SECURITIES LAWS AS FOREIGN POLICY

Karen E. Woody*

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* Karen E. Woody is a securities and white collar criminal defense attorney in Washington, D.C. The author would like to thank Chris Brummer, Penny Pether, Mark Niles, Margaret Ryznar, Behzad Gohari, and Brett Sisto for their encouragement and advice, as well as Amy Dillard for her continual support.

I do not like to see social or foreign policy provisions engrafted onto the securities laws. I have serious doubt, in any event, about the efficacy of using the securities laws to effect social and foreign policy aims, however noble and urgent.[1]

INTRODUCTION

The Securities and Exchange Commission ("SEC") was founded in 1934 and bestowed by Congress with a three-pronged mission: (a) protecting investors; (b) maintaining fair, orderly, and efficient markets; and (c) facilitating capital formation.[2] Markedly absent from this congressional mandate is any administrative authority or charge to effect international, diplomatic, or human rights-oriented goals. Instead, the focus of the mandate is the creation and preservation of market integrity to assure investors that their investments are safe.[3] Despite this clear, financial-based mission of the SEC, Congress has co-opted the agency and its regulatory resources to achieve decidedly non-financial, extraterritorial goals related to foreign policy. This article addresses the use of securities laws and their regulatory agency, the SEC, for congressional foreign policy goals. Part I first examines the historical mission and purpose of federal securities laws and of the SEC. Part I then explores the inherent risks of an agency operating outside of its mission, using the economic theory of opportunity cost to underscore the importance of an agency acting in conformance with its mandate and its institutional expertise. Part I also posits that institutional harm is dependent upon the level of authority granted by Congress and the tasks inherent in regulating the legislation. Part II analyzes three different examples of congressional misappropriation of the resources and expertise of the SEC to further congressional extraterritorial interests unrelated to the SEC's core mission. Rather than touting the success of additional corporate social responsibilities mandated by legislative provisions, this article contributes

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

2 *The Investor's Advocate: How the SEC Protects Investors, Maintain Market Integrity, and Facilitates Capital Formation*, SEC, http://www.sec.gov/about/whatwedo.shtml (last visited Nov. 11, 2014).

3 The mandate is met, in theory and practice, by the establishment of a rigorous disclosure regime. Thus, market transparency, fairness, and investor protection is achieved through dissemination of material information to investors. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1199–200 (1999). "Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions." *The Investor's Advocate*, *supra* note 2. While disclosure represents the underpinning of securities laws, this Article does not address the merits of disclosure of information relevant to the three statutory examples discussed in Section III, *infra*. Rather, the focus of this Article is on the institutional design and mandate of the SEC as an agency, and the core mission of federal securities laws in general.

to this field of literature by arguing that these statutory provisions can do more harm than good in the form of wasted opportunity costs.

I. MAINTAINING THE INTEGRITY OF THE SEC MANDATE

A. The Role of Securities Laws and the SEC

It is widely accepted that the primary goal of federal securities laws and regulation is investor protection. This is evident from the text of the Securities Act of 1933 ("Securities Act"), which includes the phrase "protection of investors" eight times in its twenty-five pages.[4] Likewise, the Securities Exchange Act of 1934 ("Exchange Act") includes the phrase over two hundred times.[5] In fact, Senator Duncan Fletcher and Representative Rayburn introduced the Securities Exchange Act of 1934 "for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation."[6] Likewise, in the seminal securities law case, *Basic v. Levinson*, the Supreme Court reiterated the purpose of the Act: "The 1934 [Exchange] Act was designed to protect investors against manipulation of stock prices."[7] In addition to the emphasis on investor protection, the Exchange Act also created the SEC, which was charged with a tripartite mandate: (a) protecting investors; (b) maintaining fair, orderly, and efficient markets; and (c) facilitating capital formation.[8] This mandate has been

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[4] Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–aa (2012)); Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 212 (2013).

[5] Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–pp (2012)).

[6] 78 CONG. REC. 2264 (1934) (message from President Franklin D. Roosevelt).

[7] *Basic*, 485 U.S. at 230 (1988). Interestingly, the "four distinct, but related, harms from which securities regulations might be intended to protect investors are: 1) fraud, 2) an unlevel informational playing field, 3) the extraction of private benefits from the firm by firm insiders, and 4) investors' propensity to make unwise investment decisions." Guttentag, *supra* note 4, at 207. In other words, investors are to be protected from unfairness, even in the form of fraud, but also protected from themselves. Much ink has been spilled analyzing the concept of protecting investors from themselves, and whether the threat of an "unsophisticated investor" still looms in today's market. This concept has been debated fiercely of late, particularly with the passage of the JOBS Act and the potential loosening of regulations that once only benefited well-known, seasoned issuers. However, while this concept may be the focus of my future scholarship, it will not be addressed in depth herein.

[8] The hallmark of the first two prongs of the mandate, investor protection and assurance of fair markets, lies in market transparency, and is achieved through disclosure of material information to investors. *See, e.g.*, *Basic*, 485 U.S. at 230 (1988); *see also* Williams, *supra* note 3. In theory, the first prong of the mandate is met if the other two "legs of the stool" fall into place. Meaning, once a well-capitalized, fair and efficient market is established, investors are more likely to invest their capital with a sense of security. Of utmost importance to the disclosure regime is the promulgation of material information. Material information includes "what is important to investors, nothing more and nothing less." *See* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152.

reiterated time and again through statutes,[9] case law,[10] and various academic commentaries on securities laws.

Notably, whenever the clear investor protection mandate of the SEC has been altered or slightly broadened, the ultimate goal has been to increase the efficiency of the SEC, rather than burden the agency with tasks unrelated to its mission. For example, in 1996, Congress passed the National Securities Market Improvement Act ("NSMIA"), which included a provision to increase the efficiency of the SEC rulemaking process.[11] Although the primary objective of

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Specifically, information is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote in a corporate election. *Basic*, 485 U.S. at 238 (citing SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)). The Supreme Court applied the "probability times magnitude test" for estimating when speculative or forward-looking information is sufficiently important to rise to the level of "material". The Supreme Court, as well as the SEC through its regulations, has implicitly defined material information as information that bears on the *economic* value of an investment. *See* Williams, *supra* note 3, at 1264. The SEC's understanding of the materiality standard is that a reasonable investor "generally focuses on matters that have affected, or will affect, a company's *profitability and financial* outlook." Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1434 (2002) (emphasis added).

[9] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. 107-204, tit. III, 116 Stat. 745, 775–85 (codified as amended in scattered sections of 15 U.S.C.) (increasing penalties for fraudulent corporate activity and requiring certification from executives on public filings, among other investor protection initiatives); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (containing Title IX, titled "Investor Protections and Improvements to the Regulation of Securities," which provided bounties for whistleblowers, increased the budget of the SEC, streamlined the SEC's operations, expanded secondary liability for aiding and abetting, among other provisions; codified as amended in scattered sections of 15 U.S.C.).

[10] *See, e.g.*, SEC v. Ralston Purina Co., 346 U.S. 119 (1953). In *Ralston Purina*, the Supreme Court considered whether securities offered to employees of Ralston Purina constituted a public offering, such that the offering needed to comply with Section 5 of the Securities Act. The Supreme Court reasoned that the offering needed the protection of the Securities Act because the employees were unsophisticated investors and likely did not have access to all of the relevant information necessary to determine if the securities were a reasonable investment. In coming to its conclusion, the Supreme Court held that the purpose of the securities laws "is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *Id.* at 124. *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (holding that the sole purpose of Section 14(e) of the Exchange Act, prohibiting fraudulent, deceptive or manipulative practices in connection with tender offer or any solicitation of security holders in opposition to or in favor of tender offer, is protection of investors who are confronted with tender offer).

[11] National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, § 106(b), 110 Stat. 3416, 3424 (codified as amended at 15 U.S.C. 77b). The NSMIA, enacted in response to the states' failure to regulate uniformly certain types of national security offerings, created the "covered security" for which state securities registration requirements were preempted by federal requirements. Covered securities include securities listed, or approved to be listed, on the New York Stock Exchange and NASDAQ; securities sold to qualified purchasers; mutual fund shares; securities of the same issuer that are equal in rank or senior to the listed securities; certain securities exempt under Section 3(a) of the Securities Act; securities exempt from registration under the Securities Act if sold pursuant to Rule 506 of Regulation D.

NSMIA was to provide for federal preemption of state securities regulations in various circumstances, the statute included a provision expanding the criteria the SEC must use when carrying out rulemakings pursuant to the Securities Act or the Exchange Act. Pursuant to the NSMIA, when the SEC engages in rule-making or review of a rule promulgated by a self-regulatory organization, the agency must consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[12] The legislative history on the NSMIA indicates that Congress was intent on continuing the SEC's focus on investor protection in SEC rulemaking, as that had been "[f]or 62 years, the foremost mission of the Commission."[13] In recent history, Congress has increasingly enlisted the SEC and securities laws for purposes well beyond the protection of investors. As described in depth below, congressional expansion of the SEC's original mandate is problematic for a number of reasons, not the least of which is that it undercuts the agency's efficiency and effectiveness, which creates ripple effects of potentially disastrous consequences.

