SEC RULES AND HUMAN RIGHTS: SPECIALIZED DISCLOSURE FOR CORPORATE ACCOUNTABILITY

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U.S. Securities and Exchange Commission ("SEC") rules promulgated through amendments to the Securities and Exchange Act of 1934 mandated by federal legislation serve as a means of reaching U.S. companies that are expanding their operations overseas. These rules are conceived of as an accountability mechanism, wherein companies choosing to operate in jurisdictions with weak rules of law are required to report on aspects of their activities affecting human rights in those countries. The corporate disclosure requirements found in the SEC final rule, promulgated through the amendment made in the Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1502, is an example of this approach with regard to companies using conflict minerals. The experience of companies subject to reporting requirements under Dodd-Frank Section 1502 provides important considerations that must be made for the proposed specialized disclosure requirement in the Global Online Freedom Act for ICT companies dealing with government surveillance and censorship demands abroad, going beyond the transparency that would result from reporting. Although SEC specialized corporate disclosure requirements are an effective means of increasing transparency among U.S. issuers, they will not lead to long-term changes in industry practice if not combined with greater involvement in multi-stakeholder efforts, increased awareness among investors with leverage on company decision-making, and effective internal initiatives within companies themselves.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amends Section 13 of the Securities and

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Exchange Act of 1934 to authorize promulgation of rules requiring issuers to disclose annually information about minerals sourced from the Democratic Republic of Congo ("DRC") and adjoining countries.[1] Section 1502 outlines a reporting requirement that involves "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals,"[2] including a certified independent private sector audit, a determination of whether the minerals are "DRC Conflict Free," and efforts to make the information obtained through due diligence available to the public.[3] The law was passed in response to a growing movement among consumers, Non-Governmental Organizations ("NGOs"), and various legislators, who recognized the connection between the atrocities committed as part of an ongoing regional conflict in a number of Central African nations and U.S. companies producing consumer electronics sold to the American public.[4] One of the major functions of the corporate disclosure requirements on conflict minerals in Section 1502 is to "promote transparency and consumer awareness regarding the use of sought-after minerals extracted in and around DRC."[5] Accordingly, Section 1502 developed a specialized corporate disclosure approach designed to hold U.S. companies accountable for their supply chain connection to human rights abuses committed in the DRC and adjoining countries.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) [hereinafter Dodd-Frank Act].

[2] *Id.*

[3] *Id.* at 2214.

[4] *See, e.g.*, *Metals in Mobile Phones Help Finance Congo Atrocities*, GLOBAL WITNESS (Feb. 16, 2009), http://www.globalwitness.org/library/metals-mobile-phones-help-finance-congo-atrocities (noting research revealing that armed groups in the Democratic Republic of Congo ("DRC") financed their operations through the minerals trade); *A Comprehensive Approach to Congo's Conflict Minerals – Strategy Paper*, THE ENOUGH PROJECT AND THE GRASSROOTS RECONCILIATION GROUP (Apr. 24, 2009), http://www.enoughproject.org/publications/comprehensive-approach-conflict-minerals-strategy-paper (highlighting the responsibility of companies that may be sourcing minerals from the DRC to ensure they are not fueling the region's conflict); Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 2(10) (2009–2010) (acknowledging that "[m]ineral derivatives from the Democratic Republic of Congo are used in industrial and technology products worldwide, including mobile telephones, laptop computers, and digital video recorders.").

[5] Emily Veale, *Is There Blood on Your Hands-Free Device?: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo*, 21 CARDOZO J. INT'L & COMP. L. 503, 522 (2013) [hereinafter Veale, *Is There Blood on Your Hands-Free Device?*].

The SEC's final rule on corporate disclosure relating to conflict minerals was passed in August 2012.[6] The final rule applies to any company required to file reports with the SEC under the Exchange Act of 1934 who use the minerals tin, tantalum, tungsten, or gold where these are "'necessary to the functionality or production' of a product manufactured or contracted to be manufactured by th[at] company."[7] As a first step, countries using any of the designated minerals must conduct a reasonable "country of origin" inquiry.[8] If the company knows or has reason to believe the minerals come from the DRC region based on their inquiry, it must conduct due diligence on its supply chain and file a Conflict Minerals Report to make a determination regarding whether the minerals are "DRC Conflict Free" or "Not Been Found to Be 'DRC Conflict Free.'"[9] Due diligence must conform to a nationally or internationally recognized due diligence framework and is subject to an independent private sector audit and certification requirement.[10] The final rule also allows a two-year phase-in period for large companies (four years for smaller reporting companies) to adjust to the disclosure requirements, during which a company that is unable to determine the origin of its minerals from due diligence can designate those minerals as "DRC Conflict Undeterminable" in their Conflict Minerals Report.[11] All reporting under the SEC final rule must be made publicly available on each company's website, whether or not the minerals are determined to be "DRC Conflict Free."[12]

The required corporate disclosure on conflict minerals is significant because it attempts to hold accountable those companies that may be complicit in human rights abuses committed by foreign governments. The SEC determined that the reporting requirement would help investors price securities of relevant companies based on the reported information and would generally increase transparency and informational efficiency in the

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[6] *See generally* Conflict Minerals, Securities Exchange Act of 1934, Release No. 34-67716, 2012 WL 3611799 (Aug. 22, 2012) [hereinafter Conflict Minerals Release].

[7] *Fact Sheet: Disclosing the Use of Conflict Minerals*, SEC.GOV, http://www.sec.gov/News/Article/Detail/Article/1365171562058#.UqIwARbvyu5 [hereinafter *SEC Fact Sheet*].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

market.[13] However, there have been a number of criticisms against using an SEC rule as an accountability mechanism within the international human rights context. Two major problems with the SEC rule promulgated under Dodd-Frank Section 1502 are that the rule does not fall within the typical corporate decision making framework and that it has not produced any results in changing industry practice because of delays in implementation.

The SEC rule on conflict minerals, as mentioned previously, is not like other typical reporting requirements because it does not directly serve the main corporate interest of profit maximization and shareholder benefit. The SEC is required to consider whether the rules they promulgate will "promote efficiency, competition, and capital formation."[14] This duty resonates with the traditional and principal end goals of corporate decision making to maximize profit and value for shareholders of the company.[15] Human rights abuses committed in the DRC and adjoining countries are, arguably, not directly relevant to a corporation's profits or shareholder benefit. In fact, opponents commenting on the proposed conflict minerals rule argued that the Conflict Minerals Report required would include information outside the scope of what is considered material to investors.[16]

In response to legal challenges mounted by the Chamber of Commerce, the National Association of Manufacturers, and the Business Roundtable, the Interfaith Center on Corporate Responsibility ("ICCR") reinforced its view that the SEC conflict minerals reporting requirement is based on concerns that are integral to investor materiality.[17] In comments made to the

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[13] Nat'l Ass'n of Mfrs. v. SEC, No. 13-cv-635 (RLW), 2013 WL 4010670 (D.D.C. 2013) (citing 77 Fed. Reg. at 56,350).

[14] Securities Exchange Act of 1934, § 3(f), 48 Stat. 881 (current version at 15 U.S.C. § 78c(f) 2012).

