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IRRESPONSIBLE CORPORATE-RESPONSIBILITY RULES

Lide E. Paterno

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Lide E. Paterno*

ABSTRACT

A wave of legislative efforts in the first half of this decade, at both the federal and state levels, has steered corporations to engage in corporate social responsibility. At the national level, Congress is increasingly calling upon the Securities and Exchange Commission ("SEC") to promulgate specialized disclosure rules. The most notable example is Section 1502 of the Dodd-Frank Act, which requires publicly traded corporations to disclose their use of broadly defined "conflict minerals" in any products the corporations manufacture. At the local level, well over half the state legislatures have adopted benefit-corporation statutes meant to encourage corporate directors to promote the public good.

These two well-meaning phenomena appear congruent and their goals seem promising: superficially, the SEC's specialized disclosure rules can be characterized as federal benefit-corporation rules. However, closer examination reveals that the federal specialized disclosure rules ignore the main insights of the state benefit-corporation trend and, as a result, are likely to be ineffective. Specifically, comparison of the two models indicates that the federal rules impose substantial costs while yielding speech of slight value and effecting little change in corporate behavior. Econometric analysis of first-year filings under the SEC's conflict minerals regulations supports this apprehension, suggesting that the benefits of the federal benefit-corporation rules are more illusory than actual. By overpromising and underdelivering, these federal corporate-social-responsibility rules are, in fact, irresponsible.

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INTRODUCTION

Corporate social responsibility—the notion that businesses should be mindful of their effects on public welfare—has become a trend that companies are eager to ostensibly adopt, celebrities are quick to endorse, and activists and consumers are keen to demand.[1] Governments have taken notice too. A wave of legislative efforts in the first half of this decade, at both the federal and state levels, has steered corporations to engage in beyond-profit-seeking measures to promote the public good.

The U.S. Congress's most notable example is a 2010 Amendment to the Exchange Act, buried at Section 1502 in the mammoth Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] Section 1502 calls on the Securities and Exchange Commission ("SEC" or "Commission") to require publicly traded corporations to disclose their use of broadly defined "conflict minerals" in any products the corporations manufacture. The relevant minerals appear in ubiquitous end-products, triggering a host of responsibilities: the companies must determine whether their supply chains touch the affected region in central Africa, must mitigate the possibility that proceeds from the minerals finance the ongoing conflict, and must publically disclose this information on their websites. The legislative history of Section 1502 makes clear that, although the Dodd-Frank Act as a whole primarily regulates financial institutions, this amendment was prompted by congressional concern for the long-running humanitarian crisis in the Democratic Republic of the Congo ("DRC"). Considered alongside contemporaneous legislation similarly mandating specialized disclosures regarding extraterritorial corporate conduct,[3] Section 1502 appears to be a harbinger of future congressional measures that use securities regulations as a guise to advance U.S. foreign policy goals.

At the same time, various U.S. states—including, recently and most significantly, Delaware—have adopted statutes creating a new corporate legal structure for "benefit corporations." This novel legal form allows investors in for-

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[1] *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 832 (2008). Corporate Social Responsibility ("CSR") is often referred to by similar buzzwords: "social entrepreneurship," "creative capitalism," "corporate conscience," "corporate citizenship," "sustainable responsible business," "stakeholder theory of corporate law," etc.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[3] *See, e.g.*, *id.* § 1504 (codified at 15 U.S.C. § 78m(q)(2) (2012)) (mandating disclosures regarding resource extraction abroad).

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profit corporations to orient the corporations' purposes toward a "public benefit," defined as a "material positive impact" on society and the environment.[4] The statutes typically provide to an entity registering as a benefit corporation a number of privileges and responsibilities that are tied to this public benefit purpose. For example, directors must operate the business in ways designed to achieve the corporation's asserted goals, integrating the interests of a broad range of stakeholders,[5] while managers face accountability in the derivative right of action granted to shareholders to enforce the corporation's broad mission.[6] Transparency requirements mandate that the corporation issue annual benefit reports,[7] and the corporation's beyond-profit-seeking goals are protected by stringent, judicially enforced take-over standards.[8] While the laws vary slightly in the thirty-plus jurisdictions that have passed such legislation since 2010,[9] the statutes are united in their general motivation to "rebuild public trust in business by ensuring that the benefits of [the corporations'] work extend beyond their stockholders and managers."[10]

These two well-meaning phenomena—the federal and state legislative efforts to encourage corporate social responsibility—appear congruent and their goals seem promising: superficially, the SEC's specialized disclosure rules can be characterized as federal benefit-corporation laws. However, closer examination reveals that the reasoning bolstering the state benefit-corporation statutes, aimed more at symbolism than substance, undermines the rationales of the federal regulations related to conflict minerals. In particular, aspects of the state-law trend call into question the legal

[4] MODEL BENEFIT CORP. LEGISLATION § 102 (2014). Several states have adopted the model legislation in whole or in part. *FAQ: General Questions*, BENEFIT CORP., http://benefitcorp.net/faq (last visited Feb. 19, 2016).

[5] MODEL BENEFIT CORP. LEGISLATION § 301(a).

[6] *Id.* § 305(c).

[7] *Id.* § 402.

[8] *Id.* §§ 104(b), 105.

