

THE CONFLICT MINERALS EXPERIMENT

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

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

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INTRODUCTION

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

Much of the debate, though, has been based on conjecture. The heated back-and-forth that has filled op-ed pages and scholarly journals largely took place before the statute had been given any time to operate.⁴ Both those who argued that the legislation was a costly mistake and those who defended it as a judicious counterweight to humanitarian atrocities linked to armed groups in the Congo region implicitly or explicitly staked their claims on conceptions of what would be contained in the SEC-mandated filings.⁵ Neither side, however, had the benefit of actual compliance data to support its position.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code) [hereinafter Dodd-Frank Act].

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

³ See *infra* Part I.C.

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

⁵ Unlike the merits of the legislation, the direness of the situation in the Democratic Republic of the Congo is uncontroversial. For an overview of the humanitarian crisis, see Alexandra L. Nelson, Note, *The Materiality of Morality: Conflict Minerals*, 2014 *UTAH L. REV.* 219, 221–23 (2014).

After years of guessing, this information is now available. In 2014, companies began filing reports pertaining to their use of conflict minerals. This Article closely analyzes these disclosures, and, in so doing, brings empirical evidence to bear on the conflict minerals controversy. I present data on the scope and nature of compliance based on a quantitative review of the over 1300 conflict minerals filings and a qualitative review of each filing submitted by a company included in the S&P 500 Index (over 200 of these companies, which are among the largest in the United States, submitted such disclosures).⁶

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

The data suggest that the costs and benefits of the rules were grossly exaggerated by those debating their merits. Costs were likely much lower than estimated because far fewer companies actually filed reports than estimated and many filers complied in a largely superficial manner suggestive of minimal effort.⁷

Benefits likewise appear muted. The conflict minerals rules borrow from the human rights world the regulatory strategy of “naming and shaming,” which, like the securities law trope, “sunlight is the best disinfectant,” is the concept that exposure of reprehensible conduct eliminates it.⁸ In this case, the rules are designed to inspire shareholder and consumer blowback against companies sourcing from militarized mines; those experiencing this

⁶ For a description of the S&P 500, see *S&P 500*, S&P DOW JONES INDICES, <http://us.spindices.com/indices/equity/sp-500> (last visited Dec. 16, 2014). The data on the scope of compliance include, among other things, information on how many companies made filings pursuant to the rules and the size and type of companies that filed reports. See *infra* Part II.A. The data on the nature of compliance include information on the steps companies took to meet their obligations. See *infra* Part II.B.

⁷ See *infra* Part II.B.

⁸ See Woody, *supra* note 4, at 1344. This is not the first time corporations have been subject to naming-and-shaming efforts. See generally David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). For a more general discussion of naming and shaming in the human rights context, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 309 & n.178 (2011); Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT'L L. 1079, 1082–86 (2013). The idea of using the securities laws to address social goals was given its most comprehensive and elegant defense in Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). The conflict minerals provision is one of several social disclosure laws in the Dodd-Frank Act. The statute also called for disclosures regarding mine safety, extractive industry practices, and pay disparities. See Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 584–85 & n.319 (2012).

reprisal are then expected to change their practices.⁹ This logic, while appealing on its face, depends on the ability of concerned individuals to discern which companies are “conflict free” and which are indirectly supporting human rights violations through their activities. But this cannot be done through inspection of the first-year filings. The vast majority of companies reached the same conclusion (that they have not been able to determine the source of their minerals) and conducted their diligence in nearly the same way (the centerpiece of nearly every effort was a simple supplier survey). This is not the stuff of sell orders and picket signs.

The failure of the conflict minerals rules to illuminate corporate sourcing practices is an indictment of Section 1502 and the regulations thereunder; it also provides a warning for those contemplating likeminded rules. While this is problematic in and of itself, it also serves as a broader caution. Supply chain transparency is a global concern. Other countries are considering similar regulations for conflict minerals, and “name and shame” is seen as a way to address other ills in the supply chain, including deplorable working conditions, slavery, and child labor.¹⁰ The failure of the conflict minerals rules suggests that in their current form they should not serve as the template for future efforts.

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

There are also problems with how this regulatory approach was implemented. Rather than recognizing and responding to the challenges of applying naming and shaming in this space, regulators created a prolix rule structure that maps poorly onto the name-and-shame goal. For example, information about where a company’s conflict minerals are processed into commercially usable forms is central to discerning whether it is sourcing from militarized mines. But many companies reasonably interpreted SEC language to require that they report such data only when they could precisely

⁹ See Dodd-Frank Act § 1502(a) (expressing Congress’s concern about human rights violations in the Congo); Woody, *supra* note 4, at 1344.

¹⁰ See DALE NEEF, THE SUPPLY CHAIN IMPERATIVE: HOW TO ENSURE ETHICAL BEHAVIOR IN YOUR GLOBAL SUPPLIERS 26–27 (2004); Jamie D. Prenkert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 VAND. J. TRANSNAT’L L. 451, 483–84 (2014); Steven Nakasone, *Name and Shame is New Supply Chain Game*, RETAILING TODAY (Jan. 5, 2012), <http://www.retailingtoday.com/article/name-and-shame-new-supply-chain-game>. Several states are also considering, or have already approved, conflict minerals regulation. See Prenkert & Shackelford, *supra* at 482–83; Nakasone, *supra*.

identify the processing facilities linked to their individual products; companies plausibly claimed that they could not do so and chose not to reveal this information. Drafting oversights like this greatly contributed to the flimsy reports.

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

While all of this provides fodder for those who have sought the rules' repeal,¹¹ I argue that it is too early to abandon the experiment. Though companies claimed ignorance as to many things, a large number also claimed to have identified—even if they chose not to reveal—the facilities used to process the conflict minerals in their supply chains.¹² In addition, third-party audits coordinated through a nongovernmental institutional framework have certified a number of processing facilities as conflict free, and these audits and certifications are ongoing.¹³

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

¹¹ See, e.g., CHRIS N. BAYER, DODD-FRANK SECTION 1502: POST-FILING SURVEY 2014 40 (2014), <http://www.payson.tulane.edu/sites/default/files/content/files/TulanePaysonS1502PostFilingSurvey.pdf> (describing results of a survey of affected companies in which the most frequent recommendation by those surveyed was repeal); Ben DiPietro, *Investor Groups Back Conflict Minerals Law*, WALL ST. J.: RISK & COMPLIANCE J. (May 31, 2013, 3:58 PM), <http://blogs.wsj.com/riskandcompliance/2013/05/31/investor-groups-back-conflict-minerals-law> (describing business groups seeking repeal); Benjamin Goad, *Wall Street Reform Rule Said to Increase Violence in Congo*, THE HILL (May 21, 2013, 7:58 PM), <http://thehill.com/regulation/business/301075-wall-street-reform-rule-said-to-have-increased-congolese-violence> (quoting Congressman Mick Mulvaney calling the rules “absurd” and arguing for repeal); John Kester, *SEC Should Not Handle Conflict Minerals Reports: Commissioner*, WALL ST. J.: CFO J. (Oct. 17, 2014, 4:15 PM), <http://blogs.wsj.com/cfo/2014/10/17/sec-should-not-conflict-minerals-reports-commissioner> (quoting SEC Commissioner Daniel Gallagher Jr. as arguing for repeal).

¹² See *infra* text accompanying notes 158, 171–175.

¹³ See *infra* text accompanying notes 49–53.

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

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

I. LAWMAKING, LITIGATION, AND CONTROVERSY

A. *The Conflict Minerals Legislation and Implementing Regulations*

Section 1502 of the Dodd-Frank Act, which sets forth the legislative framework for the conflict minerals rules, is a dense provision with an awkward structure. The core of the legislation consists of three parts: an introduction followed by two subsections.¹⁴ The introduction instructs the SEC to write regulations mandating that companies annually disclose whether conflict minerals that are necessary to their products originate from the Democratic Republic of the Congo (DRC) or an adjoining country. Where this is the case, the SEC is to require that companies submit a report pertaining to their use of such minerals.¹⁵

The subsections focus on the contents of this report. The first subsection instructs the SEC to require that companies include a description of the due diligence measures they have undertaken to determine “the source and chain of custody” of the conflict minerals in their supply chains.¹⁶ According to this provision, the SEC must also mandate that these reports be independently audited.¹⁷ The second subsection continues in the same vein. The SEC is instructed to call on companies to name their reports' auditors and to describe (i) all of their products that are not conflict free,¹⁸ (ii) “the facilities

¹⁴ See 15 U.S.C. § 78m(p)(1)(A) (2012).

¹⁵ See *id.* A company's products includes both things it manufactures itself and things that it contracts to manufacture. *Id.* § 78m(p)(1)(A)(ii).

¹⁶ *Id.* § 78m(p)(1)(A)(i).

¹⁷ *Id.*

¹⁸ A product is not conflict free if it contains or may contain minerals sourced from mines controlled by armed groups in the Congo region. See *id.* § 78m(p)(1)(A)(ii).

used to process the conflict minerals” in their products, (iii) “the country of origin” of such conflict minerals, and (iv) “the efforts to determine the mine or location of origin” of such conflict minerals “with the greatest possible specificity.”¹⁹ In addition to SEC reporting, the legislation also requires that this information be made available on the disclosing corporation’s website.²⁰

The key phrase, “conflict minerals,” includes tantalum, tin, tungsten, and gold.²¹ These materials are ubiquitous in our everyday lives. They are key components in everything from electronics, including smartphones and computers, to household tools and jet engine components.²²

Though the law’s language is somewhat muddled, Congress’s ambition with respect to these commercial building blocks is clear. The intent is for companies, first, to figure out if their products contain conflict minerals and, second, to determine from where those minerals originated. Congress also wants companies to report how they perform this exercise, and, for those companies potentially sourcing conflict minerals from militarized mines, to list the products that contain such minerals. It seems that the goal is to create a “bad actors” list of companies and their products that would provide the impetus for socially minded shareholders and customers to put pressure on companies to change their sourcing practices. This pressure would, in turn, inspires companies to stop doing business with militia-controlled mines, which would lessen the funding available to armed groups and thereby temper the violence in the region.²³ Such an approach is commonly referred to in the human rights arena as “naming and shaming”—bad actors are brought

¹⁹ § 78m(p)(1)(A)(ii).

²⁰ § 78m(p)(1)(E).

²¹ Dodd-Frank Act § 1502(e)(4)(A)–(B). Tantalum, tin, and tungsten are not specifically listed in the legislation. Rather, it refers to the mineral ores from which they are extracted (coltan, cassiterite, and wolframite, respectively), as well as derivatives thereof. *See id.*; Conflict Minerals, 75 Fed. Reg. 80,948, 80,950 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249b). Though tantalum, tin, tungsten, and gold are commonly referred to as “conflict minerals” in commerce and in the debate, they are technically metals. *See* DEP’T OF COMMERCE, DEPARTMENT OF COMMERCE REPORTING REQUIREMENTS UNDER § 1502(D)(3)(C) OF THE DODD FRANK ACT WORLD-WIDE CONFLICT MINERAL PROCESSING FACILITIES 2 (2013), <http://www.ita.doc.gov/td/forestprod/DOC-ConflictMineralReport.pdf> [hereinafter COMMERCE REPORT]; ENOUGH PROJECT & GRASSROOTS RECONCILIATION GRP., A COMPREHENSIVE APPROACH TO CONGO’S CONFLICT MINERALS 3 (2009), available at <http://www.enoughproject.org/files/Comprehensive-Approach.pdf> [hereinafter A COMPREHENSIVE APPROACH]. Despite the “conflict” label attached to these materials, relatively small percentages come from the Congo: 15 to 20 percent of tantalum, 6 to 8 percent of tin, 2 to 4 percent of tungsten, and less than 1 percent of gold come from the region. A COMPREHENSIVE APPROACH, *supra* note 21, at 15.

²² *See* Conflict Minerals, 75 Fed. Reg. at 80,950.

²³ Much in the same vein, one of the legislation’s authors, Senator Richard Durbin, has argued that the “transparency” elicited through the rules “will allow consumers and investors to know which companies source materials more responsibly in DRC and will hopefully persuade the industry to finally create clean supply chains out of Congo.” Press Release, Senator Richard Durbin, Statement on U.S. District Court Decision Regarding Conflict Minerals (July 7, 2013), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-statement-on-us-district-court-decision-regarding-conflict-minerals>.

to light in the hopes that they will change their behavior to avoid public condemnation.²⁴

This congressional intent is reflected in the SEC's regulations, which the agency finalized on August 22, 2012.²⁵ These rules add a great deal of nuance to the legislation's somewhat underdeveloped foundation. In fact, while Congress appears to have sacrificed clarity for brevity, the SEC made the opposite mistake and created a Byzantine and, at times, circular rule structure.

Just as the legislation instructs, under the SEC rules, the first step is for companies to determine whether conflict minerals are necessary to their products.²⁶ If not, companies need not file anything.²⁷ If a company uses conflict minerals in its products, however, it is required to conduct a so-called "reasonable country of origin inquiry" (RCOI) with respect thereto.²⁸ If the RCOI does not reveal the presence of conflict minerals from the Congo region, the company need only file a Form SD, which must "briefly" describe the company's RCOI process and its conclusion.²⁹ The company also needs to post this information on its website.³⁰

If the RCOI reveals that the company is sourcing conflict minerals from the Congo region or gives the company reason to believe that this is the case, then the company is required to conduct due diligence "on the source and chain of custody" of such minerals.³¹ If, based on its due diligence, the company determines that its minerals are *not* actually from the Congo region, then it must briefly describe its due diligence efforts, its RCOI, and its conclusion on both a Form SD and its website.³²

The SEC declined to give guidance on what specifically constitutes an RCOI.³³ It said only that such an inquiry needs to be in good faith.³⁴ The agency did say, however, with respect to due diligence, that such efforts must be audited³⁵ and must conform to "a nationally or internationally recognized due diligence framework."³⁶

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

²⁴ See Katzenstein, *supra* note 8, at 1083–86.

²⁵ Conflict Minerals, 77 Fed. Reg. at 56,276.

²⁶ See Form SD, OMB No.: 3235-0697, at Item 1.01(a), <http://www.sec.gov/about/forms/formsd.pdf> [hereinafter Form SD].

²⁷ *Id.* at Item 1.01(a)–(b).

²⁸ *Id.* at Item 1.01(a).

²⁹ *Id.* at Item 1.01(b). The SEC also set up a parallel process for companies that are using conflict minerals derived from recycled or scrap sources. It is not necessary to fully describe this added layer of complexity. Most importantly, products that solely contain minerals from recycled or scrap sources are considered DRC conflict free. *Id.* at Item 1.01(c)(4).

³⁰ *Id.* at Item 1.01(b).

³¹ *Id.* at Item 1.01(c).

³² See *id.*

³³ Conflict Minerals, 77 Fed. Reg. at 56,311–12.

³⁴ Form SD, *supra* note 26, at Item 1.01(a).

³⁵ *Id.* at Item 1.01(c)(1)(ii).

³⁶ *Id.* at Item 1.01(c)(1)(i).

Affected and High-Risk Areas (OECD Guidance).³⁷ Though the document is over 100 pages including appendices, the guidance therein boils down to a five-step due diligence process.³⁸

Step one instructs companies to “[e]stablish strong company management systems.”³⁹ According to the *OECD Guidance*, this step includes adopting a conflict minerals policy and making it available to suppliers and the general public, setting up an internal conflict minerals diligence team, establishing a system for mapping the conflict minerals supply chain, incorporating a supply chain policy in agreements with suppliers, and establishing a grievance mechanism for those wishing to report sourcing violations.⁴⁰

The second step is to “[i]dentify and assess risk in the supply chain.”⁴¹ This means “assessing the due diligence practices” of the smelters and refiners of conflict minerals in the corporate supply chain by comparing their practices against those specified for such entities in the *OECD Guidance*.⁴² Smelters and refiners are the key processing facilities for conflict minerals.⁴³ It is at these locations where the mineral ores are transformed into commercially valuable forms.⁴⁴

Third, companies are to “[d]esign and implement a strategy to respond to identified risks.”⁴⁵ This includes reporting the findings of the risk assessment in step two to senior management, as well as implementing a plan to mitigate supply chain risks.⁴⁶ A risk-mitigation plan would outline a procedure for dealing with suppliers or others in their supply chain that have shoddy supply-chain diligence or are suspected of sourcing from militarized mines.⁴⁷ Companies can respond to these supply-chain risks by, for example,

³⁷ Conflict Minerals, 77 Fed. Reg. at 56,281 & n.55; ORG. FOR ECON. COOPERATION & DEV., *OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS* (2d ed. 2013), <http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf> [hereinafter *OECD GUIDANCE*]. The OECD drafted this document over several years in collaboration with eleven African nations with the goal of “help[ing] companies respect human rights and avoid contributing to conflict through their mineral sourcing practices.” *Id.* at 3. States are not legally bound to comply. *Id.* at 4. For additional background, see LEVIN ET AL., *MINERAL SUPPLY CHAIN DUE DILIGENCE AUDITS AND RISK ASSESSMENTS IN THE GREAT LAKES REGION 8–9* (2013), http://www.sz.com/files/upload/Conflict_Minerals_Resource_Center/___Supply_Chain-Due_Diligence_Audits_and_Risk_Assessments_in_the_Great_.pdf.

