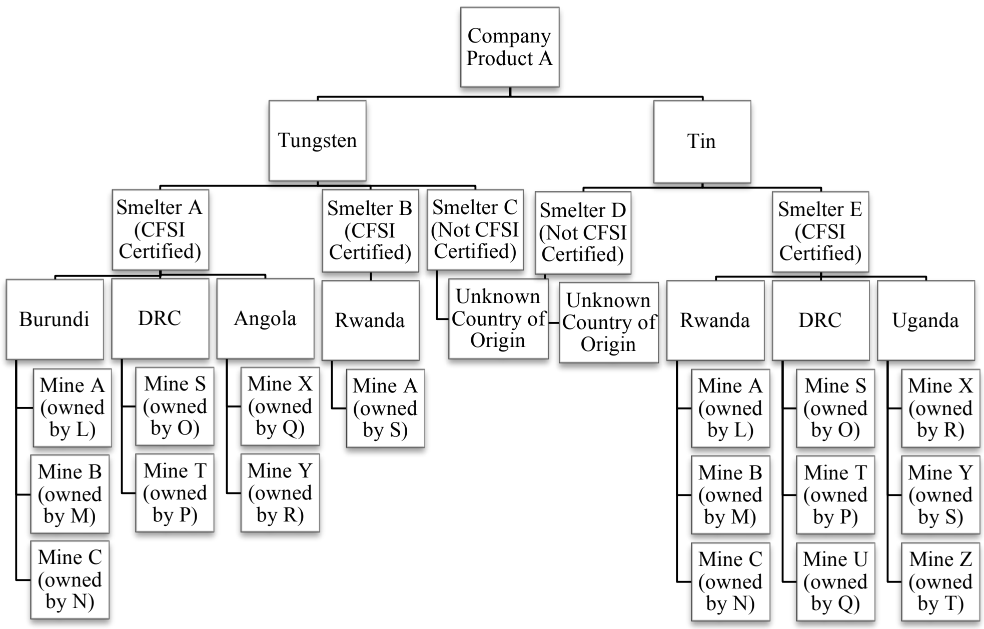
but process most of their conflict minerals through the former—may wish to explain that this is the case.

[265] *See supra* text accompanying notes 175–176.

[266] *See* BAFILEMBA ET AL., *supra* note 240, at 7; BAYER, *supra* note 77, at 28.

[267] CFSI publicly identifies certified smelters, but it only makes country-of-origin information available to its members. *Reasonable Country of Origin Inquiry Data*, CFSI, http://www.conflictfreesourcing.org/rcoi-data/ (last visited Dec. 22, 2014). Membership costs $5,000 annually. *Benefits of Membership in the Conflict-Free Sourcing Initiative*, CFSI, http://www.conflictfreesourcing.org/membership/ (last visited Dec. 22, 2014). In addition, some companies reported that CFSI tells its members the category of countries from which a smelter or refiner sources rather than the specific nation. *See, e.g.,* Ecolab Inc., *supra* note 150, at 5–6. If this is the case, then CFSI would have to be willing to share more information to provide the level of granularity sought in this proposal.

Figure 2: Conflict-Minerals Flowchart



By asking for detailed supply-chain information, this approach allows companies that are conflict free to stand out. It also exposes those that are using facilities that have chosen not to go through the CFSI audit and those that know little about their supply chain. This is actual naming and shaming. Consumers and shareholders would be able to sort companies based on real information about their sourcing practices and diligence efforts.

In addition, under this approach, there would be no need for any type of complex labeling regime. In fact, the SEC's attempt to sort companies into categories was a mistake, a gross oversimplification of supply chains and corporate efforts to disentangle them from human-rights abuses. Companies have varying levels of commitment to the idea of ethical sourcing and have had varying levels of success in achieving it. The SEC's labels fail to appreciate these distinctions and create categories that are at best unhelpful and at worst deceptive. Rather than force things into categories, this proposal brings out the details of corporate supply chains. The only labeling rules should be that companies should not be permitted to call their products conflict free unless they have only conflict-free smelters and refiners in their supply chain and should not be able to declare themselves conflict-free unless all of their products meet this criterion.