B. *The Risks Inherent in Inefficient and Inappropriate Use of Securities Laws and the SEC*

One may ask what the harm is in the congressional grant of enforcement and regulatory authority for statutes in which the goals are outside of an agency's mandate. Congress surely has the authority to task agencies with enforcing statutes, whether or not the regulatory tasks inherent in enforcing the statute aligns with the agency. However, when tasking an agency to work toward a goal outside of its mandate and outside of its expertise, the agency and the population it is designed to protect are losing out in two ways: (1) by losing the opportunity that the proper agency (i.e., one with the particular expertise and resources) and its experts would achieve the goal in a more efficient and more successful way; and (2) by reducing the ability of the mis-tasked agency to do its best with the proper tasks it should be accomplishing.[14] In other words, by tasking the SEC with an extraneous duty, such as regulation of conflict miner-

Despite federal preemption for registration, the NSMIA allowed states to preserve the right to prosecute fraud. *Id.* at 102(a), 110 Stat. 3417–19 (amending 15 U.S.C. 77r(c)).

12 Guttentag, *supra* note 4, at 213 (quoting STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 575 (3rd ed. 2012)).

13 H.R. REP. NO. 104-622, at 39 (1996).

14 *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 15 (2010) (urging that independence of agencies is essential for creating expertise, avoiding industry capture, ensuring stability, and insulating the agency from undue executive control); *but see* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133 (2012) (advocating that interagency coordination and overlap can result in agency accountability, pooling of expertise and competencies, and minimization of costs).

als,[15] which is premised on an elusive and extraterritorial goal, Congress is foregoing the opportunity that another agency, such as the Department of State, can design a better solution. Moreover, there is an increased risk that the SEC will not have sufficient resources to focus time and efforts toward the goals for which it was created; in practicality, this means that the risk of another Enron or Madoff scandal increases merely by virtue of overextension of the agency.[16] There is a sliding scale of "harm" imposed upon agencies when assigned with new statutory responsibilities and regulations.[17] To assess the amount of agency "harm," I contend that there are two major considerations: agency goals and agency tasks. When agency goals and agency tasks line up with those of new congressional legislation assigned to the agency, there is no harm or impact on the agency outside of a potential resource drain. When the legislation's tasks fall outside of an agency's competencies and expertise, and the goals of the legislation also are unrelated to an agency's goals, the maximum amount of "harm" is incurred. The gray area occurs when there are either agency tasks that align with the legislation's requirements, but the goals do not; or the converse situation, wherein the goals of the legislation and the agency align, but the tasks involved are not suited to an agency's expertise and competency. For example, in situations where the legislative tasks line up with typical agency tasks, but the goals and reasons for the work are outside of the agency's mandate, the agency is less likely to appreciate and prioritize the tasks required to achieve the extra-agency goals.

A simpler explanation is afforded by way of analogy. Take the example of a car mechanic, who is given an auto shop by a wealthy patron, with strict instruction that the auto shop be used to ensure the protection and safety of car drivers. If the mechanic is asked by a customer to work on a boat motor, the mechanic likely will perform tasks that fall within his area of expertise, and perform similar tasks to the ones he would perform if working on a car. Nonetheless, working on a boat falls outside of the mechanic's mandate to protect car drivers, and he would be operating outside of the instruction to use the auto shop for that reason. If another customer asks the mechanic to edit a draft of her novel, the mechanic is in the problematic position of being asked to per-

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15 *See infra* Part II.B.1.

16 *See* Troy A. Paredes, Comm'r, SEC, Remarks at "The SEC Speaks in 2009" (Feb. 6, 2009) (transcript available at http://www.sec.gov/news/speech/2009/spch020609tap.htm) ("[A]s an agency, the SEC has limited resources. Even if the agency's budget increases, we still will be faced with the challenge of allocating a finite number of people and funds. It is critical to recognize that there is an opportunity cost when we dedicate resources to administer particular regulations, undertake certain examinations and inspections, and pursue specific enforcement actions."); *see also* Tom C.W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEA. U. L. REV. 325 (2011) (discussing the examination and improvement of the efficacy of the current securities risk-disclosure framework).

17 For these purposes, I define "harm" as the disconnect between the goals and tasks required to enforce a statute, and the goals, expertise, and resources afforded to the agency tasked with implementing the regulation.

form a task for which he does not have expertise, in addition to the task being outside of the mandate defining the purpose of his auto shop.

In this analogy, of course, the SEC is the mechanic and the "wealthy patron" is Congress. To be a perfect analogy, however, the "customer" would be the same person as the wealthy patron who gave the auto shop to the mechanic in the first place. In other words, Congress established the SEC and granted the agency its authority; and yet it is Congress that is impressing on the agency to work outside of its stated mandate. Congress certainly has the authority to require the agency to enforce its statutes. Yet the imposition of additional regulatory tasks outside of the expertise and mandate of the agency is dangerous because of the risk of wasted opportunity costs, and the disregard for institutional design.

At a structural level, the importance of institutional design cannot be overlooked when assessing agency tasks and goals. Proper institutional design, and adherence to the design, can result in avoidance of poor decision-making arising from a lack of expertise. There is a reason that Congress established the Securities and Exchange Commission, as outlined in Part I.A. Quite simply, the SEC is tasked primarily with protecting investors, in addition to ensuring a fair and efficient market, and facilitating capital formation. Ignoring the clarion task of investor protection, or at least amending that clarion agenda to include tasks related to foreign policy, only serves to dilute the importance of the agency's original mandate.[18]

Much has been written regarding theories that describe the administrative state, and the ramifications of agencies expanding beyond their original and intended scope;[19] however, the predominant theories related to the administrative state, such as public choice,[20] neopluralism,[21] and public interest theory,[22] are

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[18] *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 478 (1987). Sunstein outlines the congressional goals for agency creation during the New Deal, noting that in the establishment of the new agencies, Congress had minimal guidelines regarding agency discretion. *Id.* Instead, Congress wanted agencies to ensure against "unreasonable practices" and to prevent "unfairness." *Id.* Moreover, Sunstein points out that the New Deal agency creation underscored the importance of insulated and technical expert agencies, which was meant to distribute powers and functions of the national government. *Id.* at 441. *See also* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010) ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.").

[19] *See, e.g.*, Amitai Aviram, *Allocating Regulatory Resources*, 37 J. CORP. L. 739 (2012); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

[20] Public choice theory posits that government officials are motivated by self-interest and work to advance their own interests, as well as the interests of well-organized political interest groups, often at the expense of the general public. *See, e.g.*, Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formation*, 47 WASH. & LEE L. REV. 527, 529 (1990).

[21] *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 57 (1998). Neopluralist theory considers central the group interest but

not directly applicable here.[23] Consider, instead, the economic theory of opportunity cost to the agency and investors as a population. The theory of opportunity cost holds that there is a cost associated with opting to perform certain tasks at the expense of others.[24] The SEC has a finite amount of resources. Therefore, calculated choices must be made regarding what resources are expended on an ever-increasing number of tasks. Congress continues to burden the agency with additional regulations, requiring rulemakings and enforcement, but without adjusting the agency's budget commensurately. Commissioner Troy Paredes made the argument for factoring opportunity cost into the calculation of what tasks the agency undertakes:

> When deciding how best to allocate the agency's resources, the Commission has to make difficult choices. . . . As much as we might like to, we simply cannot pursue to the fullest extent each and every possible violation of the securities laws. We have to make tradeoffs—reflective of our policy determinations—in light of the relevant costs and benefits that attend our different options. One cost that must be accounted for is the opportunity cost of the time and effort we spend on a particular matter. Even when we pursue a meritorious case, there is an opportunity cost that may argue for allocating the Commission's resources differently. Resources committed to a particular matter become unavailable for some other—perhaps better—purpose. Put simply, if we commit resources to aggressively pursue case A our ability to pursue case B may be compromised. The concern is that it may have been better for investors and our markets had we focused on case B instead of case A.[25]

"assumes that organized interest groups compete with one another . . . to obtain state-provided goods, including favorable regulation." *Id.*

22 *Id.* Public interest theory elevates the importance of public monitoring of regulators, and argues that such oversight leads to outcomes reflecting the general interest.

23 Interestingly, the relatively novel theory of civic republican theory is slightly more applicable:

> The theory attributes two related behavioral characteristics to such participants. First, because the theory contemplates that interested parties' preferences are endogenous to the regulatory decisionmaking process itself, it imagines that participants approach regulatory decisionmaking open-mindedly, without uncompromising commitments to any particular outcome. Indeed, this postulate most distinguishes the civic republican theory from its rivals: The theory holds that the preferences of those participating in regulatory decisionmaking processes ultimately crystallize during the very course of the decisionmaking process.
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> Second, the theory contemplates that those participants exhibit a certain amount of public-spiritedness. That is, parties seek to advance not only their own self-regarding interests, but also the broader interests of the entire political community.

Id. at 77–78 (footnotes omitted). Because the common factors among the three statutory examples analyzed in this piece are the extraterritorial, diplomatic, and humanitarian goals associated with each statute, the civic republican theory is slightly more applicable because the true benefactors of the legislation are not the legislators or government officials themselves, nor is it an industry.