³⁸ *OECD GUIDANCE*, *supra* note 37, at 17–19.

³⁹ *Id.* at 17.

⁴⁰ *Id.*

⁴¹ *Id.* at 18.

⁴² *See id.* at 42.

⁴³ *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-01-1163T, SEC CONFLICT MINERALS RULE: INFORMATION ON RESPONSIBLE SOURCING AND COMPANIES AFFECTED 1, 12* (2013) [hereinafter *GAO REPORT*].

⁴⁴ *See id.*

⁴⁵ *OECD GUIDANCE*, *supra* note 37, at 18.

⁴⁶ *See id.* at 18.

⁴⁷ *See id.*

temporarily suspending trade until the issues are resolved or ending their relationship with the implicated party.⁴⁸

Fourth, companies must “[c]arry out [an] independent third-party audit” of the smelters and refiners in their supply chain.⁴⁹ While this seems like a lot to ask of individual companies, the Organization for Economic Cooperation and Development (OECD) also advises that the audits can be centralized and coordinated through an institutional mechanism.⁵⁰ The key institutional mechanism for doing so is the Conflict-Free Smelter Program (CFSP), an industry-led initiative that coordinates third-party audits of smelters and refiners and publicly shares the results on its website.⁵¹ This auditing process is the key contribution of the Conflict-Free Sourcing Initiative (CFSI), an organization of industry members concerned about conflict minerals, which through this and other efforts described below has had a major impact on the nature of conflict mineral compliance.⁵² The OECD has blessed CFSI audits as an alternative to individual efforts.⁵³ Fifth and finally, as called for by the rules themselves, the *OECD Guidance* instructs companies to publicly report on their supply chain due diligence.⁵⁴

After compliance with all of the steps outlined above if companies are unable to rule out the possibility that their conflict minerals are from the Congo region, they must file a “Conflict Minerals Report” that includes a laundry list of items.⁵⁵ A company’s report must describe its due diligence and include an independent auditor’s certification thereof.⁵⁶ The auditor is to confirm (i) that the company inquiry conformed in all material respects to a “recognized due diligence framework” (meaning the *OECD Guidance* as it is the only one), and (ii) that the diligence that the company actually conducted matches what it described in its Conflict Minerals Report.⁵⁷

Aside from a description of audited due diligence, the rules require, in language quite close to that of Section 1502 itself, that companies include a list of products “that have not been found to be ‘DRC conflict free.’”⁵⁸ A product would fall into this category if a company could not determine that it

⁴⁸ See *id.*

⁴⁹ *Id.* at 19, 47.

⁵⁰ See *id.* at 50–51.

⁵¹ See *Conflict-Free Smelter Program*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/conflict-free-smelter-program/> (last visited Nov. 11, 2014); ORG. FOR ECON. COOPERATION & DEV., DOWNSTREAM IMPLEMENTATION OF THE OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 46 (2013), available at <http://www.oecd.org/mne/mne/DDguidanceTTTpi lotJan2013.pdf> [hereinafter *OECD STUDY*]. For an overview of CFSI audits, see LEVIN ET AL., *supra* note 37, at 27–33 tbl.5.

⁵² See *About the Conflict-Free Sourcing Initiative*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/about/> (last visited Nov. 23, 2014).

⁵³ See *OECD STUDY*, *supra* note 51, at 47.

⁵⁴ *OECD GUIDANCE*, *supra* note 37, at 19.

⁵⁵ See Form SD, *supra* note 26, at Item 1.01(c).

⁵⁶ See *id.* at Item 1.01(c)(1).

⁵⁷ *Id.* at Item 1.01(c)(1)(ii)(A).

⁵⁸ *Id.* at Item 1.01(c)(2).

did not contain conflict minerals from militarized mines.⁵⁹ This awkward double negative means that products must be listed, unless a company affirmatively determines that they are conflict free. The SEC did not prescribe that companies note the brand names or model numbers of their products; rather, it gave companies the flexibility to describe their goods however they deem appropriate.⁶⁰

The overall list, however, must be labeled as that of products having “not been found to be ‘DRC conflict free.’”⁶¹ In addition, companies are required to note “the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determine the mine or location of origin with the greatest possible specificity.”⁶²

Finally, the rules include a ramp-up period. For the first four years for smaller companies, and the first two years for others, those companies that cannot reach a firm conclusion as to the source of their conflict minerals need not list their products as “having not been found to be ‘DRC conflict free.’”⁶³ Instead, they can list them as “DRC conflict undeterminable,” and specify the efforts they are currently undertaking or plan to undertake to “mitigate the risk that [their] necessary conflict minerals benefit armed groups.”⁶⁴ In addition, during the ramp-up period, those companies taking advantage of this category need not have their due diligence efforts audited.⁶⁵

Securities regulation is known for its complexity and the conflict minerals rules are no exception. The rules branch off in a number of directions

⁵⁹ See *id.* at Item 1.01(c)(2), (d)(4).

⁶⁰ See Conflict Minerals, 77 Fed. Reg. at 56,317–18, 56,323.

⁶¹ Conflict Minerals, 77 Fed. Reg. at 56,281. Despite its significance, this labeling requirement is only explicitly included in the instructions to Form SD. Rather than specify any particular label, the body of the rules only requires a *description* of products “that have not been found to be ‘DRC conflict free.’” Form SD, *supra* note 26, at Item 1.01(c)(2). The instructions pertaining to a temporary safe-harbor, see *infra* notes 63–65 and accompanying text, however, explain that, after a grace period during which the rules allow companies to claim “conflict undeterminable” status, “a registrant with products manufactured or contracted to be manufactured that are ‘DRC conflict undeterminable[]’ must provide a description of those products as having not been found to be ‘DRC conflict free.’” Form SD, *supra* note 26, at Instruction 2 to Item 1. That the requirement is only included with a discussion of the safe harbor implies that it relies on a more direct statement elsewhere, but one does not exist. It is also only by implication that companies with products that are not conflict free are required to label them in the above manner even during the grace period.

⁶² Form SD, *supra* note 26, at Item 1.01(c)(2).

⁶³ The rules never explicitly state that “conflict undeterminable” is a required label during the two-year grace period, though the SEC interprets them as saying as much. In the adopting release, the SEC says that the “final rule permits . . . issuers [unable to determine the source of their conflict minerals] to describe their products containing those conflict minerals as ‘DRC conflict undeterminable.’” Conflict Minerals, 77 Fed. Reg. at 56,321.

⁶⁴ See Form SD, *supra* note 26, at Item 1.01(c)(1)(iii).

⁶⁵ *Id.* at Instruction 2 to Item 1.01. Also, for products that are deemed “conflict undeterminable,” companies only need to provide facility and country of origin information “if known.” *Id.* at Item 101(c)(2)(i). It is hard to see what this adds, though, because companies would never be able to provide information they did not know.

and contain multiple layers of compliance obligations. Despite the complexity, however, the SEC remained true to Congress's instructions. At their core, the rules require that companies conduct diligence into their conflict mineral supply chains and report not only on the nature of their diligence but also on their findings, including the extent to which conflict minerals from militarized mines make it into their products.

B. *The Conflict Minerals Rules in Court*

The ink was barely dry on the final rules when the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Business Roundtable challenged them in federal court.⁶⁶ They raised three primary arguments: the SEC abused its discretion in failing to include a *de minimus* exception for those companies that make scant use of conflict minerals;⁶⁷ the agency failed to conduct an appropriate cost-benefits analysis;⁶⁸ and finally, the requirement to describe products as "having not been found to be 'DRC conflict free'" was a free-speech violation.⁶⁹

The District Court for the District of Columbia found none of these arguments compelling.⁷⁰ But on appeal, the Circuit Court held that the challenged labeling requirement violates corporate free-speech rights.⁷¹ The court imposed a heightened standard of review on this mandate because, unlike traditional securities regulations, the labeling provision at issue here was not aimed at preventing consumer deception.⁷² According to the court, the rule failed the elevated review because the SEC did not provide evidence that it could have accomplished its goal of connecting company products with conflict minerals through less restrictive means.⁷³ The court noted that companies could have been permitted, for example, to use their own language to describe products that contain conflict minerals rather than words specifically dictated to them.⁷⁴

A subsequent case called the ruling into doubt,⁷⁵ but the Circuit Court has recently reaffirmed its decision.⁷⁶ In addition, to be consistent with the Circuit Court's position, the SEC has, since the original ruling, stayed the

⁶⁶ See Christopher M. Matthews, *Business Groups Sue to Block "Conflict Minerals" Rules*, WALL ST. J.: CORRUPTION CURRENTS (Oct. 22, 2012, 4:38 PM), <http://blogs.wsj.com/corruption-currents/2012/10/22/business-groups-sue-to-block-conflict-minerals-rules/>.

⁶⁷ See Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43, 61 (D.D.C. 2013), *rev'd in part*, 748 F.3d 359 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. U.S. Dep't. of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

⁶⁸ See *id.* at 55.

⁶⁹ *Id.* at 73.

⁷⁰ See *id.* at 82.

⁷¹ Nat'l Ass'n of Mfrs., 748 F.3d at 373.

⁷² See *id.* at 371–72.

⁷³ See *id.* at 372.

⁷⁴ See *id.* at 372–73.

⁷⁵ See Am. Meat Inst. v. U.S. Dep't. of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

⁷⁶ Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 521 (D.C. Cir. 2015).

requirement that companies, when appropriate during the phase in period, describe their products as “conflict undeterminable.”⁷⁷ Despite overbroad headlines,⁷⁸ the court’s determination and the SEC’s conforming redaction have little practical significance. Firms must still list all products that contain conflict minerals that may have originated from militarized mines—that portion of the regulations remains in place—but they need not use any particular label to describe them. Rather, companies are free to take the court up on its suggestion and use their own language to describe their list of products.

C. *The Conflict Minerals Rules and Policy Controversy*

As is often the case when rules are challenged, this litigation was policy-driven. While the conflict minerals rules have been subject to numerous critiques, the primary point of contention has involved their potential compliance costs. In its final rules, the SEC estimated initial costs to be \$3 to \$4 billion with yearly costs thereafter ranging between approximately \$200 and \$600 million per year.⁷⁹ And others had estimated that costs would be even higher.⁸⁰ The National Association of Manufacturers, for instance, estimated initial costs ranging from \$8 to \$16 billion.⁸¹ The sheer number of companies required to comply was one driver of these estimates. The SEC thought that approximately 6000 companies would file Form SDs and that 75% of those companies would also file Conflict Minerals Reports.⁸² Supply chain complexity was the other source of cost concerns. Many companies are numerous steps removed from the actual mining of the conflict minerals in their products.⁸³ The SEC and others predicted that for these companies to ascertain the source of such minerals, they would have to undertake a great deal

⁷⁷ Keith F. Higgins, U.S. Sec. & Exch. Comm’n, Joint Statement on the Conflict Minerals Decision (Apr. 29, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994#.VBYPV_k7tcY.

⁷⁸ See, e.g., Jonathan H. Adler, *D.C. Circuit Finds SEC’s Conflict Mineral Disclosure Rule Violates First Amendment*, WASH. POST: VOLOKH CONSPIRACY (Apr. 15, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/15/d-c-circuit-finds-secs-conflict-mineral-disclosure-rule-violates-first-amendment/>.

⁷⁹ See Conflict Minerals, 77 Fed. Reg. at 56,354.

⁸⁰ See, e.g., CHRIS N. BAYER, A CRITICAL ANALYSIS OF THE SEC AND NAM ECONOMIC IMPACT MODELS AND THE PROPOSAL OF A 3RD MODEL IN VIEW OF THE IMPLEMENTATION OF SECTION 1502 OF THE 2010 DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 35 (2011), http://www.payson.tulane.edu/sites/default/files/3rd_Economic_Impact_Model-Conflict_Minerals.pdf; Letter from Nat’l Ass’n of Mfrs. to the SEC, Initiatives under the Dodd-Frank Act, Special Disclosures Section 1502 (Conflict Minerals), File No. S7-40-102, 24–27 (Mar. 2, 2011), available at <http://www.sec.gov/comments/s7-40-10/s74010-183.pdf> [hereinafter NAM Letter].

⁸¹ See NAM Letter, *supra* note 80, at 24–27.

⁸² See *id.* at 56,355–56.

⁸³ See generally JOHN PRENDERGAST & SASHA LEZHNEV, THE ENOUGH PROJECT, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN (2009), <http://www.enoughproject.org/files/minetomobile.pdf> (outlining the conflict mineral supply chain).

of costly sleuthing.⁸⁴ Some also argued that despite companies' best efforts, accurate and comprehensive tracking might prove elusive.⁸⁵

Another prominent concern had to do with unintended consequences. The *New York Times* and *Wall Street Journal* both ran op-eds expressing the worry that the legislation was causing a *de facto* embargo of the Congo region.⁸⁶ This possibility was even the subject of a congressional hearing in 2013.⁸⁷ The editorials argued that companies had stopped buying conflict minerals from the region because that was easier than determining whether minerals sourced from there originated in lawful or militarized operations.⁸⁸ According to these critics, legitimate local miners, who are often poor individuals and families, have thus been unintended victims of Section 1502.⁸⁹

A final critique focused on the administrative and procedural side of the legislative mandate rather than its substance. Much has been written about the propriety of delegating human rights rulemaking to the SEC for inclusion in securities law filings, which typically include solely information related to the finances and financial prospects of reporting firms.⁹⁰ Even SEC Chairwoman Mary Jo White criticized the legislation for assigning to the SEC, an expert in financial regulation, the task of drafting rules aimed to shame companies into acting in conformity with a social goal.⁹¹

⁸⁴ See Conflict Minerals, 77 Fed. Reg. at 56,350–54 (analyzing the potential cost of the rules).

⁸⁵ See, e.g., RESOLVE, TRACING A PATH FORWARD: A STUDY OF THE CHALLENGES OF THE SUPPLY CHAIN FOR TARGET METALS USED IN ELECTRONICS 1, 3, 5 (2010), http://www.resolve.org/site-eiscm/files/2011/02/Tracing_a_Path_Forward-A_of_the_of_the_Supply_Chain_for_Target_Metals_Used_in_Electronics.pdf; OECD STUDY, *supra* note 51, at 59–60; IPC-Ass'n Connecting Elec. Indus., Comment Letter on SEC Proposed Rule on Conflict Minerals, 2, 19–20 (Mar. 2, 2011), <https://www.sec.gov/comments/s7-40-10/pdf>.

⁸⁶ See Aronson, *supra* note 4; *Africa and 'Obama's Embargo': A Provision of Dodd-Frank Boomerangs on the Continent's Poor*, WALL ST. J., July 18, 2011, <http://online.wsj.com/news/articles/SB10001424052748703956604576109773538681918> [hereinafter *Obama's Embargo*]; see also Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 351 (2012–13) (describing a potential boycott of the Congo region); Laura E. Seay, *What's Wrong with Dodd-Frank 1502?* 14 (Ctr. for Global Dev., Working Paper No. 284, 2012), http://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf (outlining *de facto* embargo argument).