[9] To date, the following jurisdictions have adopted benefit corporation statutes: Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Louisiana; Maryland; Massachusetts; Minnesota; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New York; Oregon; Pennsylvania; Rhode Island; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington, D.C.; and West Virginia. Additionally, benefit corporation legislation has been introduced in the following states: Alaska; Iowa; Kentucky; Maine; New Mexico; North Carolina; North Dakota; Oklahoma; and Wisconsin. *See State by State Legislative Status*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited Feb. 19, 2016).

[10] *Delaware Unveils Public Benefit Corporation Legislation*, DELAWARE.GOV (Apr. 18, 2013), http://news.delaware.gov/2013/04/18/delaware-unveils-public-benefit-corporation-legislation/ (quoting Delaware State Senator David Sokola).

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premise and corporate governance theory on which the federal specialized disclosure rules are based and cast doubt on the practical effect the rules are likely to have. Consequently, a comparison of the two legal models indicates that the federal rules yield substantial costs but bring about little change in corporate behavior and produce speech of slight value. Statistical analysis of first-year filings under the SEC regulations supports this apprehension, suggesting that the benefits of the federal benefit-corporation rules, like those of the statutes at the state level, are more illusory than actual.

Part I of this Article argues that the SEC's specialized disclosure rules can be characterized as federal corporate-social-responsibility laws. A survey of the history and legislative purpose of the federal regulations, most notably the conflict minerals rule, and the state benefit-corporation trend demonstrates that both sets of laws were passed to expand the scope of public interests that corporations serve. But the federal government's adoption of this quasi-benefit-corporation model also reflects a stark change in securities law.

Part II argues that neither set of laws yields much practical impact. Nevertheless, the wave of popular state benefit-corporation rules carries significant symbolic weight for two reasons. First, it indicates legislatures' general recognition that a corporation's operation in a marketplace of ideas may constitute meaningful speech. Second, and relatedly, the trend signals the high value legislatures place on private ordering within corporate law.

The federal specialized disclosure rules, however, ignore these two important symbolic insights. Consequently, the federal regulations strip corporate speech of the value the benefit-corporation model suggests it can hold and forces upon investors an *ex-post* change in corporate structure that resembles the mid-stream recapitalization threat that the benefit-corporation model intends to forestall. As a result, the federal regulations are unlikely to be effective and may in fact harm the very stakeholders they intend to help.

Part III supports these qualitative arguments with original quantitative research. Basic econometric examination of the first set of filings under the SEC's conflict minerals rule yields two interesting results. First, an event study of the companies' filings shows a statistically significant negative relationship between the fact that a company filed a disclosure and its change in stock valuation. Second, a cross-sectional regression analysis indicates that investors responded no differently to companies that reported a higher likelihood of using conflict minerals than to companies that definitively reported no use of conflict minerals. These two findings suggest that investors respond negatively to learning of a company's *burden* to investigate and disclose whether it may use conflict minerals, likely because of the associated costs, but investors do not seem to be substantially affected by the *content* of the disclosures.

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Although the modern federal and state approaches to corporate social responsibility appear consistent, this Article underscores, theoretically and empirically, how the federal specialized disclosure regulations ignore the two most significant, albeit symbolic, aspects of the state benefit-corporation model. The conflict minerals rule provides a useful lens to examine the consequent effect: although a serious and well-placed concern about the conflict in the DRC demands a robust foreign policy that places more accountability on the government, Section 1502 shifts onto corporate shareholders a responsibility likely to yield only optical, but hardly meaningful, results. By overpromising and underdelivering, these federal corporate-social-responsibility rules are, in fact, *irresponsible*.

I. GOVERNMENT-BACKED CORPORATE SOCIAL RESPONSIBILITY

The first half of this decade witnessed significant legislative efforts at both the federal and state levels intended to broaden the interests that corporations can, or must, pursue. This Part surveys these parallel trends, contending that federal specialized disclosure regulations are federal benefit-corporation statutes that significantly depart from traditional securities law.

A. Federal Specialized Disclosure Regulations

At the national level, Congress has increasingly amended the Exchange Act to require specialized disclosure regulations meant to advance social goals reflecting U.S. foreign policy interests. The Dodd-Frank Act initiated this trend, mandating, among other reporting requirements, disclosures to the SEC related to corporations' use of certain "conflict minerals" and corporations' payments to any foreign government in conjunction with natural resource extraction.[11] Just a few years later, Congress again called upon the SEC to enforce new corporate disclosure requirements regarding companies' engagement with laws related to Iran and the Syrian human rights situation.[12] A bill currently before Congress proposes an amendment to the Exchange Act that would require "each Internet communications service company that operates in an Internet-restricting country" to disclose

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[11] *See* Dodd-Frank Act, Pub. L. 11-2013, §§ 1502(b), 1504, 124 Stat. 1376, 2213, 2220–22 (2010) (codified at 15 U.S.C. § 78m(p) (2012)) (adding Section 13(p) to the Exchange Act).

[12] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 219, 126 Stat. 1214, 1235 (codified at 15 U.S.C. § 78m(r)) (requiring publicly traded corporations to disclose in reports to the SEC whether they "knowingly engaged" in behavior prohibited by the statute or knowingly conducted any transaction with persons or entities that had their interests blocked by certain executive orders).