As noted throughout the discussion above, the rules contain opportunities for companies to explain gaps in their knowledge or shortcomings in their sourcing practices. This feature causes the approach set forth above to resemble a so-called "comply-or-explain" framework. With comply-or-explain regulation, companies are given the choice to comply with a legal rule or explain why they are opting out.[268] Similarly, under this disclose-or-explain approach, companies are required to disclose the information that they can obtain or explain why they are uninformed. They are also given the opportunity to provide context for revelations that might cast them in a negative light. Giving companies this opportunity allows consumers and shareholders to better assess which companies align with their social goals. Firms with legitimate excuses and tangible plans would come out looking much better than those that respond with platitudes. Requiring detailed disclosures, but providing ample opportunity for explanations, effectuates the overarching purpose of the rules in that it provides as much information as possible for concerned stakeholders.

In addition, even though this revised template would result in far more transparency, it would not require additional effort by the regulated entities. It is not as if companies chose to disclose abstract product categories because it would be too expensive to ascertain and reveal the brands within. Companies were intentionally vague to reduce any chance of reprisal. Similarly, many companies were able to identify smelters and countries of origin, but chose not to disclose. It would not cost these companies more to make this information available.

In fact, this reform proposal blesses certain cost-saving practices that firms employed in the first year and saves firms money in other ways. The original rules—and much of the controversy surrounding them—were built on the premise that individual firms would undertake costly efforts to trace their conflict minerals back to their source. In practice, firms outsourced the expense to CFSI. This makes sense because centralizing efforts through an institutional mechanism is both a more efficient and effective approach. Under this proposal, therefore, firms would be explicitly relieved of any obligation to replicate CFSI's efforts.

Reliance on this institutional mechanism also calls into doubt the for-now-delayed requirement that firms have their due-diligence efforts audited. When firms are expected to trace minerals all the way to mines on their own, it may make sense to require oversight of this process. If this is now the job of an institution designed solely for this purpose—and firms only need to conduct sufficient diligence to identify their smelters and refiners—then firm-level audits seem unnecessary. Firms should be permitted to have their efforts audited if they think the cost is worth the signal of seriousness it sends to the public, but it should not be mandated.[269]

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[268] *See* Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460, 474–75 (2006).

[269] Another problem with the audit requirement is that, once in place, it would create an incentive for firms to source from outside the region, thereby amplifying concerns about a *de facto* embargo. As currently written, firms that only file a Form SD because they do not obtain minerals from the conflict area are not required to obtain an audit and are thereby saved the expense. *See* Form SD, *supra* note 24, at Item 1.01(c)(1)(ii) (requiring an audit for the Conflict Minerals Report).

The structure set out above would also eliminate the redundancies and clutter that mar the current framework and drive up compliance costs. As alluded to above, the distinction between the RCOI and due diligence is meaningless and should be abandoned.[270] The way to fix this is to eliminate the RCOI concept. Under the new framework, companies would just conduct due diligence into their supply chains and disclose the results in an outline or flowchart. If companies are not sourcing from the region, this would become clear from the information therein. Once firms conclude that they are not involved in the area, they would not be required to inquire into the identity of the mines in their supply chains and the ownership status of those operations. They could also report that they are conflict free. Once the RCOI is eliminated, there is also no need for a separate Form SD and Conflict Minerals Report. One filing would suffice.[271]

Under this revised framework, there would be no need to rely on the *OECD Guidance.* Much of what it calls for would be naturally included in company efforts to explain gaps in their supply chain. A risk-mitigation plan, for instance, would be something concerned companies would no doubt describe if forced to reveal the use of uncertified processing facilities. Instead of incorporating the entirety of the *OECD Guidance*, the SEC could point companies to it as a useful resource, but mandate the disclosure of specified information regarding the process companies followed to understand their supply chain. For example, firms should be required to discuss whether they used the CFSI questionnaire or some other mechanism to trace their conflict minerals. If they used CFSI's resource, they should be required to disclose their follow-up procedures and their response rate. Such information would not necessarily arise in corporate efforts to explain supply-chain gaps, but should be included because it illustrates the seriousness of a company's diligence effort.