24 "The opportunity cost of some decision is the value of the next best alternative that must be given up because of that decision." WILLIAM J. BAUMOL & ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY 4 (11th ed. 2009).

25 Troy A. Paredes, Comm'r, SEC, Remarks at the 43rd Annual Rocky Mountain Securities Conference (May 6, 2011) (transcript available at http://www.sec.gov/news/speech/2011

In the legislative provisions detailed in Part II, the costs of regulating and enforcing the provisions greatly outweigh the benefit. More to the point, the benefit of the legislative provisions is nebulous at best, and all three expect that the benefits will be felt abroad.[26] Thus, the opportunity costs associated with pursuing nebulous and extraterritorial goals result in the agency being unable to focus on tasks appropriate to the agency's expertise and mandate.

II. CONGRESSIONAL USE OF SECURITIES LAWS FOR FOREIGN POLICY PURPOSES

Despite the clear-cut mission of the SEC and the general aim of federal securities laws to protect investors, Congress has repeatedly used securities laws and the SEC's regulatory resources to further its foreign policy goals. In this Part, I examine three examples of stretching securities laws and the mission of the SEC to promote congressional extraterritorial goals. Each of these examples represents an amendment to Section 13 of the Exchange Act. Although one of these examples is the Foreign Corrupt Practices Act, passed in 1977, the other two examples are found in the more recent Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Although not addressed herein, Congress has amended Section 13 since Dodd-Frank with yet another extraterritorially-aimed provision, the Iran Threat Reduction and Syria Human Rights Act of 2012.[27] This trend signals that Congress is increasingly turning to securities laws and the SEC as tools in its foreign policy arsenal.

/spch050611tap.htm). Paredes indicated that there were "guideposts" the agency must follow in determining how to allocate resources and accomplish myriad agency tasks. Those guideposts include the following considerations: (1) considering how and to what extent did the misconduct harm investors; (2) whether the misconduct was intentional or the result of negligence; (3) whether certain enforcement-related objectives have already been satisfied; (4) whether the wrongdoer will be meaningfully sanctioned through means other than SEC action; (5) the deterrent effect of bringing a certain type of case; (6) whether the agency can achieve the relief it seeks without charging every potential violation and bringing a more streamlined case. *Id.*

[26] Not discussed herein, but I hope to address in future scholarship, is the fact that each of the provisions analyzed in Section III represent the exportation of American business morals. In other words, the purpose of the three provisions analyzed in this paper is not to shine sunlight on American businesses and their practices, but instead to regulate foreign activity that touches on American business. Of course, this is a large topic that warrants its own article.

[27] Although not examined in this Article, I plan on addressing in future scholarship the most recent amendment to Section 13, the Iran Threat Reduction and Syria Human Rights Act of 2012. Section 219 of the Iran Threat Reduction and Syria Human Rights Act amends Section 13 of the Exchange Act, codified at Section 13(r). Iran Threat Reduction and Syria Human Rights Act, Pub. L. 112-158, § 219(a), 126 Stat. 1214, 1235–36 (2012) (codified at 15 U.S.C. § 78m(r) (2012)). This provision requires an issuer that files Exchange Act periodic reports to provide disclosure in its periodic report if during the reporting period it or any of its affiliates has knowingly engaged in certain specified activities involving contacts with or support for Iran or other identified persons involved in terrorism or the creation of weapons of mass destruction. *Id.* at 1235. Section 13(r) also requires an issuer that includes a descrip-

These three examples represent various levels of inappropriate authority placed on the SEC by Congress. Each statute discussed has extraterritorial goals at the heart of the legislation, as detailed in the legislative histories.[28] In examining the three examples, it is true that when the means of achieving the extraterritorial goal lines up with the expertise and purpose of the SEC, then the result is a beneficial use of agency expertise for an extra-agency purpose; however, as further explored in Part II, Congress should be wary of placing the burden of lofty foreign policy goals on the backs of agencies that are already stretched thin, and for which foreign policy is not a domain.

A. Foreign Corrupt Practices Act[29]

1. Statutory Requirements

In 1977, Congress passed the Foreign Corrupt Practices Act ("FCPA"),[30] aimed at eradicating bribery occurring overseas for the purpose of obtaining business. Specifically, the FCPA prohibits the corrupt use of the mail or any other instrumentality of interstate commerce in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or any other thing of value to any person, knowing that all or some of the payment will be offered, given, or promised, directly or indirectly, to a foreign official to influence or induce the foreign official to either commit an act in violation of his or her lawful duty, or to secure an improper advantage in obtaining or retaining

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tion of an identified activity in a periodic report to concurrently file with the Commission a notice that identifies the issuer and indicates that disclosure of the activity has been included in its periodic report. *Id.* at 1236. While this amendment also seems to be congressional overreaching in terms of the role of securities laws, it is not examined in depth here.

28 The stated purpose of each of the statutes discussed includes achieving a result in a foreign country. This is distinct from the statutes being applied extraterritorially, although in the case of each of these statutes, there is an enacted or proposed piece of legislation in Europe mirroring the American laws. *See, e.g.*, *Commission 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 (Mar. 5, 2014); Bribery Act, 2010, c. 23 (U.K.).

29 Unlike the other two statutory examples discussed in this section, the FCPA does not require an affirmative filing on behalf of issuing corporations. Instead, the FCPA is a statute prohibiting specific corporate behavior, rather than mandating it. This is worth noting because it means that the division tasked with regulating the FCPA is the Division of Enforcement of the SEC; whereas with the filing requirements of Section 1502 and Section 1504 of Dodd-Frank, the Division of Corporate Finance reviews the proactive corporate filings. As a general matter, the fact that different divisions of the SEC are tasked with handling these regulations does not diminish the fact that the SEC is operating outside of its mandate in enforcing parts or all of each of these statutes.

30 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

business.[31] In addition to the anti-bribery provision, the FCPA also includes accounting provisions that require corporations to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting methods.[32] Both the anti-bribery and the accounting provisions are jointly enforced by the Department of Justice ("DOJ") and the SEC.

In particular, the FCPA prohibits bribes in the conduct of business, which includes "payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement."[33] In recent guidance promulgated by the DOJ and SEC in November 2012, the government agencies interpret the FCPA to cover payments that are business-related, although not necessarily made with the intention of obtaining or retaining business or gaining an unfair advantage in that regard. This interpretation is buttressed by examples cited by the government, including (1) "[c]ircumventing the rules for importation of products," (2) "[g]aining access to non-public bid tender information," (3) "[i]nfluencing the adjudication of lawsuits or enforcement actions," and (4) "[o]btaining exceptions to regulations."[34]

2. *Legislative History of the FCPA*

The impetus for this legislation was that in the wake of the Watergate scandal, the SEC set out to investigate questionable corporate payments that were often disguised on the corporate books and records.[35] As a result of its extensive "questionable payment" investigation, the SEC discovered over four hundred companies that had made questionable payments, totaling over $300

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31 *Id.* at § 103(a), 91 Stat. 1495.

32 *Id.* at § 102, 98 Stat. 1494.

33 CRIMINAL DIV., U.S. DEP'T. OF JUSTICE & ENFORCEMENT DIV., SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 13 (2012), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

34 *Id.* This is a somewhat broader interpretation of the Congressional intent set out in the 1988 legislative history. Although Congress cited its intent to cover payments to obtain "more favorable tax treatment," it also cautioned against expanding the prohibition to lobbying and other "normal representations to government officials." *Id.* at 107 n.67.

35 *See, e.g.*, Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271–72 (1998) (explaining that, as he watched the Watergate scandal unfold on television, Sporkin wondered how the corporations involved put the illegal payments on their books and records, and as an investigator and later as Director of Enforcement for the SEC, he set out to investigate the breadth of potentially illegal corporate payments); *see also* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 954 (2012).

million to foreign officials.[36] Notably, the SEC was chiefly concerned with the accuracy of the corporate books and records, rather than the fact that the payments went to foreign officials.[37]

In its summary of the investigation, the SEC proposed legislation aimed at shoring up corporate accountability, but declined to address the issue of foreign corruption. Specifically, the SEC suggested that Congress pass legislation that would (1) prohibit the falsification of corporate books and records, (2) prohibit corporate executives and agents from making false or misleading statements to auditors, and (3) mandate that corporate management establish and maintain adequate accounting controls such that corporate transactions are properly recorded.[38] The SEC Report, however, made clear that the agency took no position on the prohibition of certain kinds of foreign payments because such a question "presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States."[39]

The SEC Chairman at the time the FCPA was proposed, Roderick Hills, submitted written testimony to the Senate Banking Committee and emphasized that the SEC did not want to have a role in the civil enforcement of the anti-bribery provisions because "they embody separate and distinct policies from those underlying the federal securities laws."[40] He added that SEC enforcement of the anti-bribery provisions did "not easily fit" within the SEC's mandate. Because the SEC saw its role as mandating corporate disclosure rather than "impos[ing] substantive regulation on a particular aspect of corporate behavior," Hills stated that agency did not "seek nor entirely wish to have the responsibility for stopping these kinds of payments," meaning payments to foreign public officials.[41]

In spite of the SEC's efforts to narrow its jurisdictional authority with respect to the FCPA, Congress awarded the agency enforcement powers over the

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36 *See* Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2902–03 (2005).