[15] *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 ("'[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.'"). *Id.* (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

[16] *See, e.g.*, Conflict Minerals, Securities Exchange Act of 1934, Release No. 34-63547, 2011 WL 840408 (Mar. 1, 2011) (asserting that the purpose of the disclosure called for in the proposed rule is "fundamentally different" from the purposes of rules typically promulgated within the Securities Exchange Act reporting system).

[17] *See Investor Statement in Support of SEC Rule 1502 on Conflict Minerals*, SOURCING NETWORK (June 3, 2013),

proposed rule and submitted to the SEC, the ICCR and the Social Investment Forum ("SIF") asserted that proper disclosure in reporting will allow socially responsible investors to better "assess social (i.e. human rights) and reputational risks . . . associated with sourcing from the Democratic Republic of Congo."[18] The organizations further stated that the materiality argument was particularly compelling, considering that Socially Responsible Investment ("SRI") assets had grown significantly in recent years to represent a large population of investors who would deem an electronics company's potential ties to human rights abuses in DRC relevant to their investment decisions.[19]

The administrative response to similar arguments made by industry actors is consistent with that of SRI associations. The SEC posited that the cost of compliance, though significant, may be partly offset by "'increased demand'" for conflict-free products and "'shares by socially responsible consumers and investors.'"[20] Through their materiality arguments, government and investor supporters of specialized corporate disclosure for conflict minerals have indicated that the information obtained through due diligence and reported and published by companies is material for investors for whom social and reputational issues are relevant considerations in making investment decisions. In the context of conflict minerals, however, the industry backlash to the reporting requirements alone evince the notion that, for corporate actors,

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http://www.sourcingnetwork.org/storage/minerals-investors-group/CM%20Investor%20Statement%202013-05-28%20FIN.pdf (opposing the lawsuit filed against the SEC and challenging the final rule on conflict minerals on behalf of investment groups representing over $450 billion of assets under management).

[18] *See Comments Regarding File Number S7-40-10 on Conflict Minerals Disclosure*, Letter from Lauren Compere et al., Managing Director, Boston Common Asset Management, to Elizabeth M. Murphy, Sec. & Exch. Comm'n Sec'y (Mar. 2, 2011) (arguing that conflict minerals disclosure provides material information to investors and will improve market efficiency), *available at* http://www.sec.gov/comments/s7-40-10/s74010-158.pdf [hereinafter *Letter from SIF and ICCR*]; *see also* REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 176 (2012) [hereinafter CONSENT OF THE NETWORKED] ("By 2010 the amount of assets held by US investors in some form of socially responsible investment funds . . . had reached $3.07 trillion out of a total of $25.2 trillion in the US investment marketplace.").

[19] *See Letter from SIF and ICCR*, *supra* note 18 (noting that SRI assets were up by 34% since 2005).

[20] *See* Nat'l Ass'n of Mfrs. v. SEC, No. 13-cv-635 (RLW), 2013 WL 4010670 (D.D.C. 2013) (quoting the SEC in 77 Fed. Reg. at 56,350).

humanitarian concerns in the DRC are not enough incentive on their face to expend the time and resources necessary to comply with the final rule. Furthermore, the mere fact that so many industry actors have challenged the rule on these grounds shows that companies are not yet faced with enough push for policy change on the investor level to make efforts to change their supply chain practices on their own. Therefore, the arguably expansive reporting requirements promulgated under Dodd-Frank Section 1502 conflict with the traditional calculus of corporate decision makers, which is based primarily on profit maximization rather than social concerns.

The second major failure of the SEC final rule for corporate disclosure on conflict minerals is its time delay and resulting ineffectiveness in effecting industry-level change. A significant amount of time stood between the passage of Dodd-Frank and the promulgation of the corresponding SEC final rule.[21] This is important to note because Dodd-Frank's Section 1502 amendment to the Securities and Exchange Act mandated that the final rule be set forth by the SEC no later than nine months after Dodd-Frank's passage, which would have been April 2011.[22] The SEC released a proposed rule in December 2010, and allowed a period for comments on the proposed rule until January 31, 2011.[23] This comment period was then extended to March 2, 2011, so that the SEC could collect further information.[24] The final rule was not released until August 22, 2012, more than two years after the passage of Dodd-Frank Section 1502.[25] Companies were not required to submit reports pursuant to the final rule until May 31, 2014.[26] However, due to pending litigation on the final rule in the U.S. Court of Appeals for the D.C. Circuit, the SEC issued a statement moving the deadline for reporting to June 2, 2014,

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[21] *Compare* Dodd–Frank, *supra* note 1, *with* Conflict Minerals, 17 C.F.R. §§ 240, 249b (2012) (effective on Nov. 13, 2012).

[22] *See* Veale, *supra* note 5, at 524 ("Dodd-Frank's amendment of the Exchange Act requires that the SEC issue final rules implementing the statutory requirements no later than nine months after the date of enactment, or April 2011.").

[23] *Id.*

[24] *Id.* at 524–25 n.164 (citing Conflict Minerals, Extension of Comment Period, 76 Fed. Reg. 6110 (Feb. 3, 2011), *available at* http://www.sec.gov/rules/proposed/2011/34-63793fr.pdf).

[25] *See generally* Conflict Minerals, 17 C.F.R. §§ 240, *supra* note 21.

[26] Veale, *supra* note 5, at 525.

awaiting a decision from the Court.[27] While the reporting requirement was upheld by the D.C. Circuit Court, many companies will be able to take advantage of the aforementioned phase-in period whereby companies can deem their products as "DRC Conflict Undeterminable" in their Conflict Minerals Report if they are unable to determine the origin of their minerals definitively through their due diligence methods.[28] This phase-in period is two years for larger reporting companies, and four years for smaller reporting companies.[29]

The breakdown of the procedure through which Section 1502 was implemented represents the procedural drawback of attempting to hold companies accountable for their use of conflict minerals through specialized corporate disclosure requirements. The implication of the above timeframe is that for many companies, a final determination on the status of an issuer's mineral use is not required until 2018. This means that effective transparency on conflict minerals use will not be achieved until almost a decade after the requirement was conceived in Section 1502. The long and drawn-out process of achieving effective transparency through SEC corporate disclosure requirements has a particularly unfortunate impact in the human rights context because of the on-the-ground effect. An issuer subject to reporting requirements may be unknowingly participating in the sale of conflict minerals and funding of armed groups in the DRC and adjoining countries up to the point at which they obtain adequate information on their supply chain. For a conflict that has killed approximately 5.4 million people since 1996, procedural lags could translate into hundreds of thousands more lives lost.[30] The use of specialized corporate disclosure to hold U.S. companies accountable for their potential complicity in human rights abuses committed in the DRC and adjoining companies will thus take a greater amount of time to produce real results than other potential accountability routes.

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[27] Cory Hester, *SEC Commissioners Issue Joint Statement on Status of Conflict Minerals Rules*, WESTLAW CAPITAL MARKETS DAILY BRIEFING, 2014 WL 1672573 (Apr. 29, 2014).

[28] *SEC Fact Sheet*, *supra* note 7.

[29] *Id.*

[30] *See Eastern Congo*, ENOUGH PROJECT, http://www.enoughproject.org/conflicts/eastern_congo (last visited Jan. 28, 2015) ("Since 1996 the International Rescue Committee has calculated that approximately 5.4 million people have died from war-related causes.").