The chief way this reform proposal improves upon the current rules is by doing a better job of fitting the regulatory demands to the realities of conflict-mineral supply chains and corporate due-diligence practices. The filings largely fail in their intended purpose, but they provide a sliver of transparency that gives insight into how the rules can be mended to achieve this fit. Though the reform proposal presented in this Part is by no means a panacea, it has the potential to yield far more promising information and drive more ethical sourcing practices.[272]

[270] *See supra* text accompanying notes 212–214.

[271] Along the same lines, the redundant requirement to describe efforts to determine country- and mine-of-origin information with specificity should be deleted. *See supra* text accompanying notes 217–218.

[272] It is beyond the scope of this article to analyze fully whether each of the suggested changes would require amended legislation or could be accomplished solely through SEC rulemaking. Many of the suggestions, however, appear to be within the SEC's power. For instance, the RCOI concept, the reliance on the *OECD Guidance*, and the two-tiered reporting structure were all SEC inventions. On the other hand, some of the recommendations herein would need congressional approval. The audit requirement, for example, was specifically included in the Section 1502. *See* Dodd-Frank, Pub. L. No. 111-

At the same time, because it asks companies to reveal more rather than do more, it should not drive up compliance costs—its simplified structure may even translate to savings.

3. Concerns with the Disclose-or-Explain Template

The most poignant concerns about this approach revolve around the content and trustworthiness of the resulting filings and the potential unintended consequences of the new rules. While the worries have merit, none is severe.

The first concern is that corporations would respond to the disclosures mandated in this proposal with the same type of unintelligible boilerplate with which they greeted the current rules. While this is the course some would no doubt choose, the incentive structure in this template should make doing so much less prevalent. By raising the stakes of noncompliance, the proposed rules would make it less appealing to include nonresponses in corporate filings. In addition, under the current rules, companies can blend in by offering evasive and vague answers. This would not be an option, however, under the proposal.

Most importantly, companies would have to disclose their use of smelters or refiners that have not been cleared as conflict free. Many companies probably would have a good reason for relying on such facilities. For example, they may be in a long-term supply contract with firms that source from them. They may also plan to reassess this relationship when the contract expires. This is information that, under the proposed rules, corporations would want to include. Failure to do so would risk sanction by dissatisfied consumers or shareholders. This stands in contrast to today where companies can avoid providing any of this information with little risk of blowback. Because the proposed rules would clearly ask for the most important information, and provide companies with ample opportunity to explain weaknesses, those that shirk would be far easier to identify. They would, therefore, be far less tempted to do so.

Another concern has to do with the faith put in the CFSI audit program. CFSI is an industry organization and there is the potential that it seeks to appease industry members by setting a low bar for certification. Indeed, the ability of CFSI to successfully declare smelters and refiners conflict free to a certain extent belies the claims of those who argue that successful tracing of minerals to their source is nearly impossible.[273]

203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m(p) (2012)). The SEC would not have authority to unilaterally remove it. *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–44 (1984) (setting out the boundaries of agency discretion).