37 S. BANKING, HOUS. & URBAN AFFAIRS COMM., 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976), *reprinted in* SEC. REG. & L. REP., NO. 353, at 2 (stating "the primary thrust of our actions has been to restore the efficacy of the system of corporate accountability").

38 *Id.* at 11.

39 *Id.* at 13.

40 Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is* Not *Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1098 (2012).

41 *Id.* at 1098–99 & n.22 (quoting *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Comm. on Banking, Hous. & Urban Affairs*, 95th Cong. 111, 124–25 (1977) (statement of Roderick Hills, Chairman, SEC)).

books and records and internal controls provisions of the FCPA (the "accounting provisions"), *as well as* the anti-bribery provisions.[42] The Senate Report outlining the jurisdictional overlap between the DOJ and the SEC explained that the SEC had developed expertise in foreign investigations, and that the joint investigative responsibilities would reduce duplication of efforts and strengthen enforcement abilities.[43]

Interestingly, in 1981 and again in 1983, the Senate Banking Committee held hearings to consider amending the FCPA to consolidate enforcement of the anti-bribery provision in the DOJ.[44] In both instances, the SEC did not oppose consolidation and emphasized that the SEC's primary interest is in disclosure to investors rather than substantive regulation of commercial transaction. The Senate Banking Committee recommended consolidation after both the 1981 and 1983 hearings. Nevertheless, Congress declined to take action to consolidate the anti-bribery enforcement in the DOJ, which would have left the SEC with only enforcement power over the accounting provisions.

3. *Anti-Bribery Enforcement Is Outside of the SEC Mandate and Represents an Increase in the Agency's Opportunity Cost*

At its inception, the FCPA broke new ground in the fight against global corruption.[45] The genesis of the FCPA is understandable given that it was passed in the wake of the Watergate scandal.[46] Indeed, sweeping legislation is a common occurrence after major scandals or crises; for example, Sarbanes-Oxley was passed in the wake of the Enron and WorldCom scandals, and Dodd-Frank was passed in reaction to the financial crisis of 2008. This does not diminish, however, the problematic jurisdictional authority granted to the SEC for FCPA enforcement. Even the agency's representatives at the time of the passage of the legislation did not want enforcement authority over the anti-bribery provisions of the FCPA. Yet thirty-six years after its passage, the jurisdiction for both the anti-bribery and accounting provisions still rests concurrently with the SEC and DOJ, despite multiple attempts to consolidate the anti-bribery provision enforcement under the agency better equipped to handle it.[47]

Arguably, if bribes are properly recorded on corporate books and records, regulation of them is not related to investor protection, and therefore outside of

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42 H.R. REP. NO. 100-576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547.

43 S. REP. NO. 95-114, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4109.

44 Black, *supra* note 40, at 1105–07.

45 *But see* Joe Palazzolo, *From Watergate to Today, How FCPA Became So Feared*, WALL ST. J., Oct. 2, 2012, at B1 (pointing out that the FCPA was plucked out of "relative obscurity" since 2000, before which it was a rarely used statute).

46 The post-Watergate era also ushered in other reforms, such as campaign finance laws. *See, e.g.*, FED. ELECTION COMM'N, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW 1 (2014), *available at* http://www.fec.gov/pages/brochures/fec_feca_brochure.pdf.

47 *See* Black, *supra* note 40, at 1107.

the SEC's core mission. One could go so far as to argue that if payment of a bribe helps a corporation, investors may not have any issue with the practice (from a financial standpoint, rather than a moral one). In fact, SEC Commissioner Philip Loomis stated in a House of Representatives hearing that "the mere fact that a foreign payment has been made, particularly in a relatively small amount, is not necessarily a material fact to investors"; he noted that that there is a "significant question as to the extent to which information about foreign payments, even if illegal under foreign law or our law, or regarded as being improper, is material to an investor in appraising investment in a very large corporation."[48]

The Senate Report sparking the FCPA did not state explicitly that bribery was an investor protection issue. Instead, the Report explains that foreign policy was the primary reason for the passage of the FCPA.[49] In addition to foreign policy concerns, congressional members expressed the need for better business ethics, and a sense of morality in foreign corporate transactions.[50] There was also a sense among legislators that the United States should be a global leader in prohibiting corruption.[51] Investor protection was not, and is not, a goal of the FCPA. At most, there was a nod toward indirect investor protection in an institutional sense in the Senate Report: "There is a broad consensus that the payment of bribes to influence business decisions corrodes the free-enterprise system. Bribery short-circuits the marketplace. Where bribes are paid, business is directed not to the most efficient producer, but to the most corrupt. This misallocates resources and reduces economic efficiency."[52] However, the SEC has expertise in regulating corporate books and records. This is the task that affords it the capability of meeting its mandate of investor protection. The agency should not be tasked with the additional foreign policy aim of reducing global corruption when jurisdiction is equally and, indeed, more appropriately granted to the DOJ. The result of this additional regulatory task is an increase in the agency's opportunity cost, which stretches the agency's resources and human

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48 MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 11–12 (2014).

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> Bribery of foreign officials by U.S. corporations . . . creates severe foreign policy problems. The revelations of improper payments invariably tends to embarrass friendly regimes and lowers the esteem for the United States among the foreign public. It lends credence to the worse suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems. It increases the likelihood that when an angry citizenry demands reform, the target will be not only the corrupt local officials, but also the United States and U.S. owned business.
>
> Bribery by U.S. companies also undermines the foreign policy objective of the United States to promote democratically accountable governments and professionalized civil services in developing countries.

Koehler, *supra* note 35, at 942–43 (quoting S. REP. NO. 94-1031, at 3–4 (1976)).

50 *Id.* at 947.

51 *Id.*

52 *Id.* (quoting S. REP. NO. 94-1031, at 3).

capital. The agency is therefore less equipped to handle its properly assigned tasks, and therefore is inflicted with institutional harm.

B. *Conflict Minerals Disclosure Requirements*

1. *Statutory Requirements*

Section 1502 of Dodd-Frank amends Section 13 of the Exchange Act[53] by increasing mandatory disclosure requirements for producers of goods that include minerals derived from the Democratic Republic of Congo ("DRC").[54] In general, this provision mandates the annual disclosure of whether conflict minerals necessary in the production of a company's manufactured goods originate in the DRC or an adjoining country.[55] The term "conflict mineral" is defined to mean "(A) columbite-tantalite (coltan) [also known as tantalum], cassiterite [also known as tin ore], gold, wolframite [also known as tungsten], or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country."[56] If the conflict minerals in use originated in the DRC or an adjoining country, the disclosing party must submit a report to the SEC that includes: (i) a description of the due diligence process undertaken by the disclosing party with regard to the source and chain of custody of those conflict minerals, which must be independently audited;[57] and (ii) a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the identity of the independent auditor of the source and supply chain, the facilities that process the conflict minerals used by the disclosing party, the country from which the conflict minerals were obtained, and the efforts used to determine the origin (i.e., the specific mine) of the conflict mineral.[58] For a product to be considered

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[53] 15 U.S.C. § 78m(p) (2012).

[54] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1502(b), 124 Stat. 1376, 2213–15 (2010) (codified as amended at 15 U.S.C. § 78m). The regulation on conflict minerals is quite different from conflict diamonds, which is regulated by the Clean Diamond Trade Act, by virtue of the United States being a signatory to the Kimberly Process Certification Scheme.

[55] 15 U.S.C. § 78m(p)(1)(A). "Adjoining countries" include Angola, Burundi, Central African Republic, Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

[56] Dodd-Frank Act, § 1502(e)(4)(A)-(B), 124 Stat. 2218.

[57] 15 U.S.C. § 78m(p)(1)(A)(i). This independent audit must be certified by the disclosing party, which is an integral part of the due diligence process. 15 U.S.C. at § 78m(p)(1)(B). Additionally, this audit must be considered reliable by the SEC. *See* 15 U.S.C. at § 78m(p)(1)(C).

[58] *Id.* at § 78m(p)(1)(A)(i)–(ii). However, on April 14, 2014, the District Court of Appeals for the District of Columbia Circuit held that requiring issuers to describe their products as "not DRC conflict free" is compelled speech and therefore a violation of freedom of speech under the First Amendment. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014). The Court held that requiring an issuer to label its products as "not DRC conflict

"DRC conflict free," the product must not contain minerals that finance, directly or indirectly, any armed groups in the DRC or adjoining countries.[59]

The reach of this disclosure requirement extends to any individual or company subject to any of the Exchange Act's disclosure requirements if such companies or individuals require conflict minerals in the production of the products they manufacture or contract to be manufactured.[60] Beyond making the relevant disclosures to the SEC, those subject to this provision must post the required disclosures on their corporate websites.[61]

The SEC's rule sets out three steps issuers should follow in order to comply with requirements of Section 1502. First, issuers[62] must determine whether Section 1502 applies to them. According to the rule, issuers that both directly manufacture products using conflict minerals, as well as those that contract for the manufacturing of their products, are subject to the rule.[63] The final rule

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free" is tantamount to requiring an issuer to "confess blood on its hands." *Id.* at 371. The D.C. Circuit dismissed all other challenges to the rule, including to the lack of any *de minimis* exception in the SEC's rule and to the SEC's cost-benefit analysis. *Id.* at 366, 369. Thus, the remainder of the rule is intact, but companies are not required to use the mandated term "DRC conflict free" in their descriptions of products.