⁸⁷ See Kevin J. Kelley, *US Congress: Conflict Minerals Law Fuels War in DR Congo*, THE EAST AFRICAN, May 25, 2013, <http://www.theeastafrican.co.ke/news/US-Congress-minerals-law-fuels-war-in-DR-Congo-/12558/1862724/-/12iws3sz/-/index>; Majority Staff of H. FIN. SERVS. COMM. MAJORITY STAFF, 113TH CONG., MEMO. MONETARY POLICY AND TRADE SUBCOMM. HEARING ON “THE UNINTENDED CONSEQS. OF DODD-FRANK’S CONFLICT MINERALS PROVISION” (Comm. Print 2013), http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/052113_Monetary_and_Trade_Subcommittee_Hearing.pdf.

⁸⁸ See Aronson, *supra* note 4; *Obama's Embargo*, *supra* note 86.

⁸⁹ See Aronson, *supra* note 4; *Obama's Embargo*, *supra* note 86.

⁹⁰ See, e.g., Woody, *supra* note 4, at 1342, 1345; Goad, *supra* note 11.

⁹¹ See Mary Jo White, Chairwoman, U.S. Sec. & Exch. Comm'n, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture at Fordham Law School: The Importance of Independence (Oct. 3, 2013), <http://www.sec.gov/News///Speech/1370539864016#.VBYovvk7tcY>.

Supporters of the rules counter all of these concerns. They argue that while the SEC may not be perfectly suited for this task, it can do much to further human rights objectives.⁹² They also contend that concerns about costs, feasibility, and unintended consequences are overstated.⁹³ Rather, they see the conflict minerals rules as a reasonable response to rampant human rights abuses.⁹⁴

With equal passion on both sides, it is easy to focus on the wrangling and forget that the debate has taken place without the most important piece of information—the corporate filings themselves. The cost and feasibility of compliance, whether companies are abandoning the region, what the consequences are of relying on a securities regulator to enact human rights legislation—the companies' first-year disclosures shed tremendous light on all of these issues.

Insights from company filings also have wider implications. U.S. states, including California, Maryland, and Massachusetts, have adopted or are considering adopting conflict minerals regulations.⁹⁵ The European Union,⁹⁶ Canada,⁹⁷ and China,⁹⁸ among others,⁹⁹ are also considering similar rules. Moreover, conflict minerals are not the only thing potentially buried in corporate supply chains—sweatshops may be there too. One reason for the rancor over conflict minerals may be that the rules could serve as precedent for the use of securities laws to impose transparency upon other corners of the supply chain that companies might prefer to keep in the shadows.¹⁰⁰ The content of the corporate filings reveals a great deal about whether Section 1502 and the SEC rules animating them should serve as the model for a raft of new measures or be dismissed as folly.

⁹² See, e.g., Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 115–18 (2013).

⁹³ See, e.g., Dipietro, *supra* note 11; *Myth Buster: The Conflict Minerals Provision*, GLOBAL WITNESS (June 2, 2014), <http://www.globalwitness.org/library/myth-buster-conflict>.

⁹⁴ Editorial, *Blood Money and Conflict Minerals*, BLOOMBERG VIEW, July 2, 2014, <http://www.bloombergvew.com/articles/2014-07-02/-conflict-minerals>.

⁹⁵ Prenkert & Shackelford, *supra* note 10, at 482–84.

⁹⁶ *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 conflicted affected and high-risk areas*, COM (2014) 0111 final (Mar. 5, 2014); see also Ian Weekes, *Conflict Minerals: New EU Rules Simpler Alternative to US Regulation*, GUARDIAN: SUSTAINABLE BUSINESS BLOG (London) (Mar. 26, 2014, 3:00 PM), <http://www.theguardian.com/sustainable-business/blog/eu-regulations-conflict-minerals-trade> (describing the EU proposal).

⁹⁷ *Conflict Minerals Act*, Bill C-486, 41st Parl. (2013) (Can.).

⁹⁸ See generally CHINA CHAMBER OF COMMERCE OF METALS, MINERALS AND CHEMICALS IMPORTERS & EXPORTERS, CHINESE DUE DILIGENCE GUIDELINES FOR RESPONSIBLE MINERAL SUPPLY CHAINS (Oct. 2015), file:///Users/u0850378/Downloads/CCCMC_draft_due_diligence_guidelines_EN_for_online_-_deadline_7_November_2015.pdf.

⁹⁹ See David Zaring, *Financial Reform's Internationalism 23–24* (2015) (unpublished manuscript, on file with the Harvard Business Law Review).

¹⁰⁰ See generally INT'L CORP. ACCOUNTABILITY ROUNDTABLE, "KNOWING AND SHOWING" USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE (2013), <http://accountabilityroundtable.org/wp-content/uploads/2013/10/ICAR-Knowing-Report4.pdf> (setting forth a proposal for human rights disclosures in securities filings).

II. EMPIRICAL ANALYSIS OF THE SEC FILINGS

This section illuminates the first-year compliance effort. The first part discusses the scope of compliance. It provides statistics on, among other things, how many companies filed Form SDs, how many filed Conflict Minerals Reports, and which industries were represented. The second drills down on the content of the filings themselves. I present a narrative description and summary statistics detailing how S&P 500 companies went about meeting their compliance obligations.¹⁰¹

A. The Scope of the Compliance Effort

As mentioned above, the SEC predicted that nearly 6000 companies would file conflict minerals disclosures on Form SD.¹⁰² It turns out, however, that only 1319 companies did so.¹⁰³ The SEC, therefore, overestimated by about 350%. The agency also predicted that 75% of those companies (about 4500) would file Conflict Minerals Reports in addition to their Form SDs.¹⁰⁴ This time the SEC was close—77% of filers included this report as an exhibit (1020/1319). Its initial error, however, means that the SEC still missed the mark on the total number of Conflict Minerals Reports actually filed by well over 300%. Table 1, below, summarizes this information.

TABLE 1: ACTUAL FILINGS COMPARED TO SEC ESTIMATES

	Number of Form SDs	Number of CMRs
<i>SEC Estimate</i>	5994	4496
<i>Actual Number</i>	1319	1020
<i>Percent Overestimate</i>	354%	341%

Most commentators agreed on which industries would fall within the rules’ scope. Ernst & Young issued a representative prediction that the most heavily impacted industries would be “electronics and communications, aerospace, automotive, jewelry, and industrial products.”¹⁰⁵ Unlike the SEC’s numerical estimates, Ernst & Young’s projection is consistent with the data.

¹⁰¹ Supporting data for the statistics presented in this Part are on file with the author.

¹⁰² See Conflict Minerals, 77 Fed. Reg. at 56,338 n.748.

¹⁰³ The filing deadline was June 2, 2014. See Form SD, *supra* at note 26, at General Instructions B.1–2. All filing statistics are as of August 8, 2014.

¹⁰⁴ See Conflict Minerals, 77 Fed. Reg. at 56,356.

¹⁰⁵ ERNST & YOUNG, CONFLICT MINERALS: WHAT YOU NEED TO KNOW ABOUT THE NEW DISCLOSURE AND REPORTING REQUIREMENTS AND HOW ERNST & YOUNG CAN HELP 1 (2012), [http://www.ey.com/Publication/vwLUAssets/EY_CnflctMinerals/\\$FILE/EY_.pdf](http://www.ey.com/Publication/vwLUAssets/EY_CnflctMinerals/$FILE/EY_.pdf). See also Conflict Minerals, 77 Fed. Reg. at 56,284–85.

There are two ways a review of the filings can help assess which industries were most affected. The first is to look at the raw numbers. Table 2, below, sorts companies by Standard Industrial Classification (SIC) Code (a commonly used system of categorizing companies by industry) and shows which codes generated the most filings.¹⁰⁶ It reveals that semiconductor manufacturers bore the brunt of the conflict minerals rules' requirements (turning in 118 filings) and that some other top industry categories were also related to electronics. The automotive industry shows up on the table too, as do communications and industrial products.¹⁰⁷

TABLE 2: TOP INDUSTRIES BY SIC CODE

SIC Code & Definition	Number of Filers	Percent Filing ¹⁰⁸
3674 (Semiconductors & Related Devices)	118	93%
3845 (Electromedical & Electrotherapeutic Apparatus)	48	76%
3714 (Motor Vehicle Parts & Accessories)	31	83%
3663 (Radio & TV Broadcasting & Communications Equipment)	29	69%
3841 (Surgical & Medical Instruments & Apparatus)	26	56%
7372 (Services – Prepackaged Software)	24	14%
2834 (Pharmaceutical Preparations)	23	13%
3576 (Computer Communications Equipment)	23	77%
3690 (Miscellaneous Electrical Machinery, Equipment & Supplies)	22	83%

Counter to Ernst & Young's prediction, jewelers and aerospace companies are absent. The conflict minerals rules' bearing on them becomes evident, however, when the data is parsed in another way. The sheer number of filings is revelatory, but so too is the percentage of companies within each SIC Code that filed. If a high percentage of companies in an industry makes conflict minerals disclosures, it is safe to say that the industry is heavily

¹⁰⁶ See U.S. SEC. & EXCH. COMM'N, *Division of Corporate Finance: Standard Industrial Classification (SIC) Code List*, <http://www.sec.gov/info/edgar/siccodes.htm> (last visited Dec. 12, 2014).

¹⁰⁷ Other notable SIC Codes related to these categories include: (i) for electronic, 3672 (printed circuit boards) with thirteen filers; (ii) for automotive, 3711 (motor-vehicle and passenger-car bodies) with thirteen filers; (iii) for communications, 3661 (telephone and telegraph apparatus) with sixteen filers; (iv) for industrial products, 3533 (oil and gas field machinery) with twelve filers and 3560 (general industrial machinery and equipment) with nine filers.

¹⁰⁸ This column shows, by SIC Code, the percentage of public companies traded on major exchanges that filed conflict minerals disclosures.

impacted. There were only seven filings with jewelry-related SIC Codes, but every public company with such a code filed.¹⁰⁹ Similarly, twenty-four out of twenty-five public companies in the four aerospace-related SIC Codes filed.¹¹⁰

Percentages also indicate that not all of the industries in Table 2 were truly the most impacted. As shown in the table, some had a high percentage of filers, while others were simply large industries with a small group of implicated firms. For example, 93% of semiconductor makers and 83% of automobile-part makers submitted filings, but only a small percentage of software service providers and pharmaceutical-related companies did so. For these industries, therefore, the rules were not a widespread concern.

On the other hand, surveying the data more broadly reveals a couple of other industries that the rules greatly affected. There are a variety of SIC Codes related to measurement and control instruments. While such devices are used in a wide range of industries—including some of those that Ernst & Young mentioned (namely, electronics, industrial products, and aerospace)—the number of filings produced in this area and the high percentage of these companies that filed stand out. Pooling together the four most notable related SIC Codes reveals fifty-two filings out of fifty-seven companies.¹¹¹ The other industry that stands out is retail department stores. Pooling the most impacted SIC Codes shows that thirty-one out of thirty-nine filed.¹¹²

Also notable is the range of industries affected. Sixty percent of SIC Codes had at least one filing.¹¹³ As seen above, in some cases a high percentage of companies within an industry submitted disclosures; in other cases, it was only a small fraction of those doing business in the space.

Finally, during the rulemaking process, commentators expressed special concern for smaller companies.¹¹⁴ Because of their size, small firms subject

¹⁰⁹ The following jewelry-related SIC Codes are included in the above calculation (with filers out of potential filers in parenthesis): 3910 (jewelry, silverware & plated ware) (1/1); 3911 (jewelry, precious metal) (1/1); and 5944 (retail jewelry stores) (3/3). In addition, two unlisted companies with the SIC Code 5944 filed.

¹¹⁰ The following SIC Codes are included in the above calculation (with filers out of potential filers in parenthesis): 3760 (guided missiles, space vehicles, and parts) (3/4); 3812 (search, detection, navigation guidance, aeronautical systems) (11/11); and 3728 (aircraft parts and auxiliary equipment) (10/10).

¹¹¹ The following SIC Codes were included in this calculation (with filers out of potential filers in parenthesis): 3829 (measuring and controlling devices) (10/11); 3825 (instruments for measurement and testing of electricity and electrical signals) (14/16); 3826 (laboratory analytical instruments) (15/15); and 3823 (industrial instruments for measuring, display, and control) (13/15).

¹¹² This calculation includes the following SIC Codes (with filers out of potential filers in parenthesis): 5311 (retail department stores) (6/6); 5600 (retail apparel and accessory stores) (5/7); 5621 (retail women's clothing stores) (10/13); and 5651 (retail family clothing stores) (10/13).

¹¹³ While I have used the more commonly referenced four-digit SIC Codes, there are also two-digit SIC Codes, which group companies into much broader categories. Seventy-three percent of two-digit SIC Codes were represented.

¹¹⁴ See Conflict Minerals, 77 Fed. Reg. at 56,286–87.

to the rules are likely to face proportionally larger compliance costs. While summary statistics cannot reveal proportionate costs, organizing filers by size does illuminate the extent to which the rules impacted these firms. A showing that they filed in disproportionate numbers would exacerbate cost concerns. Fortunately, the following table suggests that this was not the case. Based on the sample, larger firms actually filed at a slightly higher rate.

TABLE 3: FILERS SORTED BY COMPANY SIZE

	<i>S&P SmallCap 600</i> ¹¹⁵	<i>S&P MidCap 400</i> ¹¹⁶	<i>S&P 500</i> ¹¹⁷
<i>Filers</i>	194	134	182
<i>Percent Filing</i>	32%	34%	36%

In the end, the most surprising thing the data reveals is the SEC's vast miscalculation regarding the number of likely filers. Otherwise, the data mostly confirms predictions about where the compliance burden would most heavily fall. It also quells some concerns about smaller firms. Compliance may cost such companies proportionally more, but at least the rules do not unintentionally single them out.¹¹⁸

B. The Content of the Compliance Effort

1. The Content of Form SDs

Over 200 firms in the S&P 500 submitted a Form SD. Since the vast majority—88%—supplemented this basic filing with a Conflict Minerals Report, the Form SDs themselves were generally pithy references thereto, consisting of one or two sentences.¹¹⁹ When companies determined that they were justified in only filing Form SDs, they included more detail pursuant to the rules' requirements. For these companies, the forms averaged about 3.75 pages.¹²⁰

In principle, Form-SD-only filers are those that do not source conflict minerals from the Congo region. More specifically, companies were permit-

¹¹⁵ This is an index of 600 smaller companies. *S&P SmallCap 600*, S&P DOW JONES INDICES, <http://us.spindices.com/indices/equity/sp-600> (last visited, Dec. 16, 2014).

¹¹⁶ This is an index of 400 midsized companies. *S&P MidCap 400*, S&P DOW JONES INDICES, <http://us.spindices.com/indices/equity/sp-400> (last visited, Dec. 16, 2004).

¹¹⁷ See S&P DOW JONES INDICES, *supra* note 6.

¹¹⁸ Some noted that smaller companies would be affected as members of the supply chain of larger companies. See Conflict Minerals, 77 Fed. Reg. at 56,359. The data does not reveal whether smaller firms were disproportionately impacted in this way.

¹¹⁹ Of the 207 S&P 500 firms that filed conflict minerals disclosures only twenty-five filed only a Form SD. Fifty-two of the remaining 182 Form SDs were only one sentence long.

¹²⁰ Because these forms include both cover pages and exhibit lists, this is a generous page-number calculation.

ted to stop with this form if (i) they determined, based on their RCOI, that their conflict minerals did not originate from the area;¹²¹ (ii) their RCOI gave them no reason to believe that the area was the source of their conflict minerals;¹²² or (iii) after conducting due diligence, they determined that conflict minerals that, based on their RCOI, they had reason to believe originated from the Congo region did not actually come from there.¹²³

The second category was almost universally relied upon as the justification for only filing a Form SD. Only two companies claimed to have affirmatively determined that they did not source from the Congo region.¹²⁴ In addition, not a single S&P 500 firm filed a Form SD, but declined to file a Conflict Minerals Report, based on the final category. Taking the filings at face value, this means that due diligence never convinced a company that it was not sourcing from the Congo when its RCOI pointed to the opposite conclusion.