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"[c]ompany policies applicable to the company's internal operations that address human rights due diligence through a policy statement" that is consistent with international standards.[13] These laws are remarkable in their use of the SEC to promote broad international humanitarian interests that are only faintly connected to investors' financial concerns.[14]

1. Legislative History of the Conflict Minerals Law

Section 1502 of the Dodd-Frank Act, known as the conflict minerals law, most notably illustrates Congress's modern use of the SEC's disclosure regime to steer extraterritorial corporate behavior. A review of the history of the conflict in central Africa and of the legislative support for the law makes clear that Section 1502's purpose hardly resembles the motivations for overhauling banking institutions and financial systems that otherwise direct most of the voluminous Act. Rather than seeking to reform Wall Street or protect consumers, as the statute's title suggests, Section 1502 grew out of a hope to restore a region and safeguard communities many thousands of miles away. Section 1502 declares:

> It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of [the Act.][15]

Congress's concern is well placed: the relentless fighting in eastern Congo has earned the ignominious claim as the most lethal conflict since World War II, and the region has assumed the sad title of "rape capital" of the world.[16] The conflict has cost

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[13] Global Online Freedom Act of 2013, H.R. 491, 113th Cong. § 201 (1st Sess. 2013).

[14] Congress's intent to use the SEC's regulatory power to promote U.S. foreign policy goals is evident from the legislative history of Section 1504. *See, e.g.*, 156 CONG. REC. S3816 (daily ed. May 17, 2010) (statement of Sen. Lugar) ("More importantly, [adoption of the amendment] would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues. . . . We cannot force foreign governments to treat their citizens as we would hope, but this amendment would make it much more difficult to hide the truth.").

[15] Dodd-Frank Act § 1502(a) (adding Section 13(p) to the Exchange Act).

[16] Nicholas Kristof, *Death by Gadget*, N.Y. TIMES, June 26, 2010, http://www.nytimes.com/2010/06/27/opinion/27kristof.html?_r=0; *see also* Margot Wallström, '*Conflict Minerals' Finance Gang*

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well over five million lives in the last decade alone, with the toll mounting by several thousand every month.[17]

While the deadly episode has increasingly garnered media attention over the past several years, often linked to its role in the international mineral market, the calamity can be traced back to resource extraction at the end of the nineteenth century. King Leopold II of Belgium made this large area in the center of Africa his own, stitching assault into the fabric of the region, both its land and its people, with every piece of rubber and ivory he seized. When Congo abruptly gained independence in 1960, insurrections filled the vacuum and a young, ambitious military ruler took over power. Mobutu Sese Seko controlled the country for the following thirty-two years, his governance style characterized, without exaggeration, as "stuffing himself with fresh Parisian cake airlifted into his jungle palaces while Congolese children curled up and starved."[18] The feeble form of the country's governing political apparatus was set: a weak, corrupt central government in the capital of Kinshasa, located in the southwestern tip of the state, continues to lack any real control over the remote east.[19]

Eastern Congo began to attract more awareness from abroad following the 1994 genocide in neighboring Rwanda, when many of the perpetrators of the genocide fled across the border and used it as a base for destabilizing the region. A series of civil and regional conflicts broke out over the next several years, eventually leading to changes in power in Kinshasa but increasingly pulling the region into brutal

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Rape in Africa, GUARDIAN (Aug. 14, 2010), http://www.guardian.co.uk/commentisfree/2010/aug/14/conflict-minerals-finance-gang-rape (describing how militant groups have used sexual violence as a war tactic, leading to hundreds of thousands of unprosecuted rapes in the region).

[17] *Congo Crisis*, INT'L RESCUE COMMITTEE, http://www.rescue.org/special-reports/congo-forgotten-crisis (last visited Feb. 19, 2016).

[18] Jeffrey Gettleman, *Conflict Minerals: The Price of Precious*, NAT'L GEOGRAPHIC (Oct. 2013), http://ngm.nationalgeographic.com/2013/10/conflict-minerals/gettleman-text.

[19] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-763, CONFLICT MINERALS DISCLOSURE RULE: SEC'S ACTIONS AND STAKEHOLDER-DEVELOPED INITIATIVES 5 (2012) ("We also reported that there is a culture of impunity in eastern DRC in which those who have committed human rights abuses do not face justice for the crimes they have committed. After decades of instability and war, the central government in the capital, Kinshasa, currently has little administrative capacity and control over remote regions, including eastern DRC. The long distances between the capital and eastern DRC and the rudimentary infrastructure, which make transportation and communication difficult, further limit the central government's control in eastern DRC.").

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disarray.[20] Foreign troops officially withdrew from the country following intense international pressure in the early 2000s and left in their wake devastated infrastructure, raging ethnic tensions, a wounded population, and hundreds of mines seized by rebel groups. The minerals extracted from these mines have since provided copious funding to the rebels to continue their fighting.[21]

The rebel militias have controlled the mines by brute force, enlisting children to labor in the ground or to protect the sites, and have easily smuggled the minerals across the region's porous borders.[22] Four minerals in particular have yielded revenue to the rebels to sustain their violent campaigns: columbite-tantalite, the ore from which tantalum (often used in electronic equipment) is extracted; cassiterite, the chief ore needed to produce tin; wolframite, a source for tungsten (often used to produce hard metals because of its durability); and gold.[23] The region accounts for a disproportionately high percentage of the world's total collection of some of these minerals, with estimates gauging that it sources up to half of the globe's volume of tantalum.[24]

Prompted by outcries from human rights groups and attention from the United Nations Security Council,[25] Congress passed the "Democratic Republic of the Congo

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[20] At one point, the conflict drew in troops from Congo, Rwanda, Chad, Namibia, Angola, Burundi, Sudan, and Zimbabwe, claiming the title of Africa's World War. GÉRARD PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE 198 (2011).