[59] 15 U.S.C. § 78m(p)(1)(D).

[60] *Id.* at § 78m(p)(2)(A)–(B).

[61] *Id.* at § 78m(p)(1)(E).

[62] Under Rule 13p-1:

> [E]very registrant that files reports with the Commission under Sections 13(a) or 15(d) of the Exchange Act, having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured, shall file a report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Conflict Minerals, SEC (May 30, 2013), http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm (citations omitted). This rule, therefore, applies to every issuer required to file reports under either 13(a) or 15(d), *including voluntary filers*. *Id.* However, an issuer that acquires, or otherwise obtains control of, a non-reporting company that manufactures or contracts to manufacture products containing conflict minerals, must file a report regarding the acquired company's products at least starting the first calendar year that begins no sooner than eight months after the effective date of the acquisition. *Id.* The FAQ notes that the SEC staff "will not object if the issuer starts reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of its initial public offering registration statement." *Id.* Effectively, a company that acquires a manufacturer that previously was not subject to the rules need not gather information on the acquired company's products until the next calendar year if the closing of the acquisition occurred on or after May 1. Furthermore, an issuer must file a disclosure on its behalf *as well as* regarding the subsidiaries included in its consolidated financials. *Id.*

[63] Mining activities are excluded specifically from the rule because they are not viewed as falling within the definition of "manufacturing." This exclusion includes the mining of lower grade gold ore, as well as the ancillary activities of mining, such as transporting the ore to a processing facility, crushing and milling the ore, mixing crushed or milled ore with cyanide solution, floating cyanide mixture through a leaching circuit, extracting gold from a leached circuit, smelting the gold into ingots or bars and transporting the ingots or bars to a refinery for refining. *Id.*

states that a company is considered to be "contracting to manufacture" a product if it has influence over the manufacturing of that product. The rule clarifies that a company is NOT deemed to have influence over the manufacturing of a product if it: (1) merely affixes its brand or logo to a generic product manufactured by a third party;[64] (2) services, maintains, or repairs a product manufactured by a third party;[65] or (3) specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product.[66]

In assessing whether it is subject to the conflict minerals disclosure rules, an issuer must determine if the conflict minerals are "necessary to the functionality or production of a product."[67] The SEC did not define what "necessary to the functionality or production of a product" means. However, the two Congressional sponsors of Section 1502 opined in a comment letter that the provision should cover "all uses of conflict minerals coming from the DRC—except those that are 'naturally occurring' or 'unintentionally included' in the product."[68] Notably, the final rule did not carve out an exception for the *de minimis* presence of conflict minerals in products. Instead, all products with any amount of conflict minerals "necessary to the functionality or the production of the product" are subject to the regulation.

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[64] If an issuer's logo, serial number or other identifier is etched into a generic product that is manufactured by a third party, the issuer will not be deemed to have contracted to manufacture the product. *Id.*

[65] An issuer is not required to report on conflict minerals contained in equipment that it manufactures or contracts to manufacture to the extent that the equipment is used for a service provided by the issuer and that: (a) the equipment is retained by the service provider; (b) is to be returned to the service provider; or (c) is intended to be abandoned by the customer following the terms of service. *Id.* Item 1.01(a) of Form SD requires issuers only to report on conflict minerals that are necessary to the functionality or production of "products" they manufacture or contract to have manufactured, and the staff does not interpret equipment used to provide services to be "products" under the rule. *Id.* Further, the sale of used tools, machines, or other equipment that an issuer manufactured or contracted to manufacture for use in the manufacture of its products does not fall under the Rule. The SEC staff does not view these items as products of the issuer, and their subsequent entry into the stream of commerce does not transform them into products of the issuer. *Id.*

[66] For purposes of the rule, the SEC will not distinguish between the components of a product that an issuer directly manufactures or contracts to manufacture and the generic purchased components included in the product. Thus, companies whose products contain generic components not manufactured by the company must conduct appropriate due diligence to ascertain the source of the minerals in the generic components included in their products. Packaging, however, is not considered part of the "product," even if the packaging or container is necessary to preserve the usability of the product up to, and following, the product's purchase. This clarification is particularly important to companies in the food, beverage, and pharmaceutical industries where the packaging could contain conflict minerals, but the actual products do not. Although such companies need not comply with the rule, companies that manufacture the packaging and containers must do so. *Id.*

[67] 15 U.S.C. § 78m(p)(2)(B) (2012).

[68] Conflict Minerals, Release No. 34-63547, 75 Fed. Reg. 80,948, 80,953 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229 & 249) (quoting a letter from Sen. Richard J. Durbin and Rep. Jim McDermott, U.S. Congress).

Once an issuer has determined that its products contain minerals listed in Section 1502, it must determine if these minerals are truly *conflict* minerals, as defined by the statute, and conduct an inquiry into the origin of the contents of their products.[69] The SEC stated in its rule that, in determining the origin or the minerals, the regulation requires a "reasonable country of origin inquiry," executed in good faith.[70] However, the SEC did not set forth guidelines as to what constitutes a reasonable country of origin inquiry. Rather, it noted that it would consider an issuer to have satisfied the inquiry requirement it if sought and received reasonably reliable representations from the facility at which its minerals were processed that those minerals did not originate from the DRC or a neighboring country.

If, after completing a reasonable country of origin inquiry, the company knows or has no reason to believe that the minerals *did not* originate in any of the listed countries, or are from scrap or recycled sources, the company must provide a brief description of the basis for its determination on newly-created Form SD, which will be required to be filed with the Commission. The issuer must post that description on its website and disclose the website address to the Commission on Form SD. On the other hand, if a company knows or has reason to believe that the minerals *may* have originated in one of the listed countries, or may not be from scrap or recycled sources, the company must perform due diligence on the source and chain of supply of its minerals and submit a Conflict Minerals Report ("CMR") as an exhibit to Form SD. The CMR must also be posted on the company website.[71]

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[69] *Id.* at 80,954.

[70] *Id.*

[71] Conflict Minerals, Release No. 34-67716, 77 Fed. Reg. 56,274, 56,302 (Sep. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b). The CMR itself must include proof that the company conducted due diligence on the source and chain of supply of the conflict minerals. The due diligence must meet a standard that is nationally or internationally recognized, such as the due diligence guidance approved by the Organisation for Economic Cooperation and Development (OECD). *Id.* at 56,326.

A company's products can still be labeled "DRC conflict free" if the minerals originate from one of the listed countries but *did not finance or benefit armed groups*. *Id.* at 56,324. If a company determines, after conducting due diligence, that its products are "DRC conflict free," it must certify its findings by: (1) obtaining an independent private sector audit of its CMR; (2) certify that it obtained the audit; (3) identify the auditor; and (4) append a copy of the audit report as part of the CMR. If a company cannot assert that its products are "DRC conflict free," then, in addition to the audit and certification requirements listed above, the company must state in its CMR: (1) that the products manufactured or contracted to be manufactured have not been found to be "DRC conflict free"; (2) the facilities used to process the conflict minerals; (3) the country of origin of the conflict minerals; (4) the efforts to determine the mine or location of origin with the "greatest possible specificity." *Id.* at 56,333.

Finally, if a company is unable to determine if its products are "DRC conflict free" because it cannot determine the country of origin, or if cannot determine if the minerals in its products financed or benefited armed groups, it will be subject to a temporary two-year transition period during which time its products will be labeled "DRC conflict undeterminable." The company must still file a CMR, stating: (1) the facilities used to process the conflict

The fulsome supply chain due diligence, along with the potential for a requirement of a third-party audit of that due diligence, has rankled corporations in myriad industries.[72] Moreover, the provision affects not only companies that are required to report to the SEC but also any non-reporting companies that find themselves in the supply chain of a reporting company.

2. Legislative History of Section 1502

The DRC has a long history of civil war and human rights abuses, and has been a source of global concern for decades.[73] Moreover, the link between the violence and the mineral trade from that region has been documented by a number of non-governmental organizations ("NGOs") and the United Nations, and in 2001, the U.N. Security Council ("UNSC") passed a resolution condemning "all illegal exploitation of the natural resources of the [DRC], demand[ing] that such exploitation cease and stress[ing] that the natural resources

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minerals; (2) the country of origin, if known; (3) the efforts to determine the mine or location of origin with the greatest possible specificity; (4) the steps the company has taken or will take to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence process. The company is not required, however, to obtain an independent private sector audit of its CMR. *Id.* at 56,344–45.