According to the rules, firms relying on either of the first two categories as the basis for stopping at the Form SD stage were required to briefly describe their RCOI and their conclusion as part of the form.¹²⁵ As the above paragraphs suggest, the reported conclusion was almost always that the company had no reason to believe conflict minerals in its products came from the Congo region.¹²⁶ Companies described an RCOI that generally consisted of a survey of their suppliers.¹²⁷ Firms varied in the amount of detail they provided about these surveys and also in the extent to which they described what suppliers actually said in response that led reporting companies to believe their supply chains did not involve the Congo. Hershey Company, for instance, which uses tin in its decorative containers, merely noted that it surveyed its suppliers and, based on the survey, had no reason to believe its tin comes from the Congo region—and ended the discussion at that.¹²⁸ Altria Group, however, whose e-cigarettes and related chargers contain a small amount of tin and gold, provided far more detail.¹²⁹ It explained that its conclusion was based on a certification by its sole supplier that the conflict minerals in the products it supplies did not originate from the Congo.¹³⁰ Altria

¹²¹ See Form SD, *supra* note 26, at Item 1.01(b).

¹²² See *id.*

¹²³ See *id.* at Item 1.01(c).

¹²⁴ See Meadwestvaco Corp., Specialized Disclosure Report (Form SD), at 2 (June 2, 2014); Mohawk Indus. Inc., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014).

¹²⁵ Form SD, *supra* note 26, at Item 1.01(b).

¹²⁶ See, e.g., Clorox Co., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); Hershey Co., Specialized Disclosure Report (Form SD), at 2 (June 2, 2014).

¹²⁷ See, e.g., Hershey Co., *supra* note 124, at 2. Rather than conducting a survey, some companies already had, or were able to obtain, supplier certifications regarding the countries of origin of their conflict minerals. See, e.g., Altria Grp., Inc., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); LyondellBasell Indus. N.V., Specialized Disclosure Report (Form SD), at 2 (May 30, 2014); Newmont Mining Corp., Specialized Disclosure Report (Form SD), at 7 (May 31, 2014).

¹²⁸ Hershey Co., *supra* note 126, at 2.

¹²⁹ Altria Grp., Inc., *supra* note 127, at 2.

¹³⁰ *Id.*

also explained that the supplier was able to certify as much by obtaining similar certifications from its sub-suppliers and crosschecking smelter information against CFSP's conflict free list.¹³¹

In describing their RCOI, around 40% of companies did not reveal their survey response rate. And a number of those that supplied the information failed to hear back from everyone. Norfolk Southern, a railroad company, only filed a Form SD even though it had a response rate of just 80%,¹³² and Patterson Companies, a health-care products supplier, did the same with a response rate of just 45%.¹³³ In doing so, firms like Norfolk Southern and Patterson took advantage of SEC guidance permitting companies to declare that they have no reason to believe they are sourcing conflict minerals from the Congo even with incomplete information in this regard.¹³⁴

2. *The Content of the Conflict Minerals Reports*

Conflict Minerals Reports are required of companies that, after conducting due diligence, have been unable to rule out the Congo region as a potential source of their conflict minerals.¹³⁵ As noted above, almost nine out of ten S&P 500 companies that filed a Form SD also filed such a report. The average length of the report was about 5.5 pages. Although there was a wide range—with the shortest being one page and the longest being thirty-five—more than 80% were between two and six pages.¹³⁶ Thus, even though Chairwoman White had expressed concern about “information overload,” the actual reports were usually brief, particularly as securities law filings go.¹³⁷

The key reporting requirement for firms is to describe their due diligence efforts, the substance of which must conform to the *OECD Guidance*.¹³⁸ Almost every company noted in its report that it constructed its due diligence in adherence with this framework. About 80% of firms also broke down their diligence description into the five steps outlined therein; company responses are detailed below, and in Table 4, which is at the conclusion of this section.

The first OECD step, “establish strong company management systems,” includes five instructions for companies:¹³⁹

*Adopt and disseminate a conflict minerals policy.*¹⁴⁰ About three out of four companies established such policies and made them available on their

¹³¹ *Id.*

¹³² Norfolk S. Corp., Specialized Disclosure Report (Form SD), at 4 (June 2, 2014).

¹³³ Patterson Cos., Inc., Specialized Disclosure Report (Form SD), at 3 (June 2, 2014).

¹³⁴ See Conflict Minerals, 77 Fed. Reg. at 56,312.

¹³⁵ See Form SD, *supra* note 26, at Item 1.01(c); *supra* text accompanying note 55.

¹³⁶ Much of the difference in length is attributable to whether the firm chose to disclose smelter and refiner information. See *infra* text accompanying note 171.

¹³⁷ White, *supra* note 91.

¹³⁸ See Form SD, *supra* note 26, at Item 1.01(c); *supra* text accompanying notes 35–37.

¹³⁹ See OECD GUIDANCE, *supra* note 37, at 17.

¹⁴⁰ See *id.*

websites. Some included the text in their filings; most only noted that the policy was accessible online.

*Set up a conflict minerals diligence team.*¹⁴¹ Almost 90% of companies reported creating some type of internal cross-functional team to manage their reporting obligations. For example, Alcoa, the giant aluminum company, put in place a compliance team comprised of its chief legal officer, other executives, and representatives from each unit involved with products potentially containing conflict minerals.¹⁴²

*Establish a system for mapping the conflict mineral supply chain.*¹⁴³ Almost all companies followed essentially the same procedure for understanding their supply chain. They identified the suppliers of their conflict minerals and sent them each a survey.¹⁴⁴ The survey was almost always based on a template created by CFSI.¹⁴⁵ This template includes a number of questions about company diligence and policies.¹⁴⁶ Most importantly, it asks whether the supplier's goods contain conflict minerals, where they originate from, and in what facility they are processed.¹⁴⁷ To assist suppliers, it even includes a list of over 200 known smelters.¹⁴⁸

Almost 75% of companies also followed up with suppliers that provided answers that were incomplete or internally inconsistent, as well as those that did not respond at all. About half of companies included information on their ultimate response rate.¹⁴⁹ Based on those that provided this figure, which likely skews the numbers higher, the average was 71%. There was a great amount of variability, however, with a reported low of 21%, a high of 100%, and a standard deviation of 24%.

Seventy companies provided further insight into their supply chains by disclosing the number of conflict mineral suppliers therein. The range was extraordinary wide, with Intuit reporting that it had only two such suppliers

¹⁴¹ See *id.*

¹⁴² Alcoa Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014).

¹⁴³ See OECD GUIDANCE, *supra* note 37, at 17.

¹⁴⁴ The OECD and others have noted that companies typically only have a relationship with their direct suppliers. See, e.g., OECD STUDY, *supra* note 51, at 59–60; IPC, *supra* note 85, at 2. The filings are consistent with this observation. Only five companies explicitly noted engaging with indirect suppliers: EMC Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2–3 (June 2, 2014); Home Depot Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Intuit Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (June 2, 2014); Kohl's Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (May 30, 2014); and Macy's Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014).

¹⁴⁵ The template is publicly available. *Conflict Minerals Reporting Template*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/conflict-minerals-reporting-template/> (last visited Nov. 25, 2014).

¹⁴⁶ *Id.* at Tab 2, "Instructions."

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at Tab 5, "Standard Smelter Names."

¹⁴⁹ This figure does not include companies that listed a response rate in terms of total spend or some other accounting metric rather than as a percentage of those surveyed.

and Caterpillar suggesting that it had 40,312.¹⁵⁰ The average number was 2265; the median was 510 (because of the wide range and Caterpillar's astonishing figure, which was three-times larger than the next highest, the median is likely the better summary of the data).

*Incorporate a supply-chain policy in agreements with suppliers.*¹⁵¹ Companies were less than diligent about including language in supplier agreements. Only about one-half reported doing so.¹⁵² And companies often were not forthcoming about what the language actually said. When companies did include this information, they frequently described the language as calling on suppliers to furnish Section 1502 information when requested.¹⁵³ A dozen companies went further, though, and included language requiring their suppliers to be conflict free.¹⁵⁴

*Establish a grievance mechanism.*¹⁵⁵ Many companies ignored the OECD instruction to set up a grievance procedure. Less than half reported compliance with this seemingly ministerial requirement.

"Inconsistent" would be the best way to describe firm compliance with the first OECD step and its five subparts. It is also an appropriate description of their responses to the remaining requirements. The second step requires companies to assess risks in their supply chain by analyzing the due diligence practices of their smelters and refiners.¹⁵⁶ This overlaps with step four, which requires an independent audit of those same facilities, an assessment that would include a review of their due diligence.¹⁵⁷ About 30% of companies failed to address these requirements. Remaining companies were able to identify at least some of these facilities, and addressed these steps by referring to audits done in connection with CFSI's conflict-free smelter program.¹⁵⁸ They reported cross-checking the names of the smelters or refiners identified by their suppliers against CFSI's list of those that are conflict free. If smelters or refiners were not on the list, companies by and large did not

¹⁵⁰ See Caterpillar Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 1 (May 30, 2014) (stating that the company surveyed 38,700 conflict mineral suppliers, which represented 96% of its total conflict mineral suppliers); Intuit Inc., *supra* note 144, at 2.

¹⁵¹ See OECD GUIDANCE, *supra* note 37, at 17.

¹⁵² Sixteen percent noted, however, that they were planning to do so in the future.

¹⁵³ See, e.g., Lam Research Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Medtronic Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (May 29, 2014); Zimmer Holdings Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014).

¹⁵⁴ See, e.g., Ecolab Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (June 2, 2014); Jabil Circuit Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Sigma-Aldrich Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 1 (May 30, 2014).

¹⁵⁵ See OECD GUIDANCE, *supra* note 37, at 17.

¹⁵⁶ *Id.* at 18, 42.

¹⁵⁷ *Id.* at 19, 47.

¹⁵⁸ See *supra* text accompanying note 51.

investigate the facility's due diligence practices or hire independent auditors to do so.¹⁵⁹

Step three is where companies were required to establish and implement plans to transition existing suppliers to conflict-free sourcing or to abandon them.¹⁶⁰ Less than 30% of companies reported that they had outlined a plan.¹⁶¹ None of them reported taking any remedial action.¹⁶² Since step five—publicly reporting on conflict mineral diligence—is redundant with the rules themselves, all companies that at least filed something complied with this requirement.¹⁶³

The SEC mandated several other compliance steps beyond the due diligence reporting. A key requirement was that companies list all products that they had not determined to be conflict free (although, thanks to the Circuit Court holding, they were not required to provide any particular label for this list of products).¹⁶⁴ Some companies ignored this part of the rules or provided a general description of their business. But about 70% did include some type of product list. Most produced a list at a high level of generality, describing their products as “apparel” or “household products,” for example, rather than including brand names.¹⁶⁵ Some firms housed in generic-sounding parent companies included these bland descriptions but left out important identifying information. TJX Companies, for instance, the parent of low-cost departments stores TJ Maxx and Marshalls, noted that its “apparel” may contain conflict minerals, but never mentioned the names of its stores.¹⁶⁶

One question arising from the Circuit Court's holding was how companies would note the conflict status of their products now that they were not forced to use the labels “not . . . ‘DRC conflict free’” or “conflict undeterminable.”¹⁶⁷ The vast majority of companies took advantage of this freedom.

¹⁵⁹ The biggest exception was Intel, which reported inspecting twenty-nine processing facilities. See Intel Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (May 22, 2014), at 2.

¹⁶⁰ See OECD GUIDANCE, *supra* note 37, at 18; *supra* text accompanying notes 45–48.

¹⁶¹ This statistic does not include companies that merely reported escalation measures with respect to suppliers that failed to respond when surveyed regarding their use of conflict minerals.

¹⁶² A handful of companies, in fact, reported that they had adopted policies but found no instances requiring attention. See, e.g., Boeing Co., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Emerson Electric Co., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); Microsoft Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014).

¹⁶³ OECD GUIDANCE, *supra* note 37, at 19.

¹⁶⁴ See Form SD, *supra* note 26, at Item 1.01(c)(2); *supra* text accompanying notes 71–78 (discussing the Circuit Court holding).

¹⁶⁵ See, e.g., Best Buy Co. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); Nordstrom Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); TJX Cos. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 1 (June 2, 2014). As noted *supra* text accompanying note 60, the SEC did not require the listing of brands. Nevertheless, twelve companies did so.

¹⁶⁶ TJX Cos. Inc., *supra* note 165, at 1.

¹⁶⁷ See *supra* text accompanying notes 71–78.

About 80% chose to give no conclusion as to their products' conflict status. Often, company products that contain conflict minerals were listed near the beginning of the report. Toward the end, companies then had language indicating that, despite their due diligence, they were unable to determine their products' conflict status.¹⁶⁸ About 20% of companies, however, were a bit bolder and listed their products as "conflict undeterminable" even though doing so was not mandated. Finally, only one firm, Intel, claimed to have a conflict-free product.¹⁶⁹

The rules also required that companies list the smelters and refiners of the conflict minerals in products not found to be conflict free, as well as the countries of origin of those minerals.¹⁷⁰ About 70% of companies failed to provide smelter and refiner information. Many did not list these processing facilities even though they had identified at least a portion of those in their supply chain.¹⁷¹ Some gave no reason for omitting the names,¹⁷² but many claimed that even though they could identify such facilities, they could not link particular minerals to their products. According to these companies, when they polled their suppliers, they would get a response at the "company level," meaning that they were told all of the smelters and refiners that the supplier used.¹⁷³ In many cases, however, suppliers apparently did not take the additional step of informing companies which of these facilities processed the minerals that made it into the company's specific products. Companies, therefore, could not match conflict minerals from a particular smelter or refiner with their particular goods, and, based on this gap, claimed not to have enough information to include facilities in their filings.¹⁷⁴

On the other hand, about 30% of filers did list the processing facilities in their supply chains, sometimes with the caveat that, for the reason noted above, they could not be sure that their products actually contained conflict minerals from those included.¹⁷⁵ In addition, some companies that included

¹⁶⁸ Although unusual, some companies gave no conclusion at all. *See, e.g.*, Procter & Gamble Co., Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014).

¹⁶⁹ Intel Corp., *supra* note 159, at 4, 7–8.

¹⁷⁰ Form SD, *supra* note 26, at Item 1.01(c)(2).

¹⁷¹ As noted *supra* text accompanying note 158, about 70% of companies reported checking their processing facilities against the CFSI conflict-free list. Out of the 134 that claimed to have done so, however, only 50 actually listed their facilities—less than 40%.

¹⁷² *See, e.g.*, Allegion plc, Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014); Berkshire Hathaway Inc., Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014); Broadcom Corp., Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014).

¹⁷³ *See, e.g.*, Danaher Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (June 2, 2014); Harley-Davidson Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5 (June 2, 2014); Honeywell Int'l Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5 (June 2, 2014); Lockheed Martin Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); Reynolds Am. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); TJX Cos. Inc., *supra* note 165, at 3; Whirlpool Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (May 30, 2014).

¹⁷⁴ *See, e.g.*, *supra* note 173.

¹⁷⁵ *See, e.g.*, Ecolab Inc., *supra* note 154, at 3–4 n.1(a); KLA-Tencor Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2–3, 5 (June 2, 2014); Garmin Ltd., Conflict Minerals

facility information chose to list only those that appeared on the CFSI conflict-free list, omitting others without explanation.¹⁷⁶

Country-of-origin disclosure was even less frequent. Eighty percent of companies failed to provide this information. As with facilities, some companies provided no explanation for the omission.¹⁷⁷ Others claimed that they could not determine the country of origin for the conflict minerals in their products. While some left it at that,¹⁷⁸ others provided details as to why. When smelters and refiners process conflict minerals, ores from different regions are combined and the location of origin becomes impossible to track.¹⁷⁹ Thus, the only way to trace the source of a conflict mineral in a product is to identify the smelter from which it came. If, for example, a particular smelter only processed minerals from Asia, then a company downstream from the smelter could know that is where its raw materials came from. Since companies could not match smelters to products, they claimed to be unable to match products to countries as well.¹⁸⁰

Despite these obstacles, as with facilities, some companies included a list of countries, sometimes with a qualification to reflect their uncertainty about the exact match to their products.¹⁸¹ Curiously, of the filers that provided country-of-origin information, some did not include any from the

Report (Form SD) Exhibit 1.02, at 6 (June 2, 2014); Micron Tech. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 n.6 (May 30, 2014).