The Global Online Freedom Act ("GOFA") is a more recent effort to address corporate accountability for human rights issues overseas, targeting companies within the ICT sector operating in countries with restrictions on their citizens' use of the Internet. GOFA was first introduced in Congress in 2006, in response to a disclosure of information by Yahoo! in China that led to the imprisonment of Chinese dissidents by the Chinese government.[31] It was thus passed to address those U.S. companies who "for the sake of market share and profits . . . have compromised both the integrity of their product and their duties as responsible corporate citizens" by providing information to sovereign governments that are used to enforce questionable human rights practices with regard to freedom of expression and privacy.[32]

The SEC rule envisioned by GOFA is similar to the rule pursuant to Dodd-Frank Section 1502 because it aims to hold corporate entities operating within restrictive human rights environments accountable through a human rights due diligence requirement to produce greater transparency. Section 201 of the latest version of the Global Online Freedom Act proposes an amendment to the Securities Exchange Act of 1934 to create a rule requiring companies operating in State Department-designated "Internet-restricting countries" to include in their annual report "[c]ompany policies applicable to the company's internal operations that address human rights due diligence through a statement of policy . . . ."[33] This policy must outline clear expectations for all parties under the company's control operating in relevant countries.[34] The policy and corresponding human rights due diligence must also be made publicly available and adequately communicated, and must be "independently assessed by a third party to demonstrate compliance in practice . . . ."[35] Companies who participate in good standing with a multi-stakeholder initiative that requires its corporate members to undergo independent third party assessments are exempted from

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[31] *See* Ian Brown, *The Global Online Freedom Act*, 14 GEO. J. OF INT'L. AFF. 153, 154 (2013) (discussing the evolution of the Global Online Freedom Act).

[32] *See id.* at 155 (quoting GOFA sponsor Representative Christopher Smith's remarks on the proposed legislation).

[33] H.R. 491, 113th Cong. § 201 (1st Sess. 2013).

[34] *Id.*

[35] *Id.*

the reporting requirement.[36]

The SEC rule proposed by GOFA, like the conflict minerals rule, requires that due diligence conforms to an internationally recognized framework and is assessed through an independent third party audit for compliance. GOFA requires that the statement of policy addressing the company's human rights due diligence must be "consistent with applicable provisions of the Guidelines for Multinational Enterprises issued by the Organization for Economic Co-operation and Development . . . ."[37] In the Guidelines for Multinational Enterprises, the Organization for Economic Co-operation and Development ("OECD") provides general guidelines for companies operating in multiple jurisdictions on operating their business in a manner consistent with internationally recognized standards.[38] Some relevant provisions within the Guidelines are those that obligate companies to "[s]eek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations" and "[c]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."[39] The OECD Guidelines are currently the only such government-approved code of conduct on the international level.[40] Through these provisions, the OECD Guidelines are a means of providing ICT companies with some guidance on conducting human rights due diligence and formulating policies for their operations as required by the proposed GOFA rule. However, the provisions are very broad and simply cover human rights due diligence in general. Notably, the Guidelines make no mention of due diligence mechanisms or policies that are specific to the cross-section between freedom of expression and companies operating within restrictive regimes.[41]

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[36] *Id.*

[37] *Id.*

[38] *See* ORG. FOR ECON. COOPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 31 (2011) [hereinafter OECD GUIDELINES] (providing background on the history and purpose of the Guidelines).

[39] *Id* at 31.

[40] *Id.* at 3.

[41] *See* Anupam Chander, *Googling Freedom,* 99 CALIF. L. REV. 1, 8 (2011) ("Corporate responsibility codes such as the United Nations Global Compact and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises rarely mention free speech outside a general call for corporations to respect human rights.") (footnotes omitted).

Much like the use of the OECD Guidelines guides company policymaking, the requirement for an independent third-party assessment for compliance invokes the involvement of outside actors in helping change policy and practice in the ICT sector with regard to human rights. GOFA specifically references the expertise of multi-stakeholder initiatives that promote "the rule of law and the adoption of laws, policies, and practices that protect, respect, and fulfill freedom of expression and privacy."[42] GOFA defers to multi-stakeholder initiatives to provide specific guidelines for conducting human rights due diligence and shaping policies to deal with freedom of expression and privacy issues, as evidenced by its safe harbor provision, exempting companies who participate in these initiatives from the reporting requirements under the SEC rule.[43] The Global Network Initiative ("GNI") is referenced by name in GOFA as a multi-stakeholder initiative, providing guidance to companies for developing adequate strategies to address human rights in Internet-restricting countries.[44]

For its part, the GNI requires all of its members to conduct human rights impact assessments to obtain information on potential freedom of expression and privacy risks to users.[45] The human rights impact assessments would be conducted each time a company reviews and revises its procedures for dealing with government requests for user information; enters a new market; evaluates potential partners, investments and suppliers; or develops new technologies, products, and services.[46] The GNI's Implementation Guidelines outline the methods that should be used for human rights assessments focused on threats to freedom of expression and privacy, including one that the actors' companies should consult with and prioritize their use of assessments.[47] The GNI also requires its company participants to undergo an

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42 H.R. 491, 113th Cong. § 201, at 21 (1st Sess. 2013).

43 *See id.* ("An Internet communications service company that operates in an Internet-restricting country shall not be required to include the annual report of the company information described in paragraph (1) if the company includes in the annual report of the company [proof of participation in a multi-stakeholder initiative").

44 *Id.*

45 Global Network Initiative, *Implementation Guidelines for the Principles on Freedom of Expression and Privacy*, at 2, https://globalnetworkinitiative.org/implementationguidelines/index.php.

46 *Id.*

47 *Id.*

independent third-party assessment of the type of method required under the proposed reporting requirement, which would supervise the work of an independent assessor who is selected by the company from a pool of assessors approved by the GNI board.[48] While multi-stakeholder initiatives, like the GNI, are more constructive than the OECD Guidelines in providing a framework for companies falling under the reporting requirements in GOFA Section 201,[49] these initiatives are completely voluntary and private, and thus, do not carry the same weight as do legal obligations for companies.[50]

The reporting requirements envisioned in GOFA present some of the same challenges as those contained in Dodd-Frank Section 1502, highlighting major gaps in using specialized corporate disclosure as a means of addressing human rights issues faced by U.S. issuers overseas.[51] The first of these gaps is that transparency is only the first step in a much larger process needed to hold companies accountable and change corporate practice with regard to human rights abuses committed within foreign jurisdictions. The end result of specialized corporate disclosure requirements under Dodd-Frank and GOFA would be greater availability of information about company practices that might otherwise be difficult for consumers and investors to obtain. Legislation requiring corporate disclosure on human rights issues is supported by the belief that one way to change company policies is to encourage transparency and to encourage invested actors to develop campaigns to bring the human rights issues to public attention, to the point where companies are incentivized to change their policies and practices.[52] However, the mere availability of information will not change a company's decision-making practices or policy, unless the information is harnessed as part of a larger movement. Without activist efforts to seek out information

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48 *See* Global Network Initiative, *Governance, Accountability and Learning Framework*, https://globalnetworkinitiative.org/governanceframework/index.php (outlining the responsibilities of the Board and participating companies in regards to the independent assessment process).

49 OECD GUIDELINES, *supra* note 38, at Sec. 201.

50 *See* Chander, *supra* note 41, at 38 ("[T]he private initiative lacks the legal sanctions available to enforce a statutory obligation.").