[72] Cassiterite, or tin, is used by the electronics, automotive, industrial manufacturing, and construction industries as a crucial component in solders for joining pipes and circuits; it is also used in automobile parts, steel plating, and various alloys. MICHAEL LITTENBERG ET AL., CONFLICT MINERALS DUE DILIGENCE 4 (2012), *available at* http://www.srz.com/files/upload/Littenberg_Damania_Valane_PLC_Nov_2011_Conflict_Minerals.pdf. Children's shoes that light up upon impact also contain cassiterite. *Id.* at 3. Likewise, columbite-tantalite, or coltan, is used in hearing aids, pacemakers, carbide tools, and jet engines. *Id.* at 4. Wolframite, or tungsten, is used in metal wires, electrodes, and welding instruments. *Id.*

[73] Originally colonized in 1885 by Belgian King Leopold II, the DRC achieved independence from Belgium in 1960 but was ruled for the following thirty years by the authoritarian regime of Mobutu Sese Seko. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-763, CONFLICT MINERALS DISCLOSURE RULE: SEC'S ACTIONS AND STAKEHOLDER-DEVELOPED INITIATIVES 3 (2012), *available at* http://www.gao.gov/assets/600/592458.pdf. In 1997, Laurent Kabila toppled Mobutu's regime, throwing the country into civil war, during which rebel groups took over various regions of the DRC. *Id.* at 5. Kabila was assassinated in 2001 and power shifted to his son, Joseph Kabila, under whose reign the fighting has continued, if not increased. *See id.* at 5.

> As we reported in 2010, illegal armed groups and some Congolese national military units are consistently and directly involved in human rights abuses against the civilian population in eastern DRC and are involved in the exploitation of conflict minerals and other trades. We also reported that there is a culture of impunity in eastern DRC in which those who have committed human rights abuses do not face justice for the crimes they have committed. After decades of instability and war, the central government in the capital, Kinshasa, currently has little administrative capacity and control over remote regions, including eastern DRC. The long distances between the capital and eastern DRC and the rudimentary infrastructure, which make transportation and communication difficult, further limit the central government's control in eastern DRC.

Id.

of the [DRC] should not be exploited to finance the conflict in that country."[74] The UNSC also called on member states to "take measures, as they deem appropriate, to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase."[75]

Likewise, congressional concern with the growing violence the DRC originated well before 2010 and the passage of Dodd-Frank.[76] As early as 2008, variations of legislation akin to Section 1502 had been put forth by members of Congress. For instance, in May 2008, Senator Brownback introduced a bill in the Senate Finance Committee, which was cosponsored by Senator Durbin, called the Conflict Coltan and Cassiterite Act of 2008 ("CCCA").[77] This bill, had it become law, would have made it unlawful to import products from the DRC that contain coltan or cassiterite.[78] The CCCA never received a floor vote, and on April 23, 2009, Senator Brownback again introduced legislation, this time in the Senate Banking, Housing, and Urban Affairs Committee, to address the humanitarian crisis in the DRC.[79] The contours of Senator Brownback's subsequently proposed bill, called the Congo Conflict Minerals Act of 2009 ("CCMA"), were much more closely aligned with the Brownback Amendment. The CCMA took a noted step back from the more aggressive CCCA in that it did not include criminal penalties for willfully violating the CCMA's other provisions.[80] Like Section 1502 of Dodd-Frank, the CCMA would have

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[74] S.C. Res. 1376, para. 8, U.N. Doc. S/RES/1376 (Nov. 9, 2001) (emphases omitted).

[75] S.C. Res. 1857, para. 15, U.N. Doc. S/RES/1857 (Dec. 22, 2008).

[76] *See* 156 CONG. REC. S8680–81 (2010) (statement of Sen. Russ Feingold, addressing the rationale behind earlier versions of Section 1502):

> This amendment specifically responds to the continued crisis in the eastern region of the [DRC]. Despite efforts to curb the violence, mass atrocities and widespread sexual violence and rape continue at an alarming rate. Some have justifiably labeled eastern Congo as "the worst place in the world to be female." Several of us in this body, including Senators Brownback and Durbin and I, have traveled to this region and seen first-hand the tragedy of this relentless crisis.

The concern also extended beyond members of Congress. In the summer of 2009, Secretary of State Hillary Clinton visited the DRC to encourage the Congolese government and the United Nations to end the violence that is ravaging the country. *See* Jeffrey Gettleman, *Clinton Presses Congo on Illicit Minerals*, N.Y. TIMES, Aug. 11, 2009, at A7. Of particular concern for Secretary Clinton was the increased violence against women, as she declared, "Women are being turned into weapons of war." *Id.*

[77] Conflict Coltan and Cassiterite Act of 2008, S. 3058, 110th Cong. (2008).

[78] *Id.* at §§ 3–4.

[79] Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009). Similar legislation was proposed in the House of Representatives by Rep. Jim McDermott. *See* Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

[80] *Compare* S. 891, *with* S. 3058. According to Senator Feingold,

> we must tread carefully because there are many communities in eastern Congo whose livelihoods are intertwined with the mining economy. All-out prohibitions or blanket sanctions could be counterproductive and negatively affect the very people we seek to help. I am confident that [the CCMA] is sensitive to that complex reality.

155 CONG. REC. S4697 (2009) (statement of Sen. Russ Feingold).

amended the Exchange Act by adding certain disclosure requirements, and it would have made it U.S. policy to promote peace and security in the DRC.[81]

Of utmost importance for purposes of this Article is the following difference between the earlier versions of the legislation and the final Section 1502 language: the final version of Section 1502 deleted a provision that would have allowed the SEC to review or temporarily waive the disclosure requirements if the SEC determined that a waiver was "(A) necessary for the protection of investors; and (B) in the public interest."[82] The significance, of course, is that not only is the SEC operating well outside of its financial mandate in regulating supply-chain disclosures regarding conflict minerals, it was not afforded the discretion to attempt to stay true to its investor protection mission in the final version of the legislation.

3. *Coloring Outside the Lines: Conflict Mineral Regulation Lies Beyond the SEC Mandate*

Section 1502 is not a financial regulation, but rather a provision aimed at ending the atrocities of a war occurring seven thousand miles from Wall Street. In fact, the prologue of Section 1502 expressly declares:

> It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the

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[81] *See* S. 891 §§ 3, 5. Ultimately, this bill was cosponsored by twenty-two senators in addition to Senator Brownback. *S. 891 (111th): Congo Conflict Minerals Act of 2009: Status*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s111-891 (last visited Nov. 25, 2014). At the time the CCMA was introduced in committee, Senator Brownback stated, "We have taken a strong hard look at [the CCCA] and have done our best to improve on it." 155 CONG. REC. S4696 (2009) (statement of Sen. Sam Brownback). Senator Feingold, joining as an original co-sponsor, added that "the long-term goal is not to shut this trade down, but to support a conflict-free mining economy that benefits the Congolese people." *Id.* at S4697 (statement of Sen. Russ Feingold). Other significant differences between the CCMA and the final version in Dodd-Frank are that the CCMA would have applied to persons who engaged in "the commercial exploration, extraction, importation, exportation, or sale of" conflict minerals or use conflict minerals "in the manufacture of a product for sale," and the CCMA would have applied the disclosure requirements not only to parties that engage in the relevant activities but also to any person who controls another person or entity (defined as controlling 50 percent of the voting stock or capital) that engages in the relevant activities. S. 891 § 5. Section 1502, by contrast, only applies to issuers that manufacture or contract to manufacture products containing conflict minerals. 15 U.S.C. § 78m(p)(1)(A)(ii). Likewise, the CCMA did not require an independent audit of the CMR, nor did it require corporate disclosure on corporate websites. S. 891 § 5.

[82] *Compare* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1502(b), 124 Stat. 1376, 2213–15 (2010) (codified as amended at 15 U.S.C. § 78m), *with* S. 891 § 5.

> provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).[83]

Tasking the SEC with oversight of conflict minerals disclosure is well beyond the SEC mandate and overextends the agency in ways that could prove harmful to its sole mission: investor protection. In addition, one would be misguided to argue that the *task* involved in adhering to the legislative intent of Section 1502 is one that is well within the SEC's power. That is, because the SEC is charged merely with reviewing additional corporate disclosures, a task in which it certainly has expertise, the SEC is in no position to evaluate the veracity of conflict mineral disclosures, nor is it interested in spending resources on regulating disclosures of such arguably non-material information.[84]

For this reason, the regulation falls into the category of committing maximum harm to the agency because both the tasks and the goals of the legislative provision fall outside of the SEC's expertise and mandate. This provision requires corporate disclosure of the use of conflict minerals in products, with the goal of reducing trade in conflict minerals, and thereby reducing violence in the Democratic Republic of Congo. The task of reviewing corporate disclosures to assess whether a product contains conflict minerals is of no relevance to the SEC as the agency focuses on investor protection. Likewise, the goals of the provision fall far afield of the agency's mission, as well. How does the agency show progress on reducing the supply of conflict minerals in the supply chain; moreover, how does the agency show progress on reducing violence in the eastern region of Congo, as is the stated goal of the statutory provision? Conflict minerals regulation represents an example of a statute creating institutional harm and increasing an agency's opportunity cost.

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83 Dodd-Frank Act, § 1502(a), 124 Stat. 2213.