¹⁷⁶ See, e.g., Goodyear Tire & Rubber Co., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); Kroger Co., Conflict Minerals Report (Form SD) Exhibit 1.02, at 1–2 (June 2, 2014); Xerox Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5–8 (May 29, 2014).

¹⁷⁷ See, e.g., Covidien plc, Conflict Minerals Report (Form SD) Exhibit 1.02 (May 30, 2014); Ingersoll-Rand plc, Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014); Teradata Corp., Conflict Minerals Report (Form SD) Exhibit 1.02 (May 30, 2014); VF Corp., Conflict Minerals Report (Form SD) Exhibit 1.02 (June 2, 2014). *But see* Sigma-Aldrich Corp., *supra* note 154, at 3; Thermo Fisher Sci. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3–4 (May 30, 2014) (explaining omission).

¹⁷⁸ See, e.g., Johnson & Johnson, Conflict Minerals Report (Form SD) Exhibit 1.02, at 5 (May 30, 2014); PVH Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Stanley Black & Decker Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5 (June 2, 2014).

¹⁷⁹ See Conflict Minerals, 77 Fed. Reg. at 56,321; PRENDERGAST & LEZHNEV, *supra* note 83, at 6.

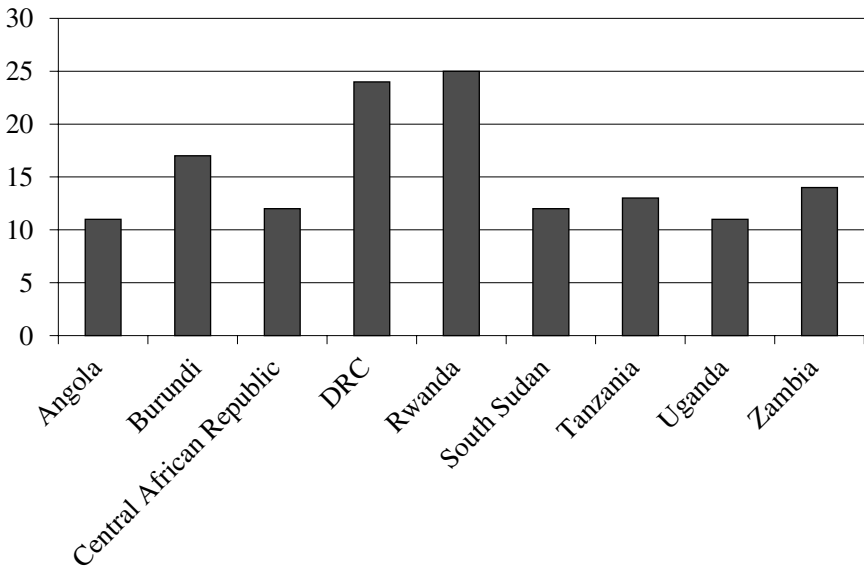
¹⁸⁰ See, e.g., Danaher Corp., *supra* note 173, at 2; Honeywell Int'l Inc., *supra* note 173, at 5; Lockheed Martin Corp., *supra* note 173, at 4; Medtronic Inc., *supra* note 153, at 3; TJX Cos. Inc., *supra* note 165, at 3. Although companies stopped at this point, there is an additional layer of complexity in that even if a particular smelter is matched to a particular product, country-of-origin information may still prove out of reach. Smelters often process minerals from more than one region. PRENDERGAST & LEZHNEV, *supra* note 83, at 6. In this case, even if a company identifies one of its smelters, the company cannot know for sure if minerals from a particular country processed in that smelter made it into its specific products. After the metals are liquefied, melted together, and then apportioned to different manufacturers, who is to say which country's minerals ended up in which company's products?

¹⁸¹ See, e.g., Cerner Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Garmin Ltd., *supra* note 175, at 6; Micron Tech. Inc., *supra* note 175, at 6.

Congo region.¹⁸² If none of their facilities sourced from there, however, the companies would not have had to file a Conflict Minerals Report in the first place.

Figure 1, below, summarizes the country-of-origin information for companies reporting sourcing from the Congo area. It is a small sample because so few companies listed specific countries therein, but Rwanda and the DRC stand out as the ones noted most frequently. They are cited 40% more than Burundi, the next most commonly mentioned country.

FIGURE 1: COUNTRY-OF-ORIGIN INFORMATION OF CONFLICT MINERALS



The rules' attention to country of origin includes one additional requirement—this one relates to process rather than results. Companies were required to describe their efforts to “determine the mine or location of origin [of their conflict minerals] with the greatest possible specificity.”¹⁸³ This aspect of the regulations was essentially shrugged off. More than one-half of filers ignored it. Those that did address it frequently referenced their due diligence and RCOI descriptions as their efforts to determine this information.¹⁸⁴

¹⁸² See, e.g., McKesson Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4–5 (June 2, 2014); Sandisk Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (May 30, 2014).

¹⁸³ Form SD, *supra* note 26, at Item 1.01(c)(2).

¹⁸⁴ See, e.g., L Brands, Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); Newell Rubbermaid Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 6 (May 30, 2014); Zimmer Holdings, Inc., *supra* note 153, at 4.

Finally, the rules called for all companies using the “conflict undeterminable” category to list the steps they were taking or planned to take to improve their diligence and to mitigate the risk that they source from militarized mines.¹⁸⁵ Despite no longer having to choose any particular label, almost 90% of companies included a responsive section. Many referenced specific OECD requirements, such as updating their supplier contracts, as steps that they planned to implement.¹⁸⁶ Many others contained platitudinous language about continuing to “engage with” their suppliers on the conflict minerals issue.¹⁸⁷ The following table summarizes the contents of S&P 500 Conflict Minerals Reports.

TABLE 4: S&P 500 COMPANY COMPLIANCE STEPS IN CONFLICT MINERALS REPORTS

Conflict Minerals Rules Compliance Steps	Percent of Companies Taking Step Listed
<i>Requirement to Describe Due Diligence</i>	-
Noted <i>OECD Guidance</i>	98%
Described Due Diligence in Terms of <i>OECD Guidance’s</i> 5 Steps	82%
<i>Step 1</i>	-
Enacted Conflict Minerals Policy	85%
Made Conflict Minerals Policy Publicly Available	75%
Created Internal Conflict Minerals Team	87%
Surveyed Suppliers	99%
Reported Response Rate	47%
Used CFSI Template for Survey	92%
Followed up on Incomplete/Inconsistent Responses & Nonresponses	73%

¹⁸⁵ See Form SD, *supra* note 26, at Item 1.01(c)(1)(iii).

¹⁸⁶ See, e.g., Agilent Techs., Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 6 (June 2, 2014); Autodesk Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 4 (June 2, 2014); C.R. Bard, Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (June 2, 2014); Garmin Ltd., *supra* note 175, at 7.

¹⁸⁷ See, e.g., Autodesk Inc., *supra* note 186, at 4; Cummins Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 6 (May 30, 2014); Harley-Davidson Inc., *supra* note 173, at 7.

Conducted Site Visits of Suppliers and Processing Facilities ¹⁸⁸	4%
Amended Supplier Agreements	51%
Put in Place a Grievance Procedure	47%
<i>Steps 2 and 4</i>	-
Incorporated Results of CFSI Smelter Audits	73%
Conducted Own Processing Facility Audit	0% ¹⁸⁹
<i>Step 3</i>	-
Reported Findings to Senior Management	55%
Adopted a Risk Management Plan	29%
<i>Step 5</i>	-
Reported on Due Diligence	100%
<i>Other Requirements</i>	-
Listed Future Risk-Mitigation Efforts	87%
Described Products Not Found to be Conflict Free	71%
Listed Processing Facilities	31%
Listed Countries of Origin	20%
Described Efforts to Determine Origin of Conflict Minerals with Specificity	40%
<i>Conflict-Status Categorization</i>	-
Conflict Free	1% ¹⁹⁰
Not Conflict Free	0%
Conflict Undeterminable	21%
“Unable to Determine” or No Specific Conclusion	77%

What stands out in the above chart is the frequency of low compliance percentages. While in some cases companies may have good—or at least defensible—reasons for omitting information, the end result is a set of Con-

¹⁸⁸ Apple, General Electric, Intel, and Qualcomm reported visiting smelters. See Apple, Conflict Minerals Report (Form SD) Exhibit 1.02, at 2 (May 29, 2014); Gen. Elec. Co., Conflict Minerals Report (Form SD) Exhibit 1.02, at 7 (June 2, 2014); Intel Corp., *supra* note 159, at 2; Qualcomm Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 6 (June 2, 2014).

¹⁸⁹ Intel was the only company to do so. See Intel Corp., *supra* note 159, at 2.

¹⁹⁰ In addition to Intel’s declaration that it had a conflict-free product, see *supra* text accompanying note 170, Qualcomm claimed that its “integrated circuit products” were conflict free with respect to tantalum, see Qualcomm Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 6 (June 2, 2014).

flict Minerals Reports that reveal quite little about conflict mineral supply chains.

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

The nature of compliance provides particular insight into the costs and benefits of the conflict minerals rules. For most companies, compliance appears to have involved little cost. Due diligence essentially boiled down to sending out a survey created by a third party and checking certain results against a third-party-generated list. Companies also took procedural steps, such as setting up a conflict minerals policy, an internal team, and a grievance mechanism. Although implementing these steps takes time, particularly for those companies with a wide range of products and complex supply chains, the burden appears relatively insubstantial. That the results of such efforts—the filings themselves—were brief and devoid of detail further supports the idea that little effort went into compliance with these rules.

It is true that the rules contemplate some trickle-down costs. As noted above, companies required to file these reports are often many levels removed from the actual mines.¹⁹¹ Thus, for a company's suppliers to provide meaningful information when requested, these firms must poll their own suppliers. To illuminate an entire supply chain, this process would have to continue all the way to the source, which necessarily adds expense.

But compliance often did not follow this idealized conception. In describing their survey results, many companies noted that numerous suppliers responded with inconclusive answers.¹⁹² A survey reply along the lines of, "we don't know," entails little cost and eliminates expenses further up the chain. And answers like this should be expected. Unless suppliers are themselves subject to the SEC rules or otherwise contractually obligated to follow up, there is nothing that says they have to assist in a company's diligence efforts. They might do so to maintain good relations with customers that push them, but buyers have little reason to exert much force. From a risk-averse company's perspective, no answer is better than one that links minerals to conflict mines. Thus, while costs extend past the actual filers, it is easy to overstate how far they reach.

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

¹⁹¹ See *supra* note 83 and accompanying text.

¹⁹² See, e.g., Ball Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014) ("We have elected not to present smelter and refiner names that have been identified by suppliers in this report due to the number of non-responders and incomplete responses that were received to our survey."); Caterpillar Inc., *supra* note 149, at 1 ("The majority of suppliers surveyed either provided an incomplete or inconclusive response or did not provide any response."); Costco Wholesale Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 1 (June 2, 2014) ("[A] number of suppliers failed to respond."); Qualcomm Inc., *supra* note 188, at 5 ("The vast majority of our direct suppliers reported unknown countries of origin for their necessary conflict minerals.").

of filers by around 350%.¹⁹³ Given the perfunctory effort and unexpectedly small number of filers, the true costs of compliance were likely far less than critics warned.

As might be expected, the lower costs appear to be accompanied by lower benefits. There were certainly no bombshells. Not a single company admitted sourcing from a militarized mine; no products or companies could be singled out as conflict mineral offenders. Meanwhile, few appeared worthy of praise—conflict-free declarations were almost nonexistent.¹⁹⁴ Naming and shaming requires that concerned consumers and shareholders be able to distinguish between good actors and bad, so that they can take action against the latter. But the reports do not provide sufficient information to spur this socially driven behavior. The filings lack the type of specifics that could inspire investors to reallocate their money or consumers to reassess their purchasing habits. Almost every company fell into the category of having a reason to believe they were sourcing from a country in the Congo region, but being unable to tell whether their minerals were really from there, or despite being from there, were actually conflict free. Disclosures such as these provide paltry basis for change.¹⁹⁵

It could be argued that despite their inconclusiveness, the reports are still of some use, because activists can use them to differentiate among companies based on how diligently they complied. The compliance effort itself can be used as a measuring stick even if the substance of each filing provides little basis on which to discriminate.¹⁹⁶ There is certainly some truth to

¹⁹³ See *supra* text accompanying notes 103–104.

¹⁹⁴ See *supra* text accompanying note 169. Arguably, those companies that chose only to file a Form SD could be described as conflict free. However, this has a few problems. The first is that such companies were not the target of the rules. The idea was to encourage responsible sourcing from those involved in the region rather than celebrate those with no connection. Second, twenty-three out of the twenty-five S&P 500 companies that only filed a Form SD claimed they were entitled to do so because they lacked a reason to believe that the conflict minerals they used were from the Congo. See *supra* text accompanying note 124. Under SEC rules, they were allowed to make such a claim, so long as none of their survey responses, or other information at their disposal, indicated otherwise. See Conflict Minerals, 77 Fed. Reg. at 56,312–13. But this is not the same as being certified as conflict free. It is a claim based on supply chain ignorance rather than knowledge of conflict-free sourcing. As noted *supra* text accompanying notes 132–134, some companies claimed they lacked a reason to believe that they were sourcing from the Congo despite limited knowledge of their supply chain. Finally, neither of the S&P 500 firms that actually established that their supply chain did not involve the Congo were from heavily impacted industries like electronics, where such a declaration would be most meaningful.

¹⁹⁵ In a forthcoming paper, Robert Eccles and George Serafeim suggest that “even without stakeholder engagement,” disclosures may serve an “internal transformation function.” Robert G. Eccles & George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective*, in CORPORATE STEWARDSHIP 3 (Lawler et al. ed., 2015). In the conflict minerals context, this theory would suggest that the disclosure mandate may be beneficial, regardless of successful naming and shaming, because companies may change what they do in order to change what they report. While this is a provocative argument, there is scant evidence that it reflects what happened here. Rather than change their behavior, companies buried it in jargon.

¹⁹⁶ Global Witness, for example, makes this argument. See GLOBAL WITNESS, *supra* note 93. Responsible Sourcing Network published a pilot study ranking 51 filers. It sorted them into

this, but sorting companies based on compliance is a high-cost, partly subjective, endeavor. The benefits also pale in comparison to true naming and shaming. It is much less poignant to criticize a company for cursory compliance than it is to identify it as sourcing from a mine linked to human rights abuses. Compliance-based sorting is also only beneficial in extreme cases. Because many companies complied in an almost identical fashion, this metric is useful only to call out those that turned in a truly excellent effort and those that all but ignored the rules.

Finally, benefits from this approach exist only on the margin. There are ways companies can demonstrate their commitment to conflict-free sourcing other than through careful compliance. They can, for instance, join industry organizations committed to this goal. In fact, before the conflict minerals rules went into effect, the Enough Project had ranked electronics companies based on activities like this.¹⁹⁷ While compliance may be a cleaner signal, the fact remains that it is only its added benefit that matters—the extent to which this tells us something we did not already know. If achieved, the true hope of the conflict minerals rules—to allow us to sort companies based on where they source—would have greatly expanded our awareness.

The calm that greeted the public dissemination of the reports supports the conclusion that they lack the content necessary to bring about the intended social change. A few complained about the lack of substance,¹⁹⁸ but there has been no semblance of public outrage. The press noticed the revelation, completely unrelated to conflict minerals, that a few companies were using a gold refinery in North Korea in violation of the U.S. embargo.¹⁹⁹ But companies are claiming that this was simply a reporting error.²⁰⁰

All of this suggests that the results of the conflict minerals rules are a faint shadow of the controversy that has surrounded the initiative ever since Congress approved the original legislation over four years ago. This is a troubling conclusion, not only for those concerned with conflict minerals

three groups based on their level of compliance. See RESPONSIBLE SOURCING NETWORK, MINING THE DISCLOSURES: AN INVESTOR GUIDE TO CONFLICT MINERALS REPORTING 35 (2015), <http://static1.1.sqspcdn.com/static/f/432032/26314376/1434388831653/mining-the-disclosures-2014.pdf?token=Tn%2FLtdmEOWjJELkOAODMRZ1%2F%2BIU%3D>.