51 Dodd–Frank Act, *supra* note 1.

52 Telephone Interview with Michael Samway, Adjunct Assistant Professor, Georgetown University (Nov. 8, 2013).

reported pursuant to SEC rules and published on a company's website, along with the use of this information as part of a concerted effort to change industry practice, transparency itself will not hold companies accountable.

The SEC rule outlined in GOFA arguably addresses the transparency conundrum more effectively than Dodd-Frank Section 1502. The final rule on conflict minerals requires only that relevant companies conduct due diligence on their supply chain and publish a determination on the origin of their minerals based on this method.[53] As a result, although the rule requires an approved process for compliance by the company to obtain and publish information on its supply chain, it leaves it up to consumers and investors to use this information to lobby the industry to change its sourcing practices. It is perhaps for this reason that so many NGOs and investor groups have published information on how and why their consumers and investors can use this information and their leverage to give companies a reason to change their practices.[54] The GOFA rule, on the other hand, contains elements that attempt to bridge the gap between transparency and changes in industry practice. Section 201 not only requires companies to report due diligence methods but also develop and report company policies that outline expectations for employees, as communicated to business partners and "reflected in operational policies and procedures necessary to embed it throughout the company."[55] This additional component in the proposed reporting requirement in GOFA obligates companies to operationalize their due diligence by setting forth a corresponding

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[53] *See SEC Fact Sheet, supra* note 7 (stating that the final steps in reporting under the SEC final rule on conflict minerals are the due diligence determination and the independent private sector audit).

[54] *See, e.g.*, Sasha Lezhnev and Alexandra Hellmuth, *Taking Conflict Out of Consumer Gadgets: Company Rankings on Conflict Minerals 2012*, ENOUGH PROJECT, Aug. 2012, at 2, 8 (including a ranking of major efforts of major electronics companies in tracing their supply chains and calling on consumers to ask "companies to publish company policies on this issue, join industry and multistakeholder groups . . . and invest in cleanly sourced minerals from the region that benefit local communities."); *see also Conflict Minerals Program Overview*, RESPONSIBLE SOURCING NETWORK, http://www.sourcingnetwork.org/minerals/ (last visited Jan. 31, 2015) (including a list of common products that may contain conflict minerals and encouraging investors to research company policies on conflict minerals and check proxy statements for resolutions on risk analysis or policies to clean up supply chains).

[55] H.R. 491, 113th Cong. § 201, at 19 (1st Sess. 2013).

change in company policy. GOFA, thereby, addresses the problematic sole requirement of transparency by at least requiring companies to take the next step needed to change their practices.

The second gap in specialized disclosure to address corporate complicity in human rights abuses is the danger of "naming and shaming" with regard to information published on company websites, as mandated by both the final rule on conflict minerals and the GOFA requirement.[56] The threat of naming and shaming, which is typically done largely through the work of NGOs, is meant to raise awareness on human rights issues, as well as to draw attention to those corporate actors that these NGOs believe are not making an adequate effort to address such issues in their operations.[57] Naming and shaming, when done properly, is effective in bringing international human rights issues to the public's attention because it allows advocacy groups to create something that resonates with the broader public and connects the individual to the human rights issue by way of a product or service provided by a brand she recognizes.[58] Naming and shaming is, oftentimes, the only effective way of bringing about change in company practice because companies avoid complicity with human rights abuses to prevent reputational damage. However, the naming and shaming approach also lends itself to the danger of antagonizing companies into creating short-term, media-driven solutions, instead of incentivizing companies to affect long-term policy changes. This approach could potentially run against the stated goals of reporting requirements in GOFA and Dodd-Frank to incentivize the relevant industries to provide products and services that consumers can trust. In situations where it is possible for a company to engage with a foreign market while complying with human rights standards at home in the United States, the naming and shaming approach could cause a company to disengage instead of cleaning up its practices.

Naming and shaming was effective in shaping the industry's

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[56] *See, e.g.*, H.R. 491, 113th Cong. §201, at 17–18, 21 (1st Sess. 2013) (requiring companies to include detailed information regarding their human rights due diligence on their public company websites).

[57] *See* Veale, *Is There Blood on Your Hands-Free Device?*, *supra* note 5, at 532 (explaining the role and techniques used by NGOs for corporate accountability on conflict minerals).

[58] *See* Telephone Interview with Michael Samway, Adjunct Assistant Professor, Georgetown University (Nov. 8, 2013) (discussing effective practices in working to change company policies).

positive response to tackling conflict minerals in supply chains. In 2009, Thaisarco Smelting and Refining Co. was referenced in a report by the NGO Global Witness as a company "involved in the trade in minerals from eastern DRC" and was thus publicly implicated in helping to fund the regional conflict.[59] Thaisarco suspended all purchases of tin ore from the DRC, partially in response to Global Witness's report.[60] This decision was made in spite of the fact that Thaisarco had already been in the process of developing a certification scheme to clean up its supply chain at the time the Global Witness report was released.[61] In announcing its decision, Thaisarco stated that "'although [it was] acting entirely lawfully, the threat of misleading and bad publicity remain[ed] for anyone who participate[d] in DRC tin trade.'"[62] Had Thaisarco continued with its efforts to create a viable certification scheme, it might have been able to pursue profit opportunities in the DRC while also cleaning up its supply chain and strengthening its commitment to human rights in the region. This scenario represents the aforementioned situation where the company can engage with the foreign market while complying with human rights standards at home. Antagonizing a company into eliminating their profit opportunities to avoid being shamed publicly through the use of reported information will not encourage companies to develop policies that reflect greater respect for human rights. Instead, such antagonizing could cause companies to exit the foreign market completely.

Although naming and shaming was a corporate concern even before Dodd-Frank Section 1502 came into play, it was clearly a relevant concern for companies during the drafting and formation of the final rule. A number of companies submitting comments to the proposed rule objected to the broad classification of cassiterite, wolframite, gold and tantalum as "conflict minerals" without distinguishing those that did not contribute to human rights abuses in DRC.[63] One industry commentator argued that such a

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59 GLOBAL WITNESS, COMPANIES INVOLVED IN THE TRADE IN MINERALS FROM EASTERN DRC 1 (2009).

60 Veale, *Is There Blood on Your Hands-Free Device?*, *supra* note 5, at 533.

61 *Id.*

62 *Id.* (citing Joe Bavier, *Thaisarco Suspends Congo Tin Ore Purchases,* REUTERS (Sept. 18, 2009), *available at* http://af.reuters.com/article/investingNews/idAFJOE58H09S20090918).

63 *See* Conflict Minerals Release, *supra* note 6, at 16 (noting that a number of corporate commentators to the proposed SEC rule believed that a blanket

classification would impose "'a reputational taint on these entire industries' and 'makes it highly challenging for companies in these industries to communicate effectively with investors and the public.'"[64] A similar objection was made to the provision in the proposed rule requiring companies to characterize their products as "not having been found to be 'DRC conflict free.'"[65] In *National Association of Manufacturers, et al. v. Securities and Exchange Commission*, Plaintiffs argued that "[t]he compelled disclosure is intended to serve as a 'scarlet letter.'"[66] These challenges by industry actors demonstrate a concern among companies that the naming and shaming that may result from the information required to be disclosed in the SEC rule may lead to a misinformed and unnecessarily negative perception of the company. Where a company has made active efforts to clean up its supply chain and has the potential to engage in the market without contributing to human rights abuses, it should be encouraged to continue its efforts to implement changes in its policy. In this sense, a naming and shaming strategy that causes companies to withdraw from the market for fear of reputational damage instead of changing long-term company practice is counterproductive.