[273] *See supra* note 82 and accompanying text. The Commerce Department, which Dodd-Frank instructed to list "all known conflict mineral processing facilities worldwide," caused a stir when it claimed that it could not ascertain which facilities were contributing to armed conflict in the Congo. *See* Dodd-Frank, § 1502(d)(3)(c); COMMERCE REPORT, *supra* note 20, at 1; Emily Chasan, *'Conflict Minerals' Too Hard to Track, Commerce Department Says*, WALL. ST. J. (Sept. 5, 2014, 5:57PM), http://blogs.wsj.com/cfo/2014/09/

While this is not a concern that can be dismissed, at this point it is speculative. The risk at issue here—really one of industry capture—is always present with regulation. Regulation occurs in spite of industry capture, and all lawmakers can do is acknowledge the risk and design institutional countermeasures. While capture potential may appear particularly pronounced in this case, there has been no indication that the audit process is compromised. Human rights groups celebrate its actions.[274] Moreover, compliance with the rules would reveal whether anything sinister is occurring. The rules require disclosure not only of the conflict-free label, but also of the country and mine of origin of the minerals processed in the smelters and refiners. NGOs with knowledge of the Congo would be able to see if any of the minerals—and therefore any of the processing facilities—had been mischaracterized.

A final concern has to do with the potential for a *de facto* embargo. I argued above that because the current rules appear to be unsuccessful in altering corporate sourcing practices, there is little concern that Dodd-Frank compliance is a long-term threat to legitimate mining in the Congo.[275] The *de facto* embargo concern resurfaces if the current rules are swapped out for ones that work. In particular, this proposal creates pressure on companies to choose conflict-free smelters and refiners. Perhaps many of these processing facilities are conflict free because they do not source from the region.[276] Or perhaps the easiest way for smelters and refiners to become conflict free is to process minerals solely from other areas. These companies might, therefore, abandon the region to respond to

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05/conflict-minerals-too-hard-to-track-commerce-department-says/. This admission should be given little weight, however, because the department appears to have merely aggregated preexisting smelter lists rather than conduct independent research and analysis. *See* COMMERCE REPORT, *supra* note 20, at 1–3.

[274] *See, e.g., Conflict-Free Smelters for All Four Conflict Minerals*, ENOUGH PROJECT (Jan. 31, 2014), http://www.enoughproject.org/blogs/conflict-free-smelters-all-four-conflict-minerals-first-time; *see also* LEVIN ET AL., *supra* note 35, at 47 (describing CFSI, the institution responsible for the audit program, as "one of the most utilized and respected resources for companies addressing conflict minerals issues."). A part of the conflict-free certification process, iTSCI, which monitors mines and traces conflict minerals, *see id.* at 36–37, has been criticized—not for lack of independence—but because of the costs it imposes on miners and its limited reach. *See* Vogel & Radley, *supra* note 238.

[275] *See supra* text accompanying notes 244–251.

[276] Some commentators have suggested this may be the case, but have stopped short of presenting evidence. *See, e.g.,* MATTHYSEN & ANDRÉS ZARAGOZA MONTEJANO, *supra* note 249, at 9 (claiming that "most smelters decided to stop sourcing from the DRC to enable them to acquire 'conflict-free smelter' status."); Aronson, *supra* note 4 (asserting that "the smelting companies that used to buy from eastern Congo haves stopped"). One commentator discusses the departure of the Malaysian Smelting Corporation from the region; but it looks like the company has recently reversed course. *Compare* Seay, *supra* note 83, at 15, *with MSC to Invest in DR Congo Smelter*, INDUS. TECH. RESEARCH INST. (June 6, 2012), https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=2455&Itemid=143. Moreover, nothing in the filings suggests this is occurring.

demand for certified facilities. Thus, if the proposal is successful, the *de facto* embargo concern rises anew.

The worry that the regulations would hurt those who it is aimed to help is no doubt troubling, but once put in the proper context, it is far less fearsome than it first appears. Properly viewed, the potential injury to individual and family miners is a potential cost of the rules. As such, it should be weighed against its benefits. The real question is whether the marginal loss to these miners, who must seek other employment, is larger than the gains in cutting off the funding to warring Congolese groups.[277] This question is unanswerable in the abstract, but the filings would provide a market-based mechanism for doing so.