¹⁹⁷ See generally ENOUGH PROJECT, GETTING TO CONFLICT FREE: ASSESSING CORPORATE ACTION ON CONFLICT MINERALS (2010), http://www.enoughproject.org/files/publications/corporate_action-1.pdf.

¹⁹⁸ See, e.g., Joe Mont, *First Conflict Minerals Reports Lack Substance, If Filed at All*, COMPLIANCE WEEK, June 10, 2014, <http://www.complianceweek.com/news/news-bulletin/first-conflict-minerals-reports-lack-substance-if-filed-at-all-0>; Elena Popina, *Intel, HP Seen as Exceptions in Conflict-Mineral Reports*, BLOOMBERG BUSINESSWEEK, June 3, 2014, <http://.com/news/2014-06-02/intel-hp-seen-as-exceptions-in-conflict>; *As June 2nd Conflict Minerals Deadline Approaches, Global Witness Warns That First Reports Lack Substance*, GLOBAL WITNESS (May 29, 2014), <http://www.globalwitness.org/library/june-2nd-conflict-minerals-dead-line-approaches-global-first-reports-lack>.

¹⁹⁹ See Jamila Trindle, *U.S. Companies Still Puzzling Over North Korean Gold Question*, FOREIGN POLICY, June 5, 2014, http://www.foreignpolicy.com/articles/2014/06/05/us_companies_still_puzzling_over_north_korean_gold_question.

²⁰⁰ See *id.*

and the human rights abuses related thereto, but also for those looking at the regulation as a model for future supply-chain transparency efforts. If there is a silver lining, however, it is that the data at least provides a starting point for an investigation into what went wrong.

III. WHY THE CONFLICT MINERALS FILINGS PROVED UNILLUMINATING

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

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

The central shortcoming of the conflict minerals filings is that they fail to provide the information necessary to name and shame companies sourcing from militarized mines. This is likely because a number of factors conspire against successful naming and shaming in this arena. The approach works best when the culpable can be clearly identified and separated from the rest, and when those who are signaled out face severe public sanction.²⁰¹ The use of conflict minerals does not present the ideal circumstances for either.

It is easier to identify parties engaged in undesirable conduct when the wrongful behavior can be uncovered and revealed without the cooperation of those same parties. Those fearful of being named and shamed have a large incentive to make the relevant information difficult to obtain. Naming and shaming conflict mineral users through self-reporting was thus destined for resistance.

Naming and shaming also works better if the repercussions for culpability are significant. This incentivizes parties to undertake the steps necessary to clear their names. Companies, however, could not be sure of the consequences for using conflict minerals. Undoubtedly, some shareholders and customers are deeply concerned about the humanitarian crisis in the region and are committed to ethical sourcing.²⁰² But conflict minerals do not

²⁰¹ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 1014 (2008) (naming and shaming has more “resonance” when the activity “arouses international outrage”).

²⁰² See John Bagwell, *Congo Activism in the Face of the Chamber of Commerce’s Lawsuit*, RAISE HOPE FOR CONGO (Oct. 26, 2012), <http://www.raisehopeforcongo.org/blog/post/congo-ac>

appear to be a top social issue. The legislation did not stem from a public outcry; nor has one greeted the leaden filings.²⁰³ If people are not clamoring for the elimination of conflict minerals, then companies are less likely to undertake potentially costly efforts to avoid their use.

A regulatory approach that relies on companies to implicate themselves is an inherently weak starting point, which likely provides part of the answer for why the reports are unsatisfying. However, weak starting points are commonplace in extraterritorial contexts such as this, where more hardline alternatives—like embargos or direct intervention—present a host of more significant problems. The challenge then is to recognize and respond to the difficulties inherent in the naming-and-shaming approach. As discussed below, lawmakers did poorly in this regard.

B. Shortcomings in the Implementation of Naming and Shaming

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

One way to incentivize compliance is to impose severe penalties on those that fail to obey. Doing so would tilt the corporate cost-benefits analysis more in favor of the rules. But neither Congress nor the SEC included any specific fines for delinquent or evasive companies. Failure to make the appropriate conflict minerals filing or to include the required content is subject to the same sanction as any other missed reporting obligation. The basic penalty is a rather innocuous \$100 per day of tardiness.²⁰⁴

The penalties escalate for more egregious conduct, but these are unlikely to be triggered. For example, missing reporting obligations could lead to a suspension of trading.²⁰⁵ But the SEC only has authority to pursue this action to protect investors²⁰⁶—and their wellbeing as traditionally conceived is not implicated here. The final rules also make clear that the filings are subject to so-called Section 18 liability.²⁰⁷ This cause of action, however,

tivism-face-chamber-commerce%E2%80%99s-lawsuit-0 (discussing a shareholder proposal at Cisco related to conflict minerals); Dipietro, *supra* note 11 (discussing support for the conflict-minerals rules from socially conscious investing groups); *List of Initiatives*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/initiatives/list-initiatives> (last visited Nov. 24, 2014) (discussing support for the rules on college campuses).

²⁰³ See Woody, *supra* note 4, at 1325–27.

²⁰⁴ Securities Exchange Act of 1934 § 32(b), 15 U.S.C. § 78ff(b) (2011).

²⁰⁵ 15 U.S.C. § 78l(j).

²⁰⁶ *Id.* For a broader discussion of penalties available to the SEC for failure to meet reporting obligations, see generally BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS HANDBOOK § 6:28 (2d ed. 2014); Robert J. Wild, *Designing an Effective Securities and Corporate Governance Compliance Program*, in CORPORATE COMPLIANCE SERIES § 1:154 (2013).

²⁰⁷ Conflict Minerals, 77 Fed. Reg. at 56,304.

which is triggered by material misstatements, is rarely used because of its strict requirements.²⁰⁸ While fraud liability under Rule 10b-5 still looms,²⁰⁹ firm conduct so far does not rise to this level.

It is also highly questionable whether the SEC would expend resources ferreting out and bringing enforcement proceedings against defiant companies. As noted above, the Chairwoman herself expressed regret over her agency's mandated involvement with these rules.²¹⁰ Commissioners of the SEC have also made their dissatisfaction clear.²¹¹ These statements send a signal to companies that compliance with the conflict minerals rules is low on the agency's radar. Indeed, it is hard to picture an agency that sees itself as the investor's guardian devoting its limited resources to the pursuit of companies that fail to draft meaningful human rights disclosures. The absence of stricter penalties and the hints of SEC indifference likely contributed to an impression that noncompliance would be tolerated.

Not only did the rules fail to signal the importance of compliance, they also lacked key transparency requirements for the companies to comply with. One problem that becomes evident in the filings is the level of generality at which the companies described their products. If the rules are at least partially aimed at consumers, then consumers need to be able to tell which particular goods are problematic. But the high-level descriptions found in company filings make this determination difficult.²¹² The vexing ambiguity can be traced back to the SEC's reluctance to provide specific guidance to companies on how to describe their products.²¹³

The rules also failed to ask companies to list the names of the mines of origin of their conflict minerals, a key piece of information for those looking to see if a company's products are financing groups implicated in human rights abuses. While the rules asked for information further down the supply chain, namely the names of the facilities used to process conflict minerals in company products and the countries of origin of those minerals, the way the rules asked for such information proved problematic. The key oversight was framing these requirements in such a way that companies could interpret them to mean that companies only need to provide processing facility and country-of-origin details if they could actually link minerals from specific facilities and countries to their products. As noted above, the structure of corporate supply chains and the nature of the information provided to down-

²⁰⁸ See *id.* at 54,349 n.813; DAY PITNEY LLP, CONFLICT MINERALS PROVISION OF THE DODD-FRANK ACT MAY RESULT IN SECTION 18 CIVIL LIABILITY 1-2 (2012), http://www.daypitney.com/news/docs/dp_4294.pdf.

²⁰⁹ 17 C.F.R. § 240.10b-5 (2013).

²¹⁰ See *supra* note 91 and accompanying text.

²¹¹ See Kester, *supra* note 11.

²¹² Anything that drives up the transaction costs of discovering which companies and products are problematic dampens the efficacy of the rules. See Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation*, J. CORP. LAW, 347, 376 (2014) (discussing a transaction-cost boundary on market forces).

²¹³ See *supra* text accompanying note 60.

stream companies prevented many filers from making these connections, which gave them plausible grounds for leaving this information out.²¹⁴ Failure to appreciate how this central disclosure requirement fit with the pragmatics of supply-chain diligence is thus a big reason why the filings are so thin.

This same oversight also undermined the sorting ability of the rules. Even though most companies chose not to use the “conflict undeterminable” label, almost all of them nevertheless concluded that they were unable to determine the conflict status of their products.²¹⁵ This is perfectly understandable given the above. Companies justified their failure to list smelters and countries of origin in their supply chains by taking the position that they were unknown when they could not be matched specifically to their products. Once a company has taken this stance, it follows that the conflict status of its products is unknown for the same reason. It, therefore, appears that a subtle problem with how the SEC worded its request for smelter and country-of-origin information explains not only the omission of key supply-chain data, but also why so many of the companies’ conclusions were essentially identical.²¹⁶

What also stands out from reading the reports is that they are muddled, redundant, and difficult to compare. Much of this owes to the structure of the rules. One of the rules’ key features is the distinction between two concepts: the reasonable country of origin inquiry and due diligence.²¹⁷ In the SEC’s eyes, the latter is supposed to be a more in depth version of the former.²¹⁸ But in practice the concepts essentially merge. It would not be efficient for companies to conduct two rounds of inquiry; it makes sense for them to ask for all of the information at once. And this is what they did. The same CFSI survey was used to shed light on all of the relevant sourcing information.²¹⁹

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

This ephemeral distinction is also the conceptual undergirding of another core redundancy: the two-tiered reporting structure. The idea was that

²¹⁴ See *supra* text accompanying notes 173–174.

²¹⁵ See *supra* text accompanying notes 168–169.

²¹⁶ The universality of this conclusion also suggests that companies did not view the chance of being one of the first to be certified as conflict free to be worth the expense of the prerequisite audit.

²¹⁷ See Form SD, *supra* note 26, at Item 1.01(a) (pertaining to the RCOI); *id.* at Item 1.01(c) (pertaining to due diligence); *supra* text accompanying notes 28–57.

²¹⁸ See Form SD, *supra* note 26, at Item 1.01(c).

²¹⁹ Also, as noted earlier, although the rules left open the possibility that companies could reverse the conclusion of their RCOI in their due diligence, this never occurred. See *supra* text accompanying notes 124–125. This further suggests the merger of these two inquiries in practice.

companies would report on their RCOI in the Form SD²²⁰ and on their due diligence in the Conflict Minerals Report.²²¹ Since these two investigations have collapsed into one, there is no need to have two separate reports. One filing that discusses a company's supply-chain inquiry would be sufficient.

Yet more redundancy is built in via the requirement that companies describe their efforts to uncover the "mine or location of origin [of their conflict minerals] with the greatest possible specificity."²²² This obligation seems to be completely swallowed by a company's duty to describe its due diligence into "the source and chain of custody of [the company's] conflict minerals."²²³ Perhaps there is an abstract distinction in that companies are to go into more depth in describing this singled-out aspect of their diligence, but this did not play out in the reports and it is difficult to conceptualize how it could.

Finally, the *OECD Guidance* is itself a source of confusion and duplication. As noted above, step two of the guidance, identify and assess supply chain risk, and step four, perform audits of smelters in the company supply chain, focus on understanding company processing facilities.²²⁴ In practice, most firms addressed both steps by referencing the results of the CFSI audits.²²⁵ To signal compliance with each, some firms noted twice in their reports that they consulted the CFSI audit list.²²⁶ The final OECD step—publicly report on due diligence—is completely redundant with the regulations themselves.²²⁷ Out of an abundance of caution, however, some firms listed this step and reported meeting it by filing the Conflict Minerals Report.²²⁸

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

²²⁰ Form SD, *supra* note 26, at Item 1.01(a)–(b).

²²¹ *Id.* at Item 1.01(c).

²²² *Id.* at Item 1.01(c)(2).

²²³ *Id.* at Item 1.01(c).

²²⁴ *See supra* text accompanying notes 156–157.

²²⁵ *See supra* text accompanying note 158.

²²⁶ *See, e.g.,* EMC Corp., *supra* note 144, at 6; Macy's, Inc., *supra* note 144, at 4; Western Digital Corp., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5–6 (June 2, 2014).

²²⁷ OECD GUIDANCE, *supra* note 37, at 19.

²²⁸ *See, e.g.,* Ford Motor Co., Conflict Minerals Report (Form SD) Exhibit 1.01, at 3 (May 28, 2014); Google Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); Under Armour, Inc., *supra* note 192, at 4.

C. Reluctant Compliance

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

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

While it is perhaps unsurprising that companies largely chose to hew to the letter of the law rather than its spirit, in this case there was also a high level of noncompliance. Table 4 illustrates the spottiness of the compliance effort. Only about one-half of companies complied with the OECD instructions to set up a grievance mechanism and alter their supplier contracts.²²⁹ And only 30% said they set up a risk management plan.²³⁰ Moreover, companies unable to determine the conflict status of their minerals were required to report on what they will do better in the future. Many listed action items that were clearly required in year one, implicitly acknowledging a compliance gap.²³¹ The enthusiasm with which companies dove into the rules' loopholes projects an air of cynicism and their failure to comply with even ministerial requirements of the *OECD Guidance* reflects a sort of casualness not usually seen in SEC filings.

And all of this says nothing of those that filed nothing. As mentioned above, far fewer companies filed reports than the SEC anticipated.²³² The agency arrived at its projected figure by adding up companies within industries most likely to have products containing conflict minerals.²³³ Although

²²⁹ See Table 4, *supra* Part II.B.2.

²³⁰ See Table 4, *supra* Part II.B.2.

²³¹ See *supra* text accompanying note 186.

²³² See Table 1, *supra* Part II.A.

²³³ The SEC's estimate of 5,994 total filers comes from aggregating the estimates of three different types of filers: domestic issuers (which file Form 10-Ks), foreign private issuers (which file Form 20-Fs), and Canadian issuers that utilize the Multijurisdictional Disclosure System (which file Form 40-Fs). See *Conflict Minerals*, 75 Fed. Reg. 80,948, 80,966 & n.176 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249b) (estimating 5,551 10-K

the SEC could have made some adjustments, the approach is reasonable, and it is hard to see how this logic could have led the agency so far astray.²³⁴ The most obvious explanation seems to be that companies simply failed to comply.²³⁵

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

IV. SUPPLY-CHAIN TRANSPARENCY THROUGH REFORM

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

A. *Maintain the Status Quo?*

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

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

²³⁴ Even though the final rules were narrower than those proposed, the SEC did not revise its estimate. *See, e.g.*, Conflict Minerals, 77 Fed. Reg. at 56,350–53 (eliminating the requirement that mining companies file conflict minerals disclosures).

²³⁵ The data analyzed herein shed little light on which companies are flaunting the rules by failing to file conflict minerals disclosures. The only hint comes from the analysis of filers by industry SIC code. *See* Table 2 *supra* Part II.A. and text accompanying notes 109–112. Where a high percentage of companies in a particular industry filed, it may be the case that the non-filers are violating the rules. Follow-up with these companies is likely the only way to tell whether their conduct is justified.

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

A potential counterargument is that circumstances will be different in coming years because the rules become more stringent once the ramp-up period expires. According to this logic, these stricter requirements would yield more transparency even if companies remain uncooperative.

Looking at how the rules would change, however, shows that this is a false hope. Substantively, the expiration of the ramp-up would mean that corporate due diligence efforts would have to be audited.²³⁶ While this would surely improve the quality of the reports somewhat, the results would likely be insignificant. An audit means that companies would have to check all of the boxes in the *OECD Guidance*. Companies would be forced to put in place risk management plans and grievance mechanisms.²³⁷ But changes like these do not address the core problems in the rules. More uniform adherence to these procedural technicalities would do little to improve supply-chain transparency.

There is also a possibility that the Supreme Court overrules the Circuit Court's holding (and subsequent reaffirmation of its holding) that the rules violate the first amendment.²³⁸ If the rules were returned to their original form, would this render them effective?