[21] Shannon Raj, Note, *Blood Electronics: Congo's Conflict Minerals and the Legislation That Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 985 (2011).

[22] John Prendergast & Sasha Lezhnev, *From Mine to Mobile Phone: The Conflict Minerals Supply Chain*, ENOUGH PROJECT 2–5 (Nov. 10, 2009), *available at* http://www.enoughproject.org/files/minetomobile .pdf (asserting that in Rwanda, for example, more than $30 million worth of tin was exported in 2007 even though the country only officially produced $8 million worth of tin; in Uganda, though only $600 worth of gold was actually produced in the country in 2007, over $70 million of gold was exported).

[23] Karen Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1318–19 (2012).

[24] Gettleman, *supra* note 18. *But see* Harry D. Gobrecht, *Technically Correct: Using Technology to Supplement Due Diligence Standards in Eastern D.R. Congo Conflict Minerals Mining*, 2011 U. ILL. J.L. TECH. & POL'Y 413, 428 (2011) (noting that the "[DRC] is responsible for such a small portion of the world's tin, tungsten, tallium, and gold").

[25] The Security Council first passed a resolution in 2001, "stressing that the natural resources of the [DRC] should not be exploited to finance the conflict in that country." S.C. Res. 1376, para. 8, U.N. Doc. S/RES/1376 (Nov. 9, 2001) (emphasis omitted). In a subsequent resolution, the Security Council explicitly "encourage[d] [m]ember [s]tates to take measures, as they deem appropriate, to ensure that importers, processing industries[,] and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase." S.C. Res. 1857,

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Relief, Security, and Democracy Promotion Act of 2006," expressing that it was U.S. policy to "make all efforts to ensure . . . [the] responsible and transparent management of natural resources across the [DRC]."[26] The statute, sponsored by then-Senator Obama, advanced several general policies, such as providing qualified bilateral assistance to the DRC and establishing the Special Envoy for the Great Lakes Region.[27] The 2006 Act did not call for specific action by the United States to address conflict minerals.

In May of 2008, Senators Brownback and Durbin, compelled by the haunting memories of their own visits to the region,[28] introduced to the Senate Finance Committee the "Conflict Coltan and Cassiterite Act of 2008."[29] The bill called for a prohibition on the import of coltan and cassiterite from the DRC and sought to impose criminal penalties on people and corporations willfully violating the ban.[30] The bill did not receive a floor vote.

Less than a year later, Senators Brownback and Feingold, eventually joined by twenty-one other co-sponsors, introduced new, less aggressive legislation that called for disclosure requirements and policy changes but did not impose criminal penalties.[31] Representative Jim McDermott introduced similar legislation in the

para. 15, U.N. Doc. S/RES/1857 (Dec. 22, 2008) (emphasis omitted). However, the effect of the resolution was undermined by the deliberate use of the term "encourage," rather than its use of the term "decide," the latter of which would have triggered compulsory obligations under Article 25 of the United Nations Charter. U.N. Charter art. 25.

[26] Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, § 102(8)(A), 120 Stat. 3384, 3386.

[27] *Id.* §§ 102(12), 107.

[28] *See* Press Release, Russ Feingold, U.S. Senator, Feingold Statement on Congo Conflict Minerals and Transparency Amendments to Financial Regulatory Reform Bill (May 19, 2010), *available at* http://www.africafocus.org/docs10/cgk1007a.php ("Several of us in this body, including Senators Brownback and Durbin and I, have traveled to this region and seen first-hand the tragedy of this relentless crisis.").

[29] S. 3058, 110th Cong. (2008).

[30] *Id.*

[31] Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009).

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House.[32] Following a series of significant changes to the draft legislation,[33] Section 1502 of the Dodd-Frank Act passed by a unanimous vote in 2010.[34]

2. The SEC's Conflict Minerals Rule

In addition to placing duties on the U.S. Department of State, the Comptroller General, and the U.S. Department of Commerce, Section 1502 amended the Securities Exchange Act of 1934, a primary statutory authority for the SEC.[35] These new provisions, added as Section 13(p) to the Exchange Act, require companies to disclose annually whether "conflict minerals" used in the production of the companies' manufactured goods originated in the DRC or an adjoining country.[36] Section 13(p) defines "conflict minerals" as columbite-tantalite (coltan or tantalum), cassiterite (tin ore), gold, wolframite (tungsten), and the derivatives of any of these minerals, in addition to "any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country."[37] If an issuer has reason to believe that it uses conflict minerals sourced from the affected region, the law imposes a number of further substantive responsibilities.[38]

Following a series of proposals, public comments, and delays, the SEC promulgated its final conflict minerals rule in mid-2012. The rule largely mirrors the Section 13(p) amendment to the Exchange Act, outlining three main responsibilities facing a corporation.

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[32] Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

[33] *See* Woody, *supra* note 23, at 1326–27 (comparing the 2009 Act to Section 1502, noting that the 2009 Act imposed the disclosure requirements on a broader scope of parties but did not require annual audits and did not require publication of information on public websites).

[34] 156 CONG. REC. S3865–66 (daily ed. May 18, 2010).

[35] Dodd-Frank Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. §§ 78m(p), 78m note (2012)).

[36] 15 U.S.C. § 78m(p)(1)(A). The term "adjoining country," in the context of this statute, "means a country that shares an internationally recognized border with the [DRC]," 124 Stat. 1376, 2213(e)(1). The definition includes the following states: Angola, Burundi, Central African Republic, Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

[37] Dodd-Frank Act § 1502(e)(4)(A)–(B) (codified at 15 U.S.C. § 78m-p(5)).