The filings would show which companies are using conflict-free processing facilities that source from the region and which are using conflict-free processing facilities that source from elsewhere (with the benefit of multiple years of disclosures, readers would even be able to see if smelters and refiners become conflict-free by fleeing the Congo). Socially motivated shareholders and consumers would care not only about the conflict-free status, but also about how the status is achieved, and reward or punish companies accordingly. These individuals would likely not be inclined to reward companies that use smelters and refiners that have taken the easy way out and thus there would be no incentive for the processing facilities to do so. If, however, companies did see some gains with these concerned constituents even when they choose smelters or refiners that left the region, then it would indicate that those most concerned about these issues believe that firms that use processing facilities that exited the Congo are still better actors than those that continue to use uncertified smelters and refiners. The logic of naming and shaming relies on the decisions of these individuals. Who better to make the cost-benefit calculation regarding the overall social impact of leaving the region?[278]

Finally, after only a few years it would become apparent from the filings whether smelters are fleeing. Since this would be the result of socially driven market forces, however, it would not mean that the rules should be changed. The appropriate response would be for human-rights groups to build assistance and jobs programs for displaced miners—and, at this point, they would have data to support their pleas for funding. In the end, as with all attempts to regulate, there are risks—of failure, industry capture, and unintended consequences—that accompany this proposal. But none of them stain its potential efficacy.

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[277] The loss to the miners is a subject of debate. *Compare* BAFILEMBA ET AL., *supra* note 240, at 3, *with* Seay, *supra* note 83, at 14.

[278] While individual shareholders and consumers could inform themselves through these filings, it is more likely that human-rights groups and other concerned intermediaries would distill the information and make recommendations that drive their decisions. This market dynamic cannot function today because the disclosures offer so little to go on. *Cf.* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984) (discussing the role of intermediaries in efficient stock markets).

D. Implications for other Supply Chain Transparency Efforts

While this Article has focused on assessing and improving the U.S. conflict-minerals rules, the analysis and proposals carry implications for U.S. states and other countries currently considering similar actions, both with respect to conflict minerals and with respect to other unethical sourcing practices.[279] As it pertains to conflict minerals, rather than copy current U.S. federal law, concerned governments should, as in the above template, seek transparency on smelters and refiners in corporate supply chains and leverage institutional efforts to certify them as conflict free. They should also provide ample opportunity for companies to explain knowledge gaps or practices that raise concerns.

More broadly, rules designed to name-and-shame companies into more socially responsible sourcing practices need to have teeth and they need to be tailored to closely reflect how the relevant supply chains work and what companies can be expected to know about them. Regulated entities will not do the work of the regulators. Rather, they should be viewed as uncooperative witnesses. Lawmakers must ask pointed and relevant questions or else they will come back empty-handed. Companies must also fear reprisal. Therefore, in contrast to what happened with Section 1502, the task of regulation and enforcement should be assigned to a body that empathizes with the social goals instead of one that begrudgingly takes on the duties.

CONCLUSION

So far, the debate about the conflict-minerals rules has offered more polemics than insight. A review of the filings themselves, however, provides an abundance of data about the efficacy of the rules and how they could be improved. Section 1502 and the SEC rules that bring it to life fail in their principal goal of naming and shaming companies that source minerals from militarized mines in the Congo. While this failure supports the legislation's repeal, I argue that a close read of the filings points to a better alternative.

Rather than give up on the worthwhile goal of fighting human-rights abuses in the Congo, the rules can be reformed so as to demand the transparency that failed to materialize in the first-year reports. To do this, the central requirement should be that corporations disclose the identity and conflict status of the facilities that process their conflict minerals. These pieces of information are largely obtainable and illuminate corporate supply chains more than a thousand other details. While supply chains would not become conflict free overnight, such revelations would provide concerned shareholders and consumers with the information necessary to apply the type of pressure that leads to change.

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[279] *See supra* text accompanying notes 93–95.