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

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

²³⁶ Form SD, *supra* note 26, at Item 1.01(c)(1)(ii)(A); *id.* at Instruction 2 to Item 1.01.

²³⁷ OECD GUIDANCE, *supra* note 37, at 17–18.

²³⁸ See Hunton & Williams LLP, *When Can Companies Be Forced to Say What They Don't Want To Say?*, Oct. 9, 2014, <https://www.hunton.com/files/News/0602224c-28c8-4490-bffd-99926ce57d1b/Presentation/NewsAttachment/ebf47219-e285-4e42-aded-9ae88d8f1bad/when-can-companies-be-forced-to-say-what-they-dont-want-to-say.pdf>.

they are choosing it because it is the only option for those that have not been able to definitively establish that they are conflict free.²³⁹ These explanations should negate any impact of the change. The bottom line is that so long as the nature of corporate compliance remains unchanged, it does not matter what company products are labeled in their reports.

If things are allowed to continue as they are, the other side of the equation—the institutional framework supporting conflict-free sourcing—is also unlikely to improve. The key is the CFSI audit program. If the number of smelters and refiners certified as conflict free grows, then more companies would be able to report that they are conflict free and there would be more choices for those firms that aspire to join them.²⁴⁰ With the current rules in place, however, growth in the number of audited facilities is far from assured. Audit costs have been estimated to range between \$5,000 and \$10,000.²⁴¹ It is possible that those firms that think the expense worthwhile have already gone through the process. Also, firms may have borne the expense expecting there to be more demand from U.S. firms for conflict-free minerals. Given the nature of compliance, this appears to have been a miscalculation. The filings contain little to suggest corporations are significantly altering their sourcing practices.²⁴² Such a tepid reaction to the rules must give pause to those smelters and refiners considering whether to go through the costly process. Moreover, audits must be renewed annually.²⁴³ In light of the above, processing facilities that are currently certified as conflict free may question whether it is worth the effort and expense to maintain their status. While Section 1502 may have provided a jolt to the audit effort, if nothing is done to the current rules, it would likely face headwinds in the future.²⁴⁴

²³⁹ Conflict Minerals, 77 Fed. Reg. at 56,322 n.562.

²⁴⁰ At last count, there were 128 certified smelters and refiners: 22 CFSI-certified tin facilities, *Conflict-Free Tin Smelters*, CFSI, <http://www.conflictreesourcing.org/tin-conflict-free-smelters/> (last visited Dec. 15, 2014); 41 CFSI-certified tantalum facilities, *Conflict-Free Tantalum Smelters*, CFSI, <http://www.conflictreesourcing.org/tantalum-conflict-free-smelters/> (last visited Dec. 17, 2014); 9 CFSI-certified tungsten facilities, *Conflict-Free Smelter Program Tungsten Smelter List*, CFSI, <http://www.conflictreesourcing.org/tungsten-conflict-free-smelters/> (last visited Dec. 13, 2014); and 56 CFSI-certified gold facilities, *Conflict-Free Gold Refiners*, CFSI, <http://www.conflictreesourcing.org/gold-conflict-free-smelters/> (last visited Dec. 10, 2014).

²⁴¹ ELECTRONIC INDUSTRY CITIZENSHIP COALITION, INC. & GLOBAL E-SUSTAINABILITY INITIATIVE, EICC-GeSI CONFLICT-FREE SMELTER PROGRAM: SMELTER/REFINER INTRODUCTORY TRAINING AND INSTRUCTION DOCUMENT 6 (2012), http://www.resolv.org/wp-content/uploads/2012/04/Smelter-Intro-Training_Final1_04_07_2012.pdf.

²⁴² Cf. Christoph Vogel & Ben Radley, *In Eastern Congo, Economic Colonialism in the Guise of Ethical Consumption?*, WASH. POST: THE MONKEY CAGE (Sept. 10, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/10/in-eastern-congo-economic-colonialism-of-ethical-consumption/> (“[A]lmost no corporate stakeholder . . . has visibly engaged in eastern Congo to help Congolese actors comply with regulations, improve labor security, or increase decent livelihoods.”).

²⁴³ LEVIN ET AL., *supra* note 37, at 44.

²⁴⁴ It is possible that international tracing efforts will continue to improve and gain broader acceptance as a way to comply with regulations put in place by countries besides the

There is also one further argument that could be made for the status quo, which is that the rules are actually working. One could claim that although the reports have proven to be unhelpful, the specter of compliance has already led to important changes. There have been claims, for instance, that the mere presence of the legislation has led to a two-tiered market in certain conflict minerals, with those traceable to conflict-free mines going for much more than the rest.²⁴⁵ The discount applied to untraced minerals aligns with the rules' goal of decreasing the funding available to Congolese militant groups.²⁴⁶

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

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

B. Repeal the Conflict Minerals Rules?

Another socially minded Dodd-Frank rule, the requirement that companies disclose the pay ratio of their executives versus their rank-and-file employees, is under congressional reconsideration.²⁴⁷ Perhaps the conflict

U.S. It is too early, however, to gauge the seriousness and impact of such regulatory efforts. The European Union's rulemaking, for instance, has been delayed until at least 2016. *See EU Conflict Minerals Regulation Not Expected Until Mid-2016 – At the Earliest*, Conflict Minerals Law (Oct. 20, 2015), <http://www.conflictmineralslaw.com/2015/10/20/eu-conflict-minerals-regulation-not-expected-until-mid-2016-at-the-earliest/>.

²⁴⁵ FIDEL BAFILEMBA ET AL., *THE IMPACT OF DODD-FRANK AND CONFLICT MINERAL REFORMS ON EASTERN CONGO'S CONFLICT*, The Enough Project, June 2014, at 2, 8, <http://www.enough.org//%20Project%20-%20The%20Impact%20of%20Dodd-Frank%20Conflict%20Minerals%20Reforms%20on%20Eastern%20Congo%E2%80%99s%2010June2014.pdf>; *but see* LEVIN ET AL., *supra* note 37, at 38 n. 138 (citing field research indicating that uncertified minerals sometimes go for higher prices).

²⁴⁶ *See* BAFILEMBA ET AL., *supra* note 245, at 2.

²⁴⁷ Emily Chasan, *Legislators Take Aim at Dodd-Frank Pay-Ratio Rule*, WALL ST. J.: CFO JOURNAL (June 20, 2013, 3:15 AM), <http://blogs.wsj.com/cfo/2013/06/20/legislators-take-aim-at-pay-ratio-rule>.

minerals rules should be next. There are two arguments for repeal—that the rules are ineffective and that they do more harm than good.

One could argue that since the conflict minerals filings are not yielding the type of information that would lead to market pressure and reformed sourcing, they should be rescinded. Even though countless dollars and hours have been spent on drafting and compliance, these are sunk costs and therefore irrelevant.

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

There is also an argument that the rules should be repealed because they are actually worsening conditions in the Congo. As I noted earlier, some have lamented that these rules have caused a *de facto* embargo of the region, which has plunged local conflict-free miners deeper into poverty.²⁴⁸

The idea that the rules are having this unintended consequence is worrisome. But it is also contestable. The Enough Project, for instance, claims that they have seen “electronics companies . . . expanding [their] minerals sourcing from the Congo.”²⁴⁹ In discussing the *de facto* embargo, a leading critic acknowledges that, “as with most data in the . . . Congo,” displacement figures “are extremely difficult to verify” and “[t]here are no polls or surveys showing . . . reliable figures on how many miners are out of work” as a result of the Dodd-Frank Act.²⁵⁰

There is also a problem with causation. A lot has happened in the Congo that might explain any movement away from Congolese minerals or displacement of local miners.²⁵¹ In 2010, for instance, the president of the DRC issued a ban on mining in two of the country’s provinces.²⁵² Moreover, there have been an astounding number of international efforts, aside from the Dodd-Frank Act, aimed at cutting off funding from militarized mines in

²⁴⁸ See *supra* notes 86–89 and accompanying text.

²⁴⁹ BAFILEMBA ET AL., *supra* note 245, at 2. See also GLOBAL WITNESS, *supra* note 93 (“Major international companies have recently begun to engage in responsible sourcing programs in some areas of Congo.”)

²⁵⁰ Seay, *supra* note 86, at 14 n.33.

²⁵¹ See generally BAFILEMBA ET AL., *supra* note 245.

²⁵² See Seay, *supra* note 86, at 13.

the region.²⁵³ These efforts might also explain any decreased demand for Congolese minerals.²⁵⁴

In addition, the idea that there is a *de facto* embargo attributable to the Dodd-Frank Act conflicts with the data in the disclosures. Nothing therein suggests that companies are abandoning the region.²⁵⁵ If there is really some semblance of a *de facto* embargo and Section 1502 is to blame, it is not because U.S. companies are leaving the Congo, it is because intermediaries have anticipated that they will, and have adjusted their practices accordingly. Once it becomes clear that companies are not actually demanding conflict-free minerals, the pressure to abandon the region should dissipate. In a strange twist, because the rules in their current form are ineffective, it makes little sense to blame them for a *de facto* embargo or adverse effects on individual and family mines.

Finally, even if the Dodd-Frank Act or other transparency efforts are decreasing demand for Congolese minerals, the answer is not necessarily to dismantle such initiatives. Another alternative is to complement these programs with others that provide assistance to displaced miners. Indeed, human rights groups and scholars that have raised concerns about a potential *de facto* embargo as a result of the Dodd-Frank Act have pointed to programs such as these—rather than repeal—as the right solution.²⁵⁶

C. Reforming the Conflict Minerals Rules

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

²⁵³ See DOMINIC JOHNSON, *NO KIVU, NO CONFLICT? The Misguided Struggle Against "Conflict Minerals" in the DRC*, 9–12 (2013), http://goodelectronics.org/news-en/new-report-from-pole-institute-about-conflict-minerals-from-congo/at_download/attachment.

²⁵⁴ See KEN MATTHYSEN & ANDRÉS ZARAGOZA MONTEJANO, 'CONFLICT MINERALS' INITIATIVES IN DR CONGO: PERCEPTIONS OF LOCAL MINING COMMUNITIES 8 (2013), http://ipis-research.be/wp-content/uploads/2013/11/20131112_HU.pdf.

²⁵⁵ In fact, some companies acknowledged the risk of a *de facto* embargo and pledged not to contribute. See, e.g., Microchip Tech. Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 5 (June 2, 2014); Seagate Tech. plc, Conflict Minerals Report (Form SD) Exhibit 1.02, at 9 (May 30, 2014); Uroplasty, Inc., Conflict Minerals Report (Form SD) Exhibit 1.02, at 3 (June 2, 2014); cf. Ken Tysiac, *Conflict Minerals Rule Poses Compliance Challenge*, J. OF ACCT. (Apr. 1, 2013), <http://www.journalofaccountancy.com/Issues/2013/Apr/20127083.htm> ("So far, it appears that companies are trying to source their minerals without causing harm to the entire region.").

²⁵⁶ See BAFILEMBA ET AL., *supra* note 245, at 14–15; Seay, *supra* note 86, at 25.

1. *Getting the Incentives Right*

The first thing that needs to be addressed is the incentive problem at the heart of the rules. Companies naturally resist revealing negative—or even potentially negative—information about themselves, but this is necessary for the rules to work.²⁵⁷ As noted above, one way to combat this predilection is to provide for specific and large penalties for noncompliance with these rules.²⁵⁸ Companies would be inclined to put more effort into their due diligence if they suspected real penalties for failure to do so. Along the same lines, companies seem to be under the impression that, when it comes to conflict minerals, the SEC is not inclined to pursue the remedies currently at its disposal.²⁵⁹ The agency has a built in mechanism to reverse this impression: it frequently signals its enforcement priorities to the securities bar and can include conflict minerals the next time that it does so.²⁶⁰

2. *Disclose or Explain*

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

The entire effort starts with the firm's products, which must be clearly disclosed. The discretion given to companies today to describe their products as they see fit should be eliminated.²⁶¹ For consumers to better discern what is happening on a product-by-product basis, they need specific brand information. The SEC, therefore, should require that companies include this level of detail.

The next step is to mandate that companies link these clearly identified products to the smelters and refiners in their supply chains. One thing that becomes clear in the reports is the importance of these processing facilities to the conflict-free effort. Even though companies avoided disclosing their smelters and refiners, many acknowledged that they could identify them.²⁶² This is crucial because, thanks to the CFSI audit program, companies need go no further to determine that their products are conflict free. The processing facility is the place where top-down and bottom-up diligence converge. The CFSI audit determines whether the supply chain reaching this point is

²⁵⁷ See *supra* Part III.A.

²⁵⁸ See *supra* text accompanying notes 204–209.

²⁵⁹ See *supra* text accompanying notes 210–211.

²⁶⁰ See, e.g., Christian Bartholomew et al., *Weil Gotshal Discusses SEC Speaks 2014: Charting a New Course for Enforcement Efforts*, CLS BLUE SKY BLOG (Apr. 1, 2014), <http://clsbluesky.law.columbia.edu/2014/04/01/weil-gotshal-discusses-sec-speaks-2014-charting-a-new-course-for-enforcement-efforts/>.

²⁶¹ See *supra* note 60 and accompanying text.

²⁶² See *supra* text accompanying note 158.

conflict free.²⁶³ Since conflict minerals cannot enter the supply chain after processing, once companies identify that their products are only incorporating materials from conflict-free smelters or refiners, they can declare their goods to be conflict free as well.

A key argument against the rules has been that it is almost impossible for companies to determine the conflict status of their products.²⁶⁴ While it is perhaps not feasible for companies to reach all the way to the mines on their own, the CFSI audit program means they do not have to. Supply-chain transparency is therefore possible, but the rules need to be specifically structured around the only realistic way to achieve it.

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

Not all companies would be able to provide smelter and refiner information. Their suppliers might be unwilling to disclose or unwilling to take the steps necessary to make such data available.²⁶⁵ To address this challenge, the rules should give companies unable to provide this information the opportunity to explain why and what steps they are taking to improve their ability to provide it in the future. Corrective plans, for instance, might include switching suppliers or including contractual language in future supply agreements mandating that suppliers provide processing-facility information.

In addition, the key piece of information is whether the smelters and refiners that a company lists have been CFSI-certified as conflict free. Corporations should therefore be required to disclose whether this is the case. Since CFSI makes its results publicly available, all companies that have identified their smelters and refiners should also be able to provide their conflict status.²⁶⁶

²⁶³ See BAFILEMBA ET AL., *supra* note 245, at 7; BAYER, *supra* note 80, at 28.

²⁶⁴ See *supra* note 85 and accompanying text.

²⁶⁵ Many companies with gold in their supply chain would have difficulty identifying their processing facilities. A large portion of the world's gold is sold through the Shanghai Gold Exchange or commingled therewith. This market, however, does not keep records with regard to where its gold is processed or sourced. See COMMERCE REPORT, *supra* note 21, at 2.

²⁶⁶ See *Conflict-Free Smelters & Refiners*, CFSI, <http://www.conflictreesourcing.org/conflict-free-smelter-refiner-lists/> (last visited Dec. 16, 2014).

Since only 128²⁶⁷ out of over 300 smelters and refiners have been audited,²⁶⁸ large companies with diverse product lines likely source from both audited and unaudited processing facilities. To accommodate these companies, the rules should provide firms that have unaudited facilities in their supply chains the opportunity to explain why and if they have any plans to change their sourcing practices.²⁶⁹

The same disclosure rules should apply for more detailed information as well, including the country and mine of origin of conflict minerals in company supply chains, the groups that control the mines where company conflict minerals are sourced, and whether groups in control are implicated in human rights abuses. Many companies declined to reveal country-of-origin information based on a narrow reading of the rules rather than ignorance.²⁷⁰ Moreover, CFSI-certified smelters and refiners must have provided both country and mine-of-origin information to the CFSI auditor.²⁷¹ And to certify the smelter or refiner, the auditor must have been able to verify who controls the mines and their culpability for crimes in the Congo. This shows that information all the way back to the mine is available at least with respect to some products for some firms. It is just a question of getting it into the reports. If companies are able to obtain this information, they should sort it by smelter. If they are unable to do so, then just as above, they should be given the opportunity to explain why and what, if anything, they are doing to further future efforts to obtain this information.²⁷²

All of this required information should be presented in a flowchart or outline depending on the complexity of a company's supply chain. A flowchart would start with a particular product. It would then list the conflict minerals therein, processing-facility information (along with audit status), country-of-origin information, and mine-of-origin information (along with what group is in control). Because minerals from militarized mines would flow through unaudited smelters for which upstream supply chain information is probably unknown, companies would be unlikely to list groups com-

²⁶⁷ See *supra* note 240.