[38] *See* 15 U.S.C. § 78m(p)(1) (explaining that an issuer that reports use of conflict minerals sources from the region must take several measures to exercise due diligence on the source and supply chain of the minerals, including, for example, undergoing an independent audit that is certified by the disclosing party and considered reliable by the SEC).

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First, the corporation must determine whether the regulations apply to it. The regulations apply broadly to any publicly traded corporation[39] that already files reports under the Exchange Act and that manufacturers a product or contracts to manufacture a product[40] for which conflict minerals are necessary to the product's generally accepted function, use, purpose, or production.[41] Conspicuously absent from the definition is a *de minimis* exception, creating an expansive scope of affected corporations. Traces of the conflict minerals appear in a seemingly unending list of products, from laptops and cellphones to car parts, paint, shoes, hearing aids, and fungicide.[42] Thousands of corporations manufacture or contract to manufacture products that are covered under the regulations.[43]

Second, after the corporation determines whether its products contain one of the listed minerals, the corporation must, in good faith, conduct a "reasonable country of origin inquiry."[44] The company must report the result of this inquiry to the SEC through an annually filed specialized disclosure report ("Form SD") and publish the report on the corporation's public website.[45] If this inquiry gives the issuer reasonable belief that the trace of minerals in its products did not originate in the DRC or a neighboring country ("Covered Countries"), the company must issue a brief explanation of the basis for its determination, thereby fulfilling its reporting requirements.[46]

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[39] Although the Dodd-Frank provision does not expressly limit the measure's applicability to reporting issuers, the SEC decided to apply its rule in such a manner. This determination was made in part for administrative efficiency reasons. *See* Conflict Minerals, Exchange Act Release No. 63,547, at 14 (Dec. 15, 2010).

[40] In its final rule, the SEC exempted from the definition of a company "contracting to manufacture" products containing conflict minerals those companies that do not have some "actual influence" over the manufacturing of that product, following aggressive lobbying by major retailers like Wal-Mart, Costco, and Target. *See* Jessica Holzer, *Wal-Mart, Target Avoid Mining Rule*, WALL ST. J., Aug. 23, 2012, at B1.

[41] Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,283–85 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

[42] *See* Woody, *supra* note 23, at 1319 nn.14–15 and accompanying text.

[43] Based on comments from industry groups, the SEC estimated that 5,994 issuers would be affected by the final rule. *See* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,338.

[44] *Id.* at 56,310–14.

[45] *Id.* at 56,277, 56,280.

[46] *Id.* at 56,277. The company is also allowed to submit this report if it has reason to believe the minerals are from scrap or recycled sources. *Id.* at 56,332.

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If, however, the corporation has reason to believe the minerals "*may* have originated" in one of the Covered Countries, a third step is triggered.[47] In such a case, the corporation must carry out due diligence on the source and supply chain of the minerals,[48] which "shall include an independent private sector audit."[49] Unless this due diligence reveals that the minerals did not originate in the Covered Countries, the company must detail the due diligence measures taken and must disclose the findings obtained in a "Conflict Minerals Report," attached as an exhibit to Form SD.[50] The Conflict Minerals Report must contain descriptions of the facilities used to process the minerals, the processing facilities' countries of origin, and the efforts the corporation undertook, with the "greatest possible specificity," to determine the mines of origin.[51]

Perhaps most controversial, the rule, as promulgated, requires the Conflict Minerals Report to include a description of the corporation's products *vis-à-vis* the minerals they contain. If a corporation is unable to verify that its minerals did not finance armed groups, or if the corporation knows that the minerals did in fact confer such benefit, then the corporation is required to include in the Conflict Mineral Report and publish on its website a declaration of its products that "have not been found to be 'DRC conflict free.'"[52] A corporation that is unable to determine the source of its minerals or their chain of custody is allowed to describe its products as "DRC conflict undeterminable" for a limited period while the corporation seeks

[47] *Id.* at 56,281 (emphasis added).

[48] *Id.* at 56,281. "The final rule requires that an issuer's due diligence follow a nationally or internationally recognized due diligence framework." *Id.* at 56,326.

[49] *Id.* at 56,320. The audit must be "conducted in accordance with the standards established by the Comptroller General of the United States." *Id.*

[50] *Id.* at 56,281. The SEC initially estimated that 20% of affected issuers would need to file a Conflict Minerals Report; however, industry commentators set this figure closer to 75%, especially in the initial year. The SEC accordingly revised its estimate to 75%. *See id.* at 56,356.

[51] *Id.* at 56,333.

[52] 15 U.S.C. § 78m(p)(1)(A)–(E) (2012); Conflict Minerals Final Rule, 77 Fed. Reg. at 56,320–21.

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additional information,[53] during which time it is exempt from the auditing requirement.[54]

Corporations do not face any penalties for the content of their disclosures, including admission of use of conflict minerals, aside from the liability for false or misleading statements that applies generally to any reports filed pursuant to the Exchange Act.[55] The final rule became effective November 13, 2012, and the first deadline for filing with the SEC and posting reports on corporations' websites was June 2, 2014.[56]

3. The Conflict Minerals Rule Departs from the SEC's Traditional Purview

The SEC adopted the conflict minerals rule by a narrow 3-2 vote.[57] The two dissenting commissioners largely based their votes on concerns that the rule's overriding foreign policy goals exceed the agency's purview.[58] Indeed, it is difficult to reconcile Section 1502's purpose, expressly tied to the "emergency humanitarian situation" in the DRC, with the SEC's stated mission "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[59]

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[53] Conflict Minerals Final Rule, 77 Fed. Reg. at 56,309 (extending the temporary provision to "smaller reporting companies," based on public float, for four years, and to all other issuers for two years).