The fear of public naming and shaming exists in the realm of ICT companies operating in Internet-restricting regimes as well. The public shaming of Yahoo! after it provided information to the Chinese government, which led to the arrest of dissident journalist Shi Tao, sparked a general call to evaluate the practices of Internet service providers working in restrictive markets.[67] Responding to public attention drawn by the incident, Yahoo! made an explicit commitment to the human rights of its users around the world through collective action, compliance practices, information restrictions, and government engagement.[68] Although Yahoo! did

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classification of the four minerals as "conflict minerals" would unfairly stigmatize the entire industry).

64 *See id.* (quoting Niotan II's letter regarding the proposed rule).

65 Nat'l Ass'n of Mfrs. v. SEC, No. 13-cv-635 (RLW), 2013 WL 4010670 (D.D.C. 2013) (quoting Plaintiff's brief) (internal quotations omitted).

66 *Id.* (quoting Plaintiff's brief) (internal quotations omitted).

67 *See generally* HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM": CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP (2006), *available at* http://www.hrw.org/reports/2006/china0806/china0806webwcover.pdf.

68 *See id.* at Appendix VII: Liu Xiaobo's Letter to Yahoo!, at 114, *available at* http://www.hrw.org/reports/2006/china0806/15.htm#_Toc142395845 (outlining Yahoo!'s commitment made to U.S. Congress in February 2006 following the Shi Tao hearings in regard to freedom of expression and privacy in

make a number of efforts to deliver on its commitment to promote human rights in Internet-restricting countries, it quickly transformed aspects of its operations in China, culminating with its handing over business operations serving the Chinese market to the Chinese company Alibaba.[69] This response is similar to the approach taken by the aforementioned Thaisarco and Global Witness, where the company responded defensively to public naming and shaming by withdrawing from markets that drew risk and negative attention to its brand. Although in the Yahoo! case, unlike that of Thaisarco, there may not have been any way to engage in the market without contributing to human rights abuses, in both cases the citizens of foreign countries continued to be subject to these abuses.

If specialized corporate disclosure is meant to change company policies in the long-term and facilitate the creation of effective industry-wide practice in dealing with human rights issues, it must not use an approach that antagonizes companies into pulling out of the markets in question to avoid addressing these issues. Withdrawal from these markets could create a vacuum to be filled by corporations of other nations that do not have the accountability measures used to restrict U.S. companies.[70] In those circumstances where it is possible for the U.S. company to implement policies, or at least make an effort to change policies in the long-term that would allow them to continue to engage with the foreign market while also upholding high human rights standards, they should be encouraged to do so. As stated in a critique of GOFA's ultimate effects in China, "U.S. legislators may want to consider whether it is better to have U.S. or Russian, Indian, North Korean, and Japanese IT companies enabling Beijing's Internet restriction."[71]

China).

[69] *See* Catherine Shu, *Yahoo China Shuts Down Its Web Portal,* TECHCRUNCH (Sept. 1, 2013), *available at* http://techcrunch.com/2013/09/01/yahoo-china-shuts-down-its-web-portal/ (discussing the process by which Yahoo operations in China were taken over and eventually phased out by Alibaba Group); *see also* Our *Work: Shi Tao*, AMNESTY INT'L, *available at* http://www.amnestyusa.org/our-work/cases/china-shi-tao (arguing that Yahoo did little to "send a clear message to Chinese authorities that censorship would not be tolerated" before ending its operations in China).

[70] *See* Chander, *Googling Freedom, supra* note 41, at 37 ("[If] U.S. corporations do choose to abandon repressive states, this abandonment will leave a hole for other companies, both indigenous and foreign, to fill; such companies may evince less concern for human rights than their departing U.S. competitors.").

[71] William J. Cannici, Jr., *The Global Online Freedom Act: A Critique of Its*

Although an approach favoring engagement where possible is not one that is universally supported, it is worth considering where such engagement would potentially be mutually beneficial to the company and the citizens within the jurisdiction of the markets served.

Finally, the third gap that is evinced by the experience of Dodd-Frank's specialized disclosure and that which is called for in GOFA is that the prevailing view of corporate decision-making is still meant to serve profit maximization and shareholder benefit. Many state corporate statutes provide corporate managers a level of discretion in decision making, allowing them to take into account ethical and community-related considerations, even where the decision may not directly benefit shareholders and promote corporate profit.[72] However, as stated by Anupam Chander, legal scholar on globalization and technology, "many academics and courts would still encourage or require managers to justify these extra-shareholder considerations as redounding ultimately to benefit the shareholder's pocketbook."[73] Thus, although human rights considerations may be part of the calculus for companies operating overseas, current corporate governance of U.S. companies indicates that profit-making objectives are still the driving force behind corporate decision-making.

As delineated previously, Dodd-Frank Section 1502 was challenged on numerous grounds related to its alleged irrelevance to shareholder interests. In response to challenges mounted against the SEC final rule by industry actors, the SEC has responded that although compliance with the rule might come at a cost borne by shareholders and could negatively impact allocative efficiency, indirect benefits would be received in the form of greater investment by socially conscious investors and consumers.[74] The envisioned increase in demand would be based

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Objectives, Methods, and Ultimate Effectiveness Combating American Businesses that Facilitate Internet Censorship in the People's Republic of China, 32 SETON HALL LEGIS. J 123, 144 (2007).

[72] *See* AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE, § 2.01(b) (1994) ("Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of the business").

[73] Chander, *Googling Freedom, supra* note 49, at 22.

[74] Nat'l Ass'n of Mfrs. v. SEC, No. 13-cv-635 (RLW), 2013 WL 4010670, at 21 n.14 (D.D.C. 2013) (citing 77 Fed. Reg. at 56,350).

on the idea that investors would not want to invest in companies that cannot disclose their minerals to be "DRC Conflict Free" because of reputational risk realized by the publishing of such information. David M. Lynn, former Chief Counsel of the Division of Corporation Finance at the SEC, opined that "this seems to be a circular argument given that, for the most part, the issuer would not have been required to perform due diligence on the supply chain and provide any disclosure regarding the use of conflict minerals absent Section 1502 of the Dodd-Frank Act."[75] Additionally, the percentage of investors and consumers that use their leverage for socially responsible investment decisions regarding conflict minerals is not yet significant enough to effect large-scale change in corporate policies.

Although similar arguments have been made by opponents of the reporting requirements set forth in GOFA, human rights issues faced by ICT companies are more relevant to shareholder value and traditional economic concerns than those faced by companies using conflict minerals. This is because there are fewer degrees of separation between investors and consumers and the human rights abuses committed by foreign governments, making ICT company policy with regard to human rights a more relevant consideration. The victims of human rights abuses in the DRC are less directly related to the supply chain or consumer base of U.S. companies selling products containing conflict minerals. In contrast, a victim whose data is provided to a repressive government by their Internet service provider is the consumer himself. This distinction, where the consumer may "stand as the unwilling victim of a tort rather than the beneficiary of a freely made contract[,]" has led to the argument that "unadulterated profit maximization – including acting in a manner indifferent to the political freedoms of one's patrons – becomes unethical."[76] Therefore, the traditional argument that SEC specialized corporate disclosure related to human rights concerns is beyond the scope of the SEC's traditional rulemaking authority may not carry as much weight in the freedom of expression and privacy context.