²⁶⁸ The exact number is unknown. The GAO counted 287, but said there are believed to be almost 500. GAO REPORT, *supra* note 44, at 3–4. The Commerce Department identified over 300. See COMMERCE REPORT, *supra* note 21, at tables 1–4.

²⁶⁹ Companies that have both certified and uncertified smelters in their supply chain—but process most of their conflict minerals through the former—may wish to explain that this is the case.

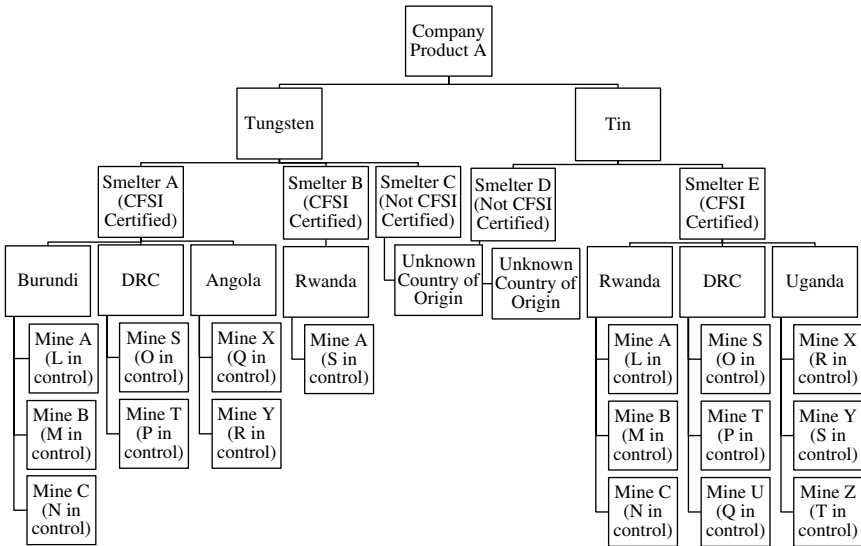
²⁷⁰ See *supra* Part V.C.

²⁷¹ See BAFILEMBA ET AL., *supra* note 245, at 7; BAYER, *supra* note 80, at 28.

²⁷² CFSI publicly identifies certified smelters, but it only makes country-of-origin information available to its members. *Reasonable Country of Origin Inquiry Data*, CFSI, <http://www.conflictreesourcing.org/rcoi-data/> (last visited Dec. 22, 2014). Membership costs \$5,000 annually. *Benefits of Membership in the Conflict-Free Sourcing Initiative*, CFSI, <http://www.conflictreesourcing.org/membership/> (last visited Dec. 22, 2014). In addition, some companies reported that CFSI tells its members the category of countries from which a smelter or refiner sources rather than the specific nation. See, e.g., Ecolab Inc., *supra* note 154, at 5–6. If this is the case, then CFSI would have to be willing to share more information to provide the level of granularity sought in this proposal.

pllicit in human rights abuses in their flowcharts. If they do, however, those groups should be designated as such (the groups, for example, could be marked with an asterisk, with an explanation following in related text). As shown in Figure 2, below, the flowchart would clearly show the lineage of each mineral in each product. Many companies would likely have blanks in this diagram. In a narrative accompanying it, companies would be free to explain the omissions and describe what steps, if any, they are taking to better their understanding. An outline would follow the exact same organization and provide the exact same opportunity for explanation.

FIGURE 2: CONFLICT MINERALS FLOWCHART



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

In addition, under this approach, there would be no need for any type of complex labeling regime. In fact, the SEC’s attempt to sort companies into categories was a mistake, a gross oversimplification of supply chains and corporate efforts to disentangle them from human rights abuses. Companies have varying levels of commitment to the idea of ethical sourcing and have had varying levels of success in achieving it. The SEC’s labels fail to appreciate these distinctions and create categories that are at best unhelpful and at worst deceptive. Rather than force companies into categories, this proposal publicizes the details of corporate supply chains. While there should still be

some rules around labeling, they should stipulate only that companies may not call their products conflict free unless they utilize only conflict-free smelters and refiners in their supply chains and that companies may not declare themselves conflict free unless all of their products meet this criterion.

As noted throughout the discussion above, the rules contain opportunities for companies to explain gaps in their knowledge or shortcomings in their sourcing practices. This feature causes the approach set forth above to resemble a so-called “comply-or-explain” framework. With comply-or-explain regulation, companies are given the choice to comply with a legal rule or explain why they are opting out.²⁷³ Similarly, under this disclose-or-explain approach, companies are required to disclose the information that they can obtain or explain why they are uninformed. They are also given the opportunity to provide context for revelations that might cast them in a negative light. Giving companies this opportunity allows consumers and shareholders to better assess which companies align with their social goals. Firms with legitimate excuses and tangible plans would come out looking much better than those that respond with platitudes. Requiring detailed disclosures, but providing ample opportunity for explanations, effectuates the overarching purpose of the rules in that it provides as much information as possible for concerned stakeholders.

In addition, even though this revised template would result in much more transparency, it would require little additional effort by the regulated entities. It is not as if companies chose to disclose abstract product categories because it would be too expensive to ascertain and reveal the brands within. Companies were intentionally vague to reduce any chance of reprisal. Similarly, many companies were able to identify smelters and countries of origin, but chose not to disclose. It would not cost these companies more to make this information available. Finally, companies only need to consult CFSI to obtain the additional downstream details that this regulatory structure seeks to bring to light.²⁷⁴

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

²⁷³ See Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460, 474–75 (2006).

²⁷⁴ As noted *supra* note 272, CFSI would have to be willing to share the information on which its audit results are based for the transparency sought in this proposal to be achieved.

Reliance on this institutional mechanism also calls into doubt the for-now-delayed requirement that firms have their due diligence efforts audited. When firms are expected to trace minerals all the way to mines on their own, it may make sense to require oversight of this process. If this is now the job of an institution designed solely for this purpose—and firms only need to conduct sufficient diligence to identify their smelters and refiners—then firm-level audits seem unnecessary. Firms should be permitted to have their efforts audited if they think the cost is worth the signal of seriousness it sends to the public, but it should not be mandated.²⁷⁵

The structure set out above would also eliminate the redundancies and clutter that mar the current framework and drive up compliance costs. As alluded to above, the distinction between the RCOI and due diligence is meaningless and should be abandoned.²⁷⁶ The way to fix this is to eliminate the RCOI concept. Under the new framework, companies would just conduct due diligence on their supply chains and disclose the results in an outline or flowchart. If companies are not sourcing from the region, this would become clear from the information therein. Once firms determine that they are not involved in the area, they would not be required to inquire into the identity of the mines in their supply chains or into who runs those operations. They could also report that they are conflict free. Eliminating RCOI also removes the need for a separate Form SD and Conflict Minerals Report. Instead, one filing would suffice.²⁷⁷

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

²⁷⁵ Another problem with the audit requirement is that, once in place, it would create an incentive for firms to source from outside the region, thereby amplifying concerns about a *de facto* embargo. As currently written, firms that only file a Form SD because they do not obtain minerals from the conflict area are not required to obtain an audit and are thereby saved the expense. See Form SD, *supra* note 26, at Item 1.01(c)(1)(ii) (requiring an audit for the Conflict Minerals Report).

²⁷⁶ See *supra* text accompanying notes 217–219.

²⁷⁷ Along the same lines, the redundant requirement to describe efforts to determine country- and mine-of-origin information with specificity should be eliminated. See *supra* text accompanying notes 222–223.

The chief way this reform proposal improves upon the current rules is by doing a better job of fitting the regulatory demands to the realities of conflict mineral supply chains and corporate due diligence practices. The first-year filings largely fail in their intended purpose, but they provide a sliver of transparency that gives insight into how the rules can be mended to achieve this fit. Though the reform proposal presented in this Part is by no means a panacea, it has the potential to yield far more promising information and drive more ethical sourcing practices.²⁷⁸ At the same time, because it asks companies to reveal more rather than do more, it should not drive up compliance costs—its simplified structure may even translate to savings.

3. *Concerns with the Disclose-or-Explain Template*

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

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

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

²⁷⁸ It is beyond the scope of this article to analyze fully whether each of the suggested changes would require amended legislation or could be accomplished solely through SEC rulemaking. Many of the suggestions, however, are within the SEC's power. For instance, the RCOI concept, the reliance on the *OECD Guidance*, and the two-tiered reporting structure were all SEC inventions. On the other hand, some of the recommendations herein would need congressional approval. The audit requirement, for example, was specifically included in Section 1502 of the Dodd-Frank Act. Because Congress required this, the SEC would not have authority to unilaterally remove it. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984) (setting out the boundaries of agency discretion).

weaknesses, those that shirk would be far easier to identify. They would, therefore, be far less tempted to do so.

Another concern has to do with the faith put in the CFSI audit program. CFSI is an industry organization. It may therefore seek to appease industry members by setting a low bar for certification. Indeed, the ability of CFSI to declare smelters and refiners conflict free to a certain extent belies the claims of those who argue that successful tracing of minerals to their source is nearly impossible.²⁷⁹

While this is not a concern that can be dismissed, at this point it is speculative. The risk at issue here—really one of industry capture—is always present with regulation. Regulation occurs in spite of industry capture, and all lawmakers can do is acknowledge the risk and design institutional countermeasures. While capture potential may appear particularly pronounced in this case, there has been no indication that the audit process is compromised. Human rights groups celebrate its actions.²⁸⁰ Moreover, compliance with the rules would reveal whether anything sinister is occurring. The rules require disclosure not only of the conflict-free label, but also of the country and mine of origin of the minerals processed in the smelters and refiners. Nongovernmental organizations with knowledge of the Congo would be able to see if any of the minerals—and therefore any of the processing facilities—had been mischaracterized.

A final concern has to do with the potential for a *de facto* embargo. I argued above that because the current rules appear to be unsuccessful in altering corporate sourcing practices, there is little concern that compliance with the Dodd-Frank Act is a long-term threat to legitimate mining in the Congo.²⁸¹ The *de facto* embargo concern resurfaces if the current rules are swapped out for ones that work. In particular, this proposal creates pressure on companies to choose conflict-free smelters and refiners. Perhaps many of these processing facilities are conflict free because they do not source from

²⁷⁹ See *supra* text accompanying note 85. The Commerce Department, which the Dodd-Frank Act instructed to list “all known conflict mineral processing facilities worldwide,” caused a stir when it claimed that it could not ascertain which facilities were contributing to armed conflict in the Congo. See Dodd-Frank Act, § 1502(d)(3)(c); COMMERCE REPORT, *supra* note 21, at 1; Emily Chasan, ‘Conflict Minerals’ Too Hard to Track, *Commerce Department Says*, WALL. ST. J.: CFO JOURNAL (Sept. 5, 2014, 5:57PM), <http://blogs.wsj.com/cfo/2014/09/05/conflict-minerals-too-hard-to-track-commerce-department-says/>. This admission should be given little weight, however, because the department appears to have merely aggregated preexisting smelter lists rather than conduct independent research and analysis. See COMMERCE REPORT, *supra* note 21, at 1–3.

²⁸⁰ See, e.g., *Conflict-Free Smelters for All Four Conflict Minerals*, ENOUGH PROJECT (Jan. 31, 2014), <http://www.enoughproject.org/blogs/conflict-free-smelters-all-four-conflict-minerals-first-time>; see also LEVIN ET AL., *supra* note 37, at 47 (describing CFSI, the institution responsible for the audit program, as “one of the most utilized and respected resources for companies addressing conflict minerals issues.”). A part of the conflict-free certification process, iTSCI, which monitors mines and traces conflict minerals, see LEVIN ET AL., *supra* note 37, at 36–37, has been criticized—not for lack of independence—but because of the costs it imposes on miners and its limited reach, see Vogel & Radley, *supra* note 242.

²⁸¹ See *supra* text accompanying notes 249–256.

the region.²⁸² Or perhaps the easiest way for smelters and refiners to become conflict free is to process minerals solely from other areas. These companies, therefore, might abandon the region to respond to demand for certified facilities. Thus, if the proposal is successful, the *de facto* embargo concern rises anew.

The worry that the regulations would hurt those who it is aimed to help is no doubt troubling, but once put in the proper context, it is far less fearsome than it first appears. Properly viewed, the potential injury to individual and family miners is a potential cost of the rules. As such, it should be weighed against its benefits. The real question is whether the marginal loss to these miners, who must seek other employment, is larger than the gains in cutting off the funding to warring Congolese groups.²⁸³ This question is unanswerable in the abstract, but the filings would provide a market-based mechanism for performing this cost-benefit analysis.

The filings would show which companies are using conflict-free processing facilities that source from the region and which are using conflict-free processing facilities that source from elsewhere (with the benefit of multiple years of disclosures, readers would even be able to see if smelters and refiners become conflict free by fleeing the Congo). Socially motivated shareholders and consumers would care not only about the conflict-free status, but also about how the status is achieved, and reward or punish companies accordingly. These individuals would likely not be inclined to reward companies that use smelters and refiners that have taken the easy way out and thus there would be no incentive for the processing facilities to do so. If, however, companies did see some gains with these concerned constituents even when they choose smelters or refiners that left the region, then it would indicate that those most concerned about these issues believe that firms that use processing facilities that exited the Congo are still better actors than those that continue to use uncertified smelters and refiners. The logic of naming and shaming relies on the decisions of these individuals. Who better to make the cost-benefit calculation regarding the overall social impact of leaving the region?²⁸⁴

²⁸² Some commentators have suggested this may be the case, but have stopped short of presenting evidence. See, e.g., MATTHYSEN & ZARAGOZA MONTEJANO, *supra* note 254, at 9 (claiming that “most smelters decided to stop sourcing from the DRC to enable them to acquire ‘conflict-free smelter’ status.”); Aronson, *supra* note 4 (asserting that “the smelting companies that used to buy from eastern Congo have stopped”). One commentator discusses the departure of the Malaysian Smelting Corporation from the region; but it looks like the company has recently reversed course. Compare Seay, *supra* note 86, at 14, with *MSC to Invest in DR Congo Smelter*, INDUS. TECH. RESEARCH INST., June 6, 2012, https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=2455&Itemid=143. Moreover, nothing in the filings suggests this is occurring.

²⁸³ The loss to the miners is a subject of debate. Compare BAFLEMBE ET AL., *supra* note 245, at 3, with Seay, *supra* note 86, at 14.

²⁸⁴ While individual shareholders and consumers could inform themselves through these filings, it is more likely that human rights groups and other concerned intermediaries would distill the information and make recommendations that drive their decisions. This market dy-

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

D. Implications for Other Supply Chain Transparency Efforts

While this Article has focused on assessing and improving the U.S. conflict minerals rules, the analysis and proposals carry implications for U.S. states and other countries currently considering similar actions, both with respect to conflict minerals and with respect to other unethical sourcing practices.²⁸⁵ As it pertains to conflict minerals, rather than copy current U.S. federal law, concerned governments should, as in the above template, seek transparency on smelters and refiners in corporate supply chains and leverage institutional efforts to certify them as conflict free. They should also provide ample opportunity for companies to explain knowledge gaps or practices that raise concerns.

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

CONCLUSION

So far, the debate about the conflict minerals rules has offered more polemics than insight. A review of the filings themselves, however, provides an abundance of data about the efficacy of the rules and how they could be improved. Section 1502 and the SEC rules that bring it to life fail in their principal goal of naming and shaming companies that source minerals from

namic cannot function today because the disclosures offer so little to go on. Cf. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984) (discussing the role of intermediaries in efficient stock markets).

²⁸⁵ See *supra* text accompanying notes 96–100.

militarized mines in the Congo. While this failure supports the legislation's repeal, I argue that a close read of the filings points to a better alternative.

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