84 *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1339 (2012) (arguing that presence of conflict minerals in an issuer's product is immaterial information that need not be disclosed); *see also* Gallagher, *supra* note 1:

> It is easy to see that the SEC role in this provision is the anomaly. That's because disclosure requirements in the securities laws are about telling investors what they reasonably should want to know before investing in a company. The point is to give investors information that is inherently "material" to their investment decisions. Disclosure is, and should be, the primary tool for the SEC to use in satisfying its mission. And so it is paramount that we focus on getting timely, material disclosures to investors.
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> . . . .
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> Unfortunately, Section 1502 is *about* curtailing violence in the DRC; it is not about investor protection, promoting fair and efficient markets, or capital formation. Warlords and armed criminals need to fund their nefarious operations. Their funding is their lifeline; it's a chokepoint that should be cut off. That is a perfectly reasonable foreign policy objective. But it's not an objective that fits anywhere within the SEC's threefold statutory mission.

C. *Extractive Industries Disclosure Requirements*

1. *Statutory Requirements*

On August 22, 2012, the SEC issued its final rule implementing Section 1504 of Dodd-Frank, "Disclosure of Payments by Resource Extraction Issuers," which requires disclosure of payments made to governments for the commercial development of oil, natural gas, or minerals.[85]

The SEC's resource extraction rule applies to U.S. and foreign companies that are 1) engaged in the commercial development of oil, natural gas, or minerals, and 2) required to file annual reports with the SEC. The rule applies to all such companies, regardless of their size or the extent of their activities constituting the commercial development of oil, natural gas, or minerals.[86] Under the rule, payments related to exploration, extraction, processing, and export, as well as the acquisition of a license for such activities, must be disclosed. Thus, the rule encompasses not only the types of mining and drilling operations that are at the core of the natural resources industry, but also related activities such as surveying, refining, processing, and shipping.[87]

Issuers that meet these requirements must complete a new form[88] and append it to their annual reports reflecting all payments (or series of related payments) of $100,000 or more.[89] In addition, the rule applies not only to payments made by the issuer itself, but also to payments made by a subsidiary of the issuer or an entity under the issuer's control, "based on a consideration of all relevant facts and circumstances."[90]

Payments to any foreign government are covered by the rule, as are payments to the U.S. Federal Government.[91] Although payments to U.S. state or

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[85] Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717, 77 Fed. Reg. 56,365 (Sep. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249).

[86] *Id.* at 56,367.

[87] The rule does not, however, cover ancillary or preparatory activities, such as the manufacturing of equipment and other products used in the commercial development of oil, natural gas, or minerals. *Id.* at 56,375.

[88] Issuers subject to Section 1504 must attach Form SD to their annual reports. Form SD is also the reporting mechanism for information provided under the SEC's "Conflict Minerals" rule, issued under Section 1502 of the Dodd-Frank Act, discussed in Section II.C. The specific information that must be provided on the form includes: (1) the total amount of payments, by category; (2) the currency of the payments; (3) the financial period in which the payments were made; (4) the business segment of the resource extraction issuer that made the payments; (5) the government that received the payments and the relevant country; (6) the projects to which the payments relate; (7) the type and total amount of payments for each project; and (8) the type and total amount of payments to each government. *Id.* at 56,368.

[89] This $100,000 threshold reflects the SEC's interpretation of the Dodd-Frank Act's requirement that the rule cover payments that are "not de minimis." *Id.*

[90] *Id.* at 56,387.

[91] "Payment" is defined in the rule to include the following: taxes, royalties, fees, production entitlements, bonuses, dividends, and payments for infrastructure improvements. *Id.* at

local governments are exempted, the term "foreign government" also comprises state, provincial, municipal, and other subnational governments, as well as any company majority-owned by a foreign government.[92] Interestingly, the SEC rejected a requirement that bribes paid to foreign government officials in connection with resource extraction contracts be disclosed. As noted in the final rule, "[a]lthough one commentator submitted data regarding payments made by some oil companies for tuition, rent, and living expenses for the students and relatives of officials in Equatorial Guinea, *those payments are not within the list of payments* [sic] *types specified by Section 13(q)*."[93] However, the rule also includes an anti-evasion provision designed to prevent companies from concealing or mischaracterizing the true nature of payments that would otherwise require disclosure.[94]

According to the SEC's calculations, compliance with the new rule initially will cost the industry as a whole $1 billion, with additional ongoing costs of $200 to $400 million per year.[95] The costs of non-compliance, however, can be expected to be even more onerous, as alleged violators could face a government investigation, penalties, and possible private litigation. Furthermore, companies could also face penalties and other repercussions overseas. For instance, on April 9, 2013, the European Union agreed to a preliminary deal requiring oil, gas, mining, and forestry companies to report in greater detail the payments they make to foreign governments.[96] This disclosure requirement has been incorporated in revisions to the EU Accounting Directives[97] and the Transparency Directive.[98]

56,378–79. With the addition of "dividends" and "payments for infrastructure improvements," this list represents a modest expansion of the types of payments enumerated in the statutory language of Dodd-Frank. The SEC declined to adopt a broader, non-exhaustive list of payment types, and also omitted a catch-all category for "other material benefits," as was suggested by some commenters on the proposed rule. *Id.* at 56,379.

92 *Id.* at 56,388–89.

93 *Id.* at 56,383 n. 257 (emphasis added). This comment originated in a letter submitted by Senator Carl Levin. Letter from Carl Levin, Chairman, U.S. Senate Permanent Subcomm. on Investigations, to Elizabeth M. Murphy, Sec'y, SEC, (Feb. 1, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-19.pdf.

94 77 Fed. Reg. at 56,380.

95 *Id.* at 56,398.

96 *See Statement by Comm'r Michel Barnier Welcoming the Agreement Reached on Disclosure Requirements for the Extractive Industry and Loggers of Primary Forests and on Simpler Accounting Requirements for Small Companies* (Apr. 9, 2013) *available at* http://europa.eu/rapid/press-release_MEMO-13-323_en.pdf.

97 *See* Council Directive 2013/34, 2013 O.J. (L 182) 52 (EU).

98 Council Directive 2013/50, 2013 O.J. (L 294) 20 (EU). The new legislation, which must be formally adopted by member states and the European Parliament, is a result of negotiations between the European Commission and the European Parliament regarding a European Commission legislative proposal adopted on October 25, 2011.

The EU legislation follows guidelines developed by the Extractive Industry Transparency Initiative ("EITI")[99] and would require all extractive and forestry industry companies listed on EU exchanges to report payments made to governments and local authorities in each country and for each project.[100] The proposed EU law, however, goes one step further than the U.S. law by subjecting large *unlisted* companies registered in the European Union to reporting requirements, even if they are not listed on an exchange or subject to other reporting requirements.[101] The SEC rule, in contrast, only applies to U.S. issuers and foreign private issuers with pre-existing reporting requirements to the Commission. The proposed EU law also is broader than the U.S. law because it includes the forestry industry among the categories of companies covered by the new reporting requirements. As a result of the SEC rule and the preliminary EU legislation, nearly 90 percent of all major extractive industry companies will be required to disclose their payments to governments and local authorities.[102]

One area in which the U.S. law is more stringent than the EU law, however, relates to exemptions from the disclosure requirement.[103] The EU legislation

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[99] EITI is a standard-setting body comprised of companies, governments, and non-governmental organizations aimed at creating transparency in the oil, gas, and mining industries. *What is the EITI?*, EITI, http://eiti.org/eiti (last visited Nov. 24, 2014).

[100] "Extractive industry" as defined in the EU legislation includes all companies with activities involving the exploration, discovery, development, and extraction of minerals, oil, and natural gas deposits, while the forestry industry includes companies with activities involving the clear-cutting, selective logging, or thinning of primary forests. ERNST & YOUNG, DISCLOSING GOVERNMENT PAYMENTS: IMPLICATIONS FOR THE OIL AND GAS INDUSTRY 3 (2013). Like companies subject to Section 1504, EU companies will need to report taxes, royalties, signature bonuses, licenses, concessions, leases and any other payments made to government and local authorities in the countries where the companies operate. "Other payments" subject to reporting requirements may include rental fees, transit fees, and dividends. *Id.* This level of disclosure is required for each project the company has undertaken in each country. The threshold for the disclosure of payments related to each project is set at €100,000 (approximately $130,000). *Id.* at 4.

[101] The EU's Accounting Directives defines a large company as that which exceeds two of the three following criteria: (a) revenue of €40 million; (b) total assets of €20 million; and (c) 250 employees. Council Directive 2013/34, at 28.

[102] Although not discussed in this Article, the disclosure requirement in the extractive industries may signal increasing disclosure requirements for other global industries, including telecommunications and construction. Indeed, the EU ministers agreed on a provision in the proposed EU law that requires them to decide in 2015 whether to extend the disclosure requirements to other sectors. ERNST & YOUNG, *supra* note 100. I hope to address this in future scholarship.