The particular impact of corporate operations on human rights

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[75] David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 336 (2011).

[76] Chander, *supra* note 41, at 25 (exploring the arguments of the "Global Shareholder Wealth Maximization" view of the social responsibility of corporations).

abuses thus appears to be more direct with Internet privacy than the sale of conflict minerals, supporting the need for a corporate accountability mechanism for ICT companies operating in restrictive regimes. However, many important players argue that an SEC rule is not the best means of achieving corporate accountability in the Internet privacy realm, as it might have been for conflict minerals. These actors argue that SEC rules should not be incorporated into GOFA because the SEC is already overburdened and should not be dealt yet another challenge in determining the materiality for investors of online privacy issues.[77] Although experts such as Bennett Freeman, of SRI mutual fund company Calvert Investments, believe that a materiality argument exists for investors with regard to Internet privacy, they believe that GOFA is much less likely to become law with the SEC reporting requirement because of the burden on the SEC.[78] In October 2013, Mary Jo White, Chairman of the SEC, addressed the issue in discussing the future of corporate disclosure requirements in a speech at the 2013 Leadership Conference for the National Association of Corporate Directors.[79] In her speech, the Chairman identified the danger of "information overload" to investors that may occur where too much required disclosure could make it very difficult for investors to sort through the information to determine what is relevant to their decision-making.[80] Many actors involved in the development of corporate accountability mechanisms for ICT companies took this as an indication that SRIs and NGOs should choose their battles carefully when it comes to supporting the promulgation of further SEC rules.[81] Although this paper does not delve into the merits of the various other options for corporate accountability aside from specialized corporate disclosure, it should be noted that this position does exist and helps validate the concern that passage of the corporate disclosure required by

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[77] Telephone Interview with Bennett Freeman, Senior Vice President for Sustainability Research and Policy, Calvert Investments (Nov. 21, 2013).

[78] *Id.*

[79] *See generally* Mary Jo White, Chairman, Sec. & Exch. Comm'n, Address at the National Association of Corporate Directors – Leadership Conference 2013: The Path Forward on Disclosure (Oct. 15, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.UscKJBaTPjA.

[80] *Id.* (discussing the concern for the disproportionate number of SEC disclosure requirements leading to an "'information overload'").

[81] Telephone Interview with Bennett Freeman, *supra* note 77.

proposed GOFA rule may, like the Dodd-Frank rule, be a challenging and unlikely possibility.

The experience of Dodd-Frank Section 1502 and the current pitfalls in using specialized corporate disclosure to hold companies accountable for human rights abuses under foreign governments teaches us a number of lessons about the efforts needed to make the proposed GOFA disclosure requirements effective. In general, there must be a more integrated approach to conducting due diligence and using the obtained information to affect change in practices industry wide. Accordingly, a greater number of major companies, relevant NGOs, investors, governments and other industry actors should become involved in multi-stakeholder initiatives to forge a more cooperative approach to complying with the standards set forth by reporting requirements. Legislators and other administrators involved in the implementation of both Dodd-Frank Section 1502 and, potentially, GOFA Section 201 recognize the utility of an established and uniform framework to guide due diligence expectations.[82] In issuing its final rule on conflict minerals, the SEC stated they were persuaded by the commentators that using "a nationally or internationally recognized due diligence framework . . . will enhance the quality of an issuer's due diligence, promote comparability of the Conflict Minerals Reports of different issuers, and provide a framework by which auditors can assess an issuer's due diligence."[83] The growing support by lawmakers for a designated due diligence framework is evidenced by the Safe Harbor provision in GOFA exempting issuers participating in multi-stakeholder initiatives from reporting separately on human rights due diligence. The need for an established due diligence framework provided through multi-stakeholder initiatives is further underscored by the recognition of legislators involved in the drafting of Dodd-Frank and GOFA specialized corporate disclosure that the SEC will not be able to verify much of the due diligence methods used by companies on its own.[84]

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[82] *See* Conflict Minerals Release, *supra* note 6 (noting that the proposed rule was modified to include adherence to the established OECD framework); *see also* H.R. 491, 113th Cong. § 201 (1st Sess. 2013) (including a Safe Harbor provision exempting issuers participating in good standing with a multi-stakeholder initiative from the human rights due diligence reporting requirements).

[83] *See* Conflict Minerals Release, *supra* note 6, at 12 (discussing the new rule pursuant to Dodd-Frank Section 1502 relating to the use of conflict minerals).

[84] Telephone Interview with Shelly Han, Policy Advisor for Economics,

Greater involvement in multi-stakeholder initiatives is also important to the effective use of specialized corporate disclosure to change ICT company practices because it encourages cooperation between the various actors involved. Cooperation among NGOs, investors, governments, companies, and other actors means more dialogue among stakeholders to "exchange feedback to develop operational approaches to address adverse human rights risks and impacts."[85] Unlike the "naming and shaming" approach, the exchange of ideas and increased dialogue between invested actors will give companies positive reinforcement and assist in the development of strategies that can be replicated in each country in which a company chooses to operate. Cooperative and mutually beneficial relationships with other involved actors would prevent companies from withdrawing from certain markets for fear of bad publicity, and would instead empower them to put in place long-term policy changes. Michael Samway, former deputy general counsel of Yahoo!, recognized this benefit of participation in multi-stakeholder initiatives in stating that "[f]orming institutional partnerships and developing relationships of trust in those stakeholder communities allows for confidential consultations and input invaluable to companies in mitigating risk and in creating value."[86] In this way, a cooperative grouping of stakeholders lends itself to ICT companies providing more reliable services to its consumers. The dialogue facilitated by multi-stakeholder initiatives thus better serves the objectives of specialized corporate disclosure for ICT companies.

Finally, greater participation in multi-stakeholder initiatives would speed up the process of complying with disclosure requirements in GOFA. Recalling the procedural implementation of the SEC final rule promulgated through Dodd-Frank, it could take many years before a finalized rule is passed containing the

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Environment, Technology and Trade, Comm'n on Sec. & Cooperation in Eur. (Nov. 5, 2013).

85 INT'L CORP. ACCT. ROUNDTABLE, "KNOWING AND SHOWING": USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE 24 (2013) [hereinafter "KNOWING AND SHOWING"] (discussing multi-stakeholder initiatives (MSIs) developed to address concerns relating to human rights).

86 Michael A. Samway, *Business, Human Rights, and the Internet: A Framework for Implementation*, *in* HUMAN DIGNITY AND THE FUTURE OF GLOBAL INSTITUTIONS 295 (Mark P. Lagon & Anthony Clark Arend eds.,, 2014) [hereinafter *Business and Human Rights*] (discussing the role of corporations in assessing human rights risks that arise).

requirements outlined in GOFA. Considering that GOFA itself has not yet been passed, the timeframe for implementation of disclosure requirements for ICT companies is indefinite. Companies that join or have already joined multi-stakeholder initiatives like the GNI will in the meantime be establishing a practice for conducting human rights due diligence without any legal duty being placed on them. As noted by a lead congressional staffer involved in the drafting of GOFA, the hope among legislators supporting GOFA is that even before reporting requirements are elaborated, "Internet users and companies feel responsible for what is going on," so that real progress can be made in changing industry practice.[87] Multi-stakeholder initiatives serve the dual purpose of providing a framework for the reporting requirements in GOFA and reducing the compliance burden placed on companies.