[54] *See Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions, Conflict Minerals, Question 14*, U.S. SEC. & EXCHANGE COMMISSION (Apr. 7, 2014), *available at* https://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm (last visited Mar. 25, 2016).

[55] To be clear, while the issuers do not face any sanctions from the government for disclosed use of conflict minerals, the supporters of the final rule contend that the final rule enables the market to impose penalties. For the reasons explained in the following part, however, this Article argues that any intended market penalties are unlikely to meaningfully materialize.

[56] The statutory deadline was May 31, 2014, but because this was a Saturday, the effective deadline was Monday, June 2, 2014. Conflict Minerals Final Rule, 77 Fed. Reg. at 56,280.

[57] Press Release, SEC Adopts Rule for Disclosing Use of Conflict Minerals (Aug. 22, 2012), *available at* http://sec.gov/news/press/2012/2012-163.htm; *see also* Christopher M. Matthews, SEC Narrowly Approves Reporting Rules on Resource Extraction, Conflict Minerals, WALL ST. J. (Aug. 22, 2012, 12:48 PM), http://blogs.wsj.com/corruption-currents/2012/08/22/sec-narrowly-approves-reporting-rules-for-energy-mining-firms/.

[58] *See* Matthews, *supra* note 57.

[59] *Compare* Dodd-Frank Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. §§ 78m(p)(1)(A)(i) (2012)), *with What We Do*, U.S. SEC. & EXCHANGE COMMISSION (June 10, 2013), http://www.sec.gov/about/whatwedo.shtml.

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Under the SEC's general disclosure regime, publicly traded companies must disclose any information considered "material."[60] The U.S. Supreme Court has defined "materiality" as information that would be "viewed by the reasonable investor as . . . significantly alter[ing] the 'total mix' of information made available,"[61] holding that this "total mix" is to be considered in relation to what is important to an investor in deciding how to vote in a corporate election.[62] While this standard need not pertain strictly to a company's profit margins, the SEC has indicated that it "generally focuses on matters that have affected, or will affect, a company's profitability and financial outlook."[63] Viewed through this framework, one would assume Congress directed the SEC to implement and oversee the conflict minerals rule because the due diligence and public reporting requirements would provide material information that reasonable investors would need to fairly evaluate whether they should retain equity in the affected corporations.

The dissenting commissioners more aptly described Section 1502, however, as a collection of "social and foreign policy aims grafted onto securities laws."[64] It is beyond dispute that Section 1502 was passed with the purpose of ameliorating the humanitarian crisis in the DRC.[65] The effect of the promulgated rule matches this intent, forcing corporations to take significant measures to indirectly serve the important public benefits the Act aims to bring about in central Africa—and, as discussed later in this Article, to do so at a cost to shareholders. In fact, members of Congress who are supportive of similar specialized disclosure rules have expressly described the targeted public benefits as being in opposition to companies' concern for share value, undermining the argument that the measures are intended to benefit

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[60] 17 C.F.R. § 240.10b-5 (2012) (promulgated under 15 U.S.C. § 78j).

[61] TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (discussing materiality in the context of proxy rules).

[62] *Id.*; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 238–39 (1988) (applying materiality requirement in the context of preliminary corporate merger discussions).

[63] Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1434 (2002) (quoting Memorandum from David B. H. Martin, Dir., Div. of Corp. Fin., SEC, to Laura Unger, Acting Chair, SEC (May 8, 2001)).

[64] *See* Matthews, *supra* note 57 (quoting Commissioner Gallagher as saying, "We are, in other words, not the right tool for this job").

[65] *See* JAMES ROBERT BROWN, THE REGULATION OF CORPORATE DISCLOSURE § 2B.12[1] (3d ed. Supp. 2016), *available at* Westlaw TROCD ("Thus, the SEC is enforcing a disclosure requirement that makes no pretense at providing information important to a reasonable investor. Instead, the requirements are entirely designed to affect corporate social behavior.").

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investors' financial interests.[66] Indeed, human rights groups' immediate praise for the Dodd-Frank amendment underscores a purpose to protect stakeholders abroad rather than shareholders in the United States.[67]

That interest-group praise transitioned into legal defense when Amnesty International—an organization committed to "shap[ing] and promot[ing] legislation and policies to advance human rights"[68]—and other like-minded organizations joined the SEC in fighting a challenge to the conflict minerals rule by the National Association of Manufacturers ("NAM") and other affected industry groups.[69] The D.C. Circuit roundly rejected each of NAM's Administrative Procedure Act ("APA") claims, holding that the Commission had offered reasonable interpretations within the agency's delegated discretion where the Dodd-Frank text was broad, silent, or otherwise ambiguous.[70] The court's review of NAM's Exchange Act and First Amendment claims, however, highlighted concerns over the conflict minerals rule's deviation from the SEC's traditional area of expertise.