[103] During the rulemaking process for Section 1504, a number of exemptions to the rule were considered but ultimately rejected. For example, there is no exemption for issuers that are subject to similar reporting requirements under home country laws or other mandates. Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717, 77 Fed. Reg. 56,365, 56,368 (Sep. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249). Conversely, the rule does not provide an exemption for instances in which a foreign law prohibits a required disclosure. Accordingly, issuers cannot use the law of a resource-producing state as a shield

provides that companies may exclude payments to a government where disclosure is clearly prohibited by criminal legislation of that country. In such a case, the company must report that it is *not* reporting payments in a specified country. Conversely, the SEC rule does not allow an exemption based on the prohibition of disclosure in a foreign jurisdiction.[104] In addition, the EU law provides an exemption in situations where obtaining the data required for disclosure is overly burdensome; the SEC rule provides no such exemption. However, in July 2013, the District Court for the District of Columbia remanded the SEC rule back to the SEC, holding that the SEC did not provide ample justification for why the mandated disclosures had to be public rather than private. In addition, the district court held that the SEC misinterpreted that congressional mandate when the agency did not provide an exemption for disclosing payments made in countries that prohibit disclosure of payment information.[105]

2. Legislative History of Section 1504

Section 1504 of Dodd-Frank was designed to improve transparency and empower citizens of resource-rich countries to hold their governments accountable for the management of revenues derived from natural resources. The original bill that eventually became Section 1504 was the Energy Security Through Transparency Act of 2009 ("ESTTA"), proposed by Senator Lugar on September 23, 2009.[106]

On the same day, the ESTTA was referred to the Senate Committee on Banking, Housing, and Urban Affairs, from which it never emerged. Eight months later, and three days before the Senate passed its version of Dodd-Frank, Senator Cardin, a co-sponsor of the ESTTA, included an amendment that would become Section 1504 (the Cardin-Lugar Amendment), the operative language of which closely tracked that of the ESTTA.[107] The Cardin-Lugar Amendment was tabled on the Senate floor and was not included in the version of the Act passed by the Senate. Senators Cardin and Lugar persisted, however,

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against disclosure to the U.S. government. Rather, the SEC has in effect mandated that issuers disregard such foreign laws. Finally, the SEC's rule does not provide an exemption for confidentiality provisions in existing or future contracts that would otherwise prevent disclosure of commercially sensitive information. *Id.*

[104] This exemption likely will be put in place after the July 2013 ruling remanding the SEC Dodd-Frank rule back to the SEC for additional rulemaking. *See infra* note 105 and accompanying text.

[105] *See, e.g.*, Katy O'Donnell, *Judge Vacates SEC Dodd-Frank Rule for Extractive Industries, Remands to SEC*, MAIN JUSTICE (July 2, 2013, 10:58 AM), http://www.mainjustice.com/justanticorruption/2013/07/02/judge-vacates-sec-dodd-frank-rule-for-extractive-industries-remands-to-sec/.

[106] Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. (2009).

[107] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1502, 124 Stat. 1376, 2213–18 (2010) (codified as amended at 15 U.S.C. § 78m) (Passed in the Senate on May 20, 2010, amending H.R. 4173).

and were finally successful in having their amendment included in the version of Dodd-Frank that emerged from the joint conference committee and eventually became law.

What seems to have been the primary driver for ESTTA is a desire to assist citizens in resource-rich countries around the world in combatting government corruption.[108] The text of ESTTA states that the reasons behind the bill included strengthening national security and foreign policy, increasing energy security, promoting reliability of commodity supplies, and creating a better business climate for oil, gas, and mining companies.[109] For example, in addition to the Congressional finding that transparency in revenue payments to governments enables citizens to hold their leaders more accountable, other Congressional findings supporting the bill included:

> Developing countries that derive a significant portion of revenues from natural resource extraction tend to have higher poverty rates, weaker governance, higher rates of conflict, and poorer development records than countries that do not rely on resource revenues. The consequences of what is known as the "resource curse" including the erosion of civil society, a rise in internal conflicts and regional violence, and the proliferation of terrorism are likely to pose a long-term threat to the national security, foreign policy, and economic interests of the United States.[110]

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[108] The text of ESTTA also states its congressional findings:

> It is the sense of Congress that—
>
> (1) the President should work with foreign governments, including members of the Group of 8 and the Group of 20, to establish domestic requirements that companies under the jurisdiction of each government publicly disclose any payments made to a government relating to the commercial development of oil, natural gas, and minerals; and
>
> (2) the United States Government should commit to global leadership of transparency in extractive industries by supporting—
>
> (A) multilateral pro-transparency efforts, such as the Extractive Industries Transparency Initiative, in revenue collection, budgeting, expenditure, and wealth management;
>
> (B) bilateral efforts to promote good governance in the extractive industries through United States missions and activities abroad;
>
> (C) the implementation of extractive industries reporting requirements for companies under the jurisdiction of the United States similar to the requirements established under section 6 of this Act; and
>
> (D) efforts to persuade other members of the Organization for Economic Cooperation and Development and Asia-Pacific Economic Cooperation to adopt uniform legislation to ensure a coordinated regulatory approach.

S. 1700 at §3.

[109] *Id.* at §2. ("The Congress finds the following: (1) It is in the interest of the United States to promote good governance in the extractive industries sector because good governance strengthens the national security and foreign policy of the United States, contributes to a better investment climate for businesses in the United States, increases the reliability of commodity supplies upon which businesses and people in the United States rely, and promotes greater energy security.").

[110] *Id.*

Two Congressional findings supporting the bill, however, addressed the nexus between transparency in the extractive industries and investor protection. These findings noted that: (1) transparency in revenue payments is "good for business, since it improves the business climate in which [extractive industry corporations] work and fosters good governance and accountability" and (2) transparency in revenue payments benefits shareholders because "such shareholders have a desire to know the amount of such payments in order to assess financial risk, compare payments from country to country, and assess whether such payments help to create a more stable investment climate," whereas undisclosed payments may be perceived as corrupt and as decreasing the value of the corporation.[111]

3. No Harm, No Foul?

Like the FCPA, this disclosure requirement aimed at stemming global corruption seems to stretch the resources of the SEC for goals not within its mandate. As noted above, the stated goals of the provision, as evidenced by the legislative history, are to improve transparency and empower citizens of resource-rich countries to hold their governments accountable for the management of revenues derived from natural resources. The task required by the legislation, reviewing corporate accounting and payments, is well within the SEC's expertise and indeed is a critical element of the agency's standard portfolio of duties. Because Section 1504 at its core requires additional transparency in corporate accounting, the *task* of regulating this provision is distinct from its goals. The *task*, therefore, is one in which the SEC has both an interest and expertise. In other words, despite the goal of this provision being outside the purview of the SEC's typical sphere, the practical enforcement requirement is one that dovetails with the agency's existing mandate of investor protection and fraud prevention. However, because the stated goal of the legislation is the empowerment of citizens of foreign countries, how is the SEC to show progress in effectuating the goal of the provision? It is difficult, therefore, to assess and measure the effectiveness and efficiency of the agency's work when the goals are unrelated to the core mission of the agency. Moreover, in an agency already stretched thin, the tasks related to this provision, although well within the agency's competency, may fall in the list of priorities when juxtaposed with agency tasks for goals that fall within the agency's mandate.

In actuality, the extractive industry disclosure provision is very similar to the accounting provisions of the FCPA and, as detailed above, enforcement of transparent accounting is appropriately housed with the SEC. Nonetheless, despite the practicalities of this provision rendering this a much "closer call" on misappropriation of the agency, the clear stated goals of the provision reside in the political and diplomatic sphere, and may well be better achieved with over-

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111 *Id.*

lapping jurisdiction. As described in Part I, however, this provision exemplifies a situation wherein the agency may be well-equipped to handle the tasks, but the goals of the provision are elusive. Thus, the effectiveness of the agency's work is nearly impossible to calculate and assess.

The extractive mineral statute therefore causes less institutional "harm" because the tasks involved line up with the agency's tasks for other regulations falling within its mandate. In other words, because the task involved in the regulation of Section 1504 lines up with typical agency tasks, such as review and analysis of corporate books and records, there is less institutional harm done. However, one cannot overlook the fact that the goals of Section 1504 are strictly extraterritorial, and the regulatory tasks of the agency therefore will be used as foreign policy measures.

CONCLUSION

The goal of this article has been to consider the role and mission of the securities laws and its regulatory agency, the SEC, as Congress continues to enlist the agency as a player in the foreign policy arena. Of the three examples discussed in Part II, each represents a different degree of congressional misappropriation. First, the Foreign Corrupt Practices Act represents a failure of Congress to streamline the SEC and its resources by declining to consolidate enforcement of the anti-bribery provisions with the DOJ. Second, conflict minerals legislation represents over-reaching by Congress and inappropriate use of the SEC for purposes clearly outside of the SEC mandate, namely, violence reduction in the Democratic Republic of Congo. Finally, the extractive industries disclosure requirement in Dodd-Frank represents a legislative measure aimed at exacting an extraterritorial and diplomatic goal through the use of securities laws. However, because this provision calls for greater transparency in corporate accounting to achieve its goal, the use of the SEC as the enforcing agency is not without merit. Nonetheless, the stated goal of the extractive industries disclosure is not in line with the SEC mandate, even if the task for achieving the goal dovetails with SEC expertise.

While the tasks inherent in the statutory provisions examined may fall in line with the SEC's typical regulatory tasks, measuring success and accountability in light of the statutory goals is outside of the agency's capability and interest. The result is an overburdened agency, at risk of failing to execute the tasks at the core of its mission of investor protection.