A second recommendation for more effective use of specialized corporate disclosure for ICT companies would be increasing shareholder and investor awareness on freedom of expression and privacy issues faced by the ICT sector. Greater investor awareness would lead to more informed investment decisions that would utilize the information used in reporting to influence company decision making to make more socially conscious decisions. The movement for Socially Responsible Investment (SRI) has spearheaded this concept, with the understanding that company decision making is still focused on the derived benefit of the shareholder and investor. Thus, changing the considerations for corporate decision making "comes down to whether consumers want to use these products, and whether shareholders want to invest in these companies."[88] Changing the corporate calculus through investor activism has centered on the challenge of proving the materiality of human rights issues in corporate operations.[89] The standards outlined by the SEC and U.S. Supreme Court in determining whether a disclosure is material is ambiguous and flexible, but places emphasis on the "reasonable investor."[90] SRI

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87 Telephone Interview with Shelly Han, *supra* note 84.

88 Telephone Interview with Bennett Freeman, *supra* note 77.

89 *See* "KNOWING AND SHOWING," *supra* note 85, at 14 ("The second part of the disclosure process requires a subjective filtering of information related to required disclosure items through a screen of materiality, with the goal of ensuring that public disclosures are useful to investors and shareholders in assessing current and prospective corporate performance.").

90 *Id.* (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)

groups and NGOs have made efforts in support of both the conflict minerals and ICT reporting requirements to show that the reported information, though under the umbrella of human rights, is material to a growing number of investors.[91] More shareholder awareness and activism efforts like these will change the expectations of the "reasonable investor" and will improve the leverage of socially responsible investors to change corporate decision making. As summarized by Bennett Freeman, "the more we can demonstrate the materiality of the issues we raise, the more ground we will gain, both with the companies we are determined to influence and the investors we seek to attract."[92]

Greater shareholder and investor awareness will incentivize companies to focus on the long-term impact of their operations in other countries. The corporate response to negative media attention on human rights issues has typically been a "window-dressing" strategy to create a temporary resolution to the problem without actually changing company practice in the long-term.[93] The real incentive to change long-term policy, however, will come from the marketplace.[94] Changes in shareholder and investor decisions thus have more impact on a company's reputation, because it goes directly to the heart of the company's quantitative value. Greater investor awareness and shareholder activism drawing upon the availability of reported information will be the push companies need to adopt significant changes that will be enforced in the long run. In the context of the ICT sector, investors and NGOs pushing for responsible corporate policies in line with the GOFA reporting requirements recognize that "[s]tanding up against government censorship and surveillance requirements that are in clear violation of international human rights norms is an

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for the proposition that "[a] fact is material if 'there is a substantial likelihood that a reasonable investor would consider it important' and would have viewed the information 'as having significantly altered the 'total mix' of information made available.'").

91 *See, e.g. Letter from SIF and ICCR*, *supra* note 18 (discussing the investor materiality argument for conflict minerals disclosure requirements and commenting on SEC proposed rule).

92 *ICONS Interview Series: Rebecca Adamson of First Peoples Worldwide Interviews Bennett Freeman of Calvert Investments,* GREEN MONEY J. (Spring 2013), http://www.greenmoneyjournal.com/spring-2013/icons/ [hereinafter *ICONS Interview Series*] (discussing corporate governance as one of Calvert's top priorities for the year).

93 Telephone Interview with Michael Samway, *supra* note 52.

94 Telephone Interview with Shelly Han, *supra* note 84.

investment in the Internet's long-term sustainability and long-term value."[95] In this way, increased investor awareness and advocacy can "contribute to . . . investment performance by challenging company directors and managements to focus on the long-term drivers of success."[96]

In addition to incentivizing companies to implement long-term change in policy, greater awareness and activism among shareholders will also lead to changes in practice industry-wide. Once the message has been sent to corporate management that human rights information required in SEC specialized corporate disclosure requirements is material to investors and an important part of their investment decisions, companies will be forced to change their practices or risk their market share.[97] Therefore, investor activism and emphasis placed on socially responsible decision-making creates industry-wide competition and differentiates those companies who change their practices from those who do not. A shift toward socially responsible investment will create a new set of expectations for companies, based on accountability and transparency.[98] During the drafting of the final SEC rule on conflict minerals, a commentator argued that compliance with a final rule could put all corporate actors within the industry on a level playing field in terms of expectations.[99] In order for this to occur, compliance with the reporting requirements must be combined with shareholder activism to change expectations of companies on the industry level.

A third and final recommendation for the effective use of specialized corporate disclosure requirements to hold companies accountable for complicity in human rights abuses overseas is the need for more substantial internal initiatives within companies

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95 *See* MACKINNON, CONSENT OF THE NETWORKED, *supra* note 18, at 178 (noting how companies have been building corporate responsibility and sustainability strategies).

96 *See ICONS Interview Series, supra* note 92 (discussing how shareholder advocacy and public policy engagement can contribute to Calvert's investment performance).

97 Telephone Interview with Bennett Freeman, *supra* note 77.

98 *See* Conflict Minerals Release, *supra* note 6, at 8 (noting the suggestion of a commentator to the proposed rule that the final rule on reporting could prepare "companies to meet a new generation of expectations for greater supply chain transparency and accountability.").

99 *See id.* ("This commentator argued that such benefits could include eliminating any competitive disadvantage to companies already engaged in ensuring their conflict mineral purchases do not fund conflict in the DRC . . . .").

themselves. This internal mechanism should be based on a team of professionals employed by the company who are primarily responsible for looking into potential human rights challenges that may be faced each time a company takes an action outside of the United States. The team should be a permanent fixture in the company and should consist of senior-level operational support.[100] Most importantly, the internal structure should involve legal analysis of relevant laws in theory and practice, and how these laws as they currently exist will impact a company's operations. The analysis would not simply be based on an effective public relations or marketing strategy; thus allowing companies to implement strategies to understand the human rights issues beyond the regulatory framework of each country in which they operate.[101] It has been argued that a major flaw with "corporate social responsibility" departments that exist in almost every major company today is their failure to incorporate the various human rights challenges encountered by their business into the company's day-to-day operations.[102] An initiative particular to business and human rights would therefore be one that specifically addresses legal frameworks in other countries and how they impact a company's work. Employing a business and human rights program, like that developed by Yahoo! and described in this paper, should be done separate from the corporate social responsibility objectives involving public relations and marketing. According to Michael Samway, this differentiation helps to prevent efforts from being diminished by the perception "that those corporate functions have less input and decision-making authority on critical legal, regulatory, and policy decisions."[103]

Internal initiatives will also provide a framework that can be applied with modification to each country or situation in which companies face human rights challenges. Similar to the argument

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100 *See Business and Human Rights*, *supra* note 86, at 304 (arguing that "relying on regular board decisions is less effective than positioning that responsibility in the hands of a dedicated team that has executive officer input and support and the ability to act with sufficient speed, understanding, and resources.").