The court ultimately rejected NAM's argument that the SEC had violated two provisions of the Exchange Act requiring a cost-benefit analysis of the effects of the rule, primarily because the court found that such an analysis was not realistically possible.[71] While it was clear that the rule would impose certain costs on issuers,[72]

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[66] *See, e.g.*, 155 CONG. REC. E1327–8 (daily ed. June 4, 2009) (statement by Rep. Christopher Smith) (arguing that the specialized disclosure rules in the Global Online Freedom Act were needed because, "[f]or the sake of market share and profits, leading U.S. companies . . . have compromised both the integrity of their product and their duties as responsible corporate citizens").

[67] *See, e.g.*, *Democratic Republic of Congo Human Rights*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/countries/africa/democratic-republic-of-congo (last visited Feb. 19, 2016) ("This legislation will greatly advance the goals of regulating and stemming the flow of conflict minerals, and limit the ability of armed groups to benefit from conflict minerals and perpetuate the conflict.").

[68] *Our Mission*, AMNESTY INT'L, http://www.amnestyusa.org/about-us/our-mission (last visited Feb. 19, 2016).

[69] *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), *adhered to after rehearing*, 800 F.3d 518, 530 (D.C. Cir. 2015).

[70] *Nat'l Ass'n of Mfrs.*, 748 F.3d at 365–69.

[71] Under 15 U.S.C. § 78w(a)(2) (2012), the Commission "shall not adopt any rule [pursuant to the relevant chapter] which would impose a burden on competition not necessary or appropriate in furtherance of" the purposes of the securities laws. Under Section 78c(f), when the Commission is "engaged in rulemaking," it must "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id.* § 78c(f).

[72] The Commission estimated the rule's costs would initially total between $3 billion to $4 billion, with annual costs of ongoing compliance likely to fall between $207 million and $609 million. Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,334 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

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the court recognized that the Commission faced a complete lack of data to measure the predicted benefits. As the court explained, "[h]ere, the rule's benefits would occur half-a-world away in the midst of an opaque conflict about which little reliable information exists, and concern a subject about which the Commission has no particular expertise."[73] Additionally, the court noted that any cost-benefit analysis would yield a "pointless . . . apples-to-bricks comparison," balancing monetary costs with non-pecuniary foreign policy goals, like "how many lives are saved or rapes prevented as a direct result of the final rule."[74]

The court's opinion reads as part-apology to the Commission for the near "impossible position" in which Congress placed it[75] and as part-resigned-acceptance, recognizing that it would be "difficult to see what the Commission could have done better" given the Commission's lack of data, expertise, or even familiarity.[76] Despite these concerns, the court nevertheless held that "Congress's 'determin[ation] that [the rule's] costs were necessary and appropriate in furthering the goals' of peace and security in the Congo" was sufficient to settle whether the rule even fell within the purview of the securities laws.[77] The ruling supplies the legal "green light" to other specialized disclosure measures that seemingly exceed the SEC's traditional function, ironically indicating that the exceptional features of these laws—the undefined, intangible, and extraterritorial nature of the benefits they aim to achieve—provide a license to the Commission to largely avoid any substantive cost-benefit analysis concerning subjects about which it "has no particular expertise."[78]

While the D.C. Circuit dismissed NAM's APA and Exchange Act claims, it held that the conflict minerals rule unconstitutionally compels speech, reversing the

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NAM did not dispute these conclusions. *See Nat'l Ass'n Mfrs.*, 748 F.3d at 369. However, these costs do not include companies' losses in equity value or expenses borne by the government to implement and oversee the new disclosure regime. *See* discussion *infra* Part III.A.

[73] *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369 ("An agency is not required to 'measure the immeasurable.'" (internal citation omitted)).

[74] *Id.*

[75] *Id.* at 370.

[76] *Id.* at 369.

[77] *Id.* at 369–70 (quoting Conflict Minerals Final Rule, 77 Fed. Reg. at 56,350) ("Congress did conclude, as a general matter, that transparency and disclosure would benefit the Congo. And the Commission invoked that general principle to justify each of its discretionary choices." (citing 15 U.S.C. § 78m note (2012))).

[78] *Id.* at 369.

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opinion of the lower court, surprising many observers, and again stressing that the rule deviated from typical securities regulations. NAM had challenged as unconstitutional the rule's requirement that companies describe their products as "DRC conflict free" in reports that must be filed with the SEC and posted on the companies' websites. The court agreed, reasoning that the rule was not "reasonably related to the [s]tate's interest in preventing deception of *consumers*,"[79] as required to avoid heightened scrutiny under D.C. Circuit precedent. Despite the SEC's stated mission to protect investors and Congress's decision to place the conflict minerals provisions in the Exchange Act, the court emphasized the obvious truth that "the 'conflict free' label is not employed to sell securities."[80] Furthermore, the D.C. Circuit recognized that it was "far from clear" that the compelled disclosure at issue here—whether a product is "DRC conflict free"—is indeed a factual statement.[81] Rather, the disclosure is more fairly characterized as a "metaphor . . . that confess[es] blood on [an issuer's] hands," operating to compel companies to "convey moral responsibilities" and "ethical[]" principles.[82] Explaining that compelled speech in these specialized disclosure rules should not enjoy relaxed scrutiny "just because Congress used the 'securities' label," the court upheld the First Amendment challenge.[83]

Over a year later, the panel took advantage of the opportunity to rehear NAM's constitutional challenge to stress the extent to which the specialized disclosure rule deviated from standard reporting requirements in securities law.[84] The court

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[79] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) (emphasis added). *But see* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014), discussed *infra*.

[80] *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372. The next section argues that the "conflict free" label is meant to advance foreign policy goals rather than protect investors from deception.

[81] *Id.* at 371.

[82] *Id.*

[83] *Id.* at 372 (explaining that to hold otherwise "would allow Congress to easily regulate otherwise protected speech using the guise of securities laws"). The court explicitly declined to address whether strict scrutiny—the form of review typically applied to noncommercial speech—or intermediate scrutiny—the form of review typically applied to commercial speech—applied, since it held that the mandatory disclosure rule could not pass under the latter standard. *Id.*

[84] Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. v. SEC II*), 800 F.3d 518, 524–25 (D.C. Cir. 2015). Shortly after the initial decision in *National Ass'n of Manufacturers v. SEC* was handed down on April 14, 2014, the D.C. Circuit issued an en banc opinion in an intervening separate case that broadened the court's ability to apply a rational review standard with respect to mandatory disclosures. *See Am. Meat Inst.*, 760 F.3d at 27 (dismissing a challenge of regulations requiring country-of-origin labels and holding that "government interests in addition to correcting deception can be invoked to sustain a disclosure mandate

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identified "ameliorat[ing] the humanitarian crisis in the DRC"—which it described as a "matter of foreign affairs" and an "entirely unproven [goal that] rests on pure speculation"—as the sole government interest motivating the disclosure requirement.[85] The court reasserted its prior order and, in December of 2015, denied the petition for an en banc rehearing.

Despite the court's critical rhetoric, however, it left the conflict minerals rule largely intact. The Commission stayed the requirement that companies use the specific term "DRC conflict free" in response to the court's First Amendment decision.[86] But in all other respects, the rule remains in force as promulgated: the Commission still requires affected companies to file a timely Conflict Minerals Report, to conduct due diligence if they have reason to believe conflict minerals used in their products originated from one of the covered countries, and to publicly disclose their findings.[87]

In sum, although Section 1502 amends the Exchange Act and directs the SEC to act, the conflict minerals rule starkly deviates from the traditional securities law measures the agency typically oversees. The law's history and the D.C. Circuit's opinion make that clear, as does the text of the rule itself, which plainly explains that "the social benefits [of the conflict minerals rule] are quite different from the economic or investor protection benefits that [the Commission's] rules ordinarily strive to achieve."[88] As scholars have already cautioned, "[b]y crossing this rubicon, the SEC may have greater difficulty resisting interest groups seeking socially

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under *Zauderer*" (citation omitted)). The panel that initially heard NAM's challenge of the conflict minerals rule issued its second decision, adhering to that initial decision, after rehearing the case on August 18, 2015.

[85] *Nat'l Ass'n of Mfrs. v. SEC II*, 800 F.3d at 524–25 (citation and internal quotation marks omitted).

[86] Press Release, SEC Issues Partial Stay of Conflict Minerals Rules (May 2, 2014), *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541720516. If a company voluntarily elects to describe its products as "DRC conflict free," it may do so provided it can verify that description through an independent private sector audit. Keith F. Higgins, *Statement of the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. & EXCHANGE COMMISSION (Apr. 29, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994.

[87] Higgins, *supra* note 86.

[88] Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

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responsible disclosure"—a trend likely to foist increasingly unfamiliar duties on the SEC and substantive responsibilities and serious costs on companies.[89]

B. State Laws Creating Benefit Corporations

At the same time that the SEC wrestled with how to promulgate these novel statutory requirements into enforceable rules, an interest in promoting corporate social responsibility ("CSR") swept through state capitols across the country. Just a few weeks prior to Congress's enactment of Section 1502, Maryland became the first state to pass a "benefit corporation" statute.[90] Since then, at least twenty-nine other states and the District of Columbia have created similar laws, and comparable draft legislation is pending in over a dozen other jurisdictions.[91] While the quiet trend progressed largely unnoticed or was outright dismissed by most academics and practitioners for its first several years, Delaware's adoption of its own benefit-corporation statute, effective as of the summer of 2013, lent a stamp of legitimacy to the benefit-corporation movement.[92]

1. Motivation for Benefit Corporations: Shielding Directors from Shareholder Value Maximization Norms

Corporations have long recognized that consumers' and investors' moral values and social interests inform their purchase of products, from consumer goods to corporate stock.[93] Over the past three decades, socially responsible investing has grown to account for almost 10% of all U.S. assets under management,[94] and financial estimates predict the opportunity for "impact investing" in emerging

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[89] *See* BROWN, *supra* note 65, § 2B.12[1].

[90] *State by State Status of Legislation*, *supra* note 9.

[91] *Id.*

[92] *See, e.g.*, Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013), http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/#4f8b868215ac (explaining that Delaware was "the [nineteenth] state to pass such a law, but it may be the most important one[,] since it is home to half of all publicly traded U.S. companies").

[93] *See, e.g.*, LAWRENCE GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 3 (2009).

[94] WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND ULTIMATELY, THE PUBLIC 3 (Jan. 18, 2013) [hereinafter CLARK WHITE PAPER], *available at* http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf.

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markets will continue to expand to between $400 billion and $1 trillion.[95] Business schools have eagerly promoted the trend, setting up social entrepreneurship programs that increasingly pump CSR-minded graduates into the market.[96]

These consumer- and investor-driven trends motivated proponents of new legislation. The marketing efforts of companies seeking to exploit the CSR phenomenon had diluted the positive messaging,[97] making it increasingly difficult to differentiate corporations that earnestly care about influencing the public good. The organization, B Lab, which for years had independently certified businesses as "B corporations," began to advocate that states modify their corporate codes to bridge the