101 Telephone Interview with Michael Samway, *supra* note 52.

102 *See Business and Human Rights*, *supra* note 86, at 299–300 (arguing that the corporate social responsibility approach has not kept up with the new challenges faced by potential human rights abuses in foreign jurisdictions that come as a direct result of a company's products or services, with particular reference to the ICT sector).

103 *Id.* at 305.

previously made regarding the benefits of participation in multi-stakeholder initiatives, internal initiatives on business and human rights would allow companies to develop and implement a standardized set of practices with regard to tackling human rights issues in their operations. The difference here, obviously, is that the framework would largely come from within as opposed to being significantly informed by NGO and investor members of a multi-stakeholder group. Both approaches serve the important function of organizing the policies and procedures necessary to embed the practice of addressing human rights into the company itself, an approach supported by internationally agreed-upon principles of the corporate responsibility to respect human rights.[104] It is important for companies to establish their own internal mechanisms by which they carry out due diligence and address human rights in their business so they can adequately prepare themselves to comply with reporting requirements while also catering their efforts to the unique identity of their company. It is certain to take a significant amount of time before any rule for ICT companies is implemented (if it becomes law at all), but if companies take steps and modify their practices with reporting in mind they will be better prepared to comply with reporting requirements if they are made into law. Aside from the demands of potential reporting requirements, an established commitment and protocol dedicated to business and human rights developed internally will also allow "more advanced planning and thoughtfulness in crisis anticipation, resolution, and avoidance."[105]

An example of an internal initiative within the business and human rights framework in the ICT sector is that of Yahoo!'s Human Rights Impact Assessment ("HRIA") in Vietnam, which was created in the wake of the reputational damage to the company caused by the Shi Tao incident in China. Yahoo! has publicly committed to carrying out HRIAs to investigate human rights and rule of law in countries in which they operate.[106] These assessments are used to decide whether to operate within a given

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104 *See* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 113 (Kwame Anthony Appiah ed., 2013) ("An explicit policy commitment is necessary in order to embed the responsibility to respect human rights within a company.").

105 *Business and Human Rights*, *supra* note 86, at 305.

106 *Human Rights Impact Assessments,* YAHOO! BUS. & HUM. RTS. PROGRAM, http://www.yhumanrightsblog.com/blog/our-initiatives/human-rights-impact-assessments/.

country.[107] Additionally, HRIAs could be used to decide whether to develop a strategic plan to designate potential human rights risks and devise strategies to deal with those risks should they arise in the course of operation. The company considers a number of factors when completing an HRIA that allow it to assess the human rights impacts of entering a new market or introducing a new product.[108] Yahoo! completed an internally driven HRIA in Vietnam before deciding whether to offer country-specific services to Vietnamese users.[109] In carrying out the assessment, Yahoo! sought to look beyond the regulatory framework of a country codified in law and communicated with relevant actors on the ground to determine how the framework was applied in practice.[110] Based on the information obtained in its HRIA, Yahoo! determined that Vietnam's restrictive practices toward Vietnamese bloggers posed a threat to the company's ability to be able to uphold rights to freedom of expression and privacy to their users if they were to operate within the country.[111] As a result, it decided to instead set up Vietnamese-language operations in Singapore, where less risk existed.[112]

Yahoo!'s HRIA initiative in Vietnam represents another benefit of internal company initiatives that could supplement the use of specialized corporate disclosure to change industry practice. Yahoo!'s HRIA is particularly important to note because it was a preventative measure used to measure the risk environment with regard to human rights if Yahoo! were to open up operations in Vietnam. These types of internal company initiatives are consistent with the goals of the proposed GOFA requirements because they provide a means by which companies can avoid

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107 *Id.*

108 *See id.* (listing the relevant factors considered in conducting HRIAs, including: "international legal and moral foundations for the rights to freedom of expression and privacy"; "[t]he general human rights landscape in the relevant country or region, with a particular focus on rule of law, free expression and privacy"; "local laws about free expression and privacy"; "Yahoo!'s business and product plans for entry into the market"; "[t]he existing and potential benefits of the Internet to the citizens of the relevant region or country"; "[r]isk scenarios based on Yahoo!'s products and operations"; "recommendations to avoid or mitigate those risks"; and "[recommendations] to protect and promote free expression and privacy [in the relevant region or country].").

109 Telephone Interview with Michael Samway, *supra* note 52.

110 *Id.*

111 MACKINNON, CONSENT OF THE NETWORKED, *supra* note 18, at 181.

112 *Id.*

future complications by applying due diligence measures *prior* to entering new markets. If companies like Yahoo! are able to determine beforehand whether the risks are too great to enter a market, it could avoid discovering unfavorable information later on if and when corporate disclosure is required. Consequently, with the proposed GOFA reporting requirements and greater SRI interest in mind, it is a smart business decision for companies to take preventative measures to ensure they will not be negatively impacted further down the line. Even without mandated disclosure, companies still have a strong incentive to employ preventative practices because those companies that have already begun to implement such programs have a competitive advantage where providing similar products. The preventative approach is not only practical but also in line with multi-stakeholder initiatives and recognized international models for business and human rights that are becoming increasingly popular and are cited with growing frequency among lawmakers.[113]

Specialized corporate disclosure is an important and growing mechanism by which U.S. companies operating in the context of weak human rights regimes can be held accountable for their actions abroad. The experience and major criticisms of the specialized corporate disclosure requirements enforced regarding conflict minerals can inform us of the prospects for other potential specialized corporate disclosure initiatives, including the human rights due diligence requirement in Section 201 of the Global Online Freedom Act. Based on a comparison of both rules and the industries that would fall under their purview, the major barriers to implementation of the specialized corporate disclosure approach as it stands are: transparency achieved through reporting is only the first step of the accountability mechanism; the danger that "naming and shaming" could antagonize companies to carry out less-than-ideal solutions to avoid public shaming; and the

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[113] *See* GLOBAL NETWORK INITIATIVE, IMPLEMENTATION GUIDELINES FOR THE PRINCIPLES ON FREEDOM OF EXPRESSION AND PRIVACY 2 (2012) (stating that participants should use HRIAs to "identify circumstances when freedom of expression and privacy may be jeopardized or advanced, and develop appropriate risk mitigation strategies . . ." including when "[e]ntering new markets, particularly those where freedom of expression and privacy are not well protected."); *see also* RUGGIE, *supra* note 104, at 112–13 (explaining that the corporate responsibility to respect enshrined in the United Nations Guiding Principles on Business and Human Rights requires that companies assess potential human rights impacts and address potential adverse impacts through prevention and mitigation).

corporate decision making calculus is still focused on profit maximization and shareholder benefit. Despite these obstacles, specialized corporate disclosure can still be used as an effective means of holding companies accountable for human rights impacts overseas and to change industry practice to be more in line with concerns of business and human rights, but it must be part of a coordinated approach involving all affected actors. To that end, it is recommended that there be greater company participation in multi-stakeholder initiatives aimed at implementing business and human rights strategies in ICT companies, greater investor awareness and shareholder activism at work to use information published to change company decision making, and greater internal initiatives within the companies themselves to bolster the company's commitment to human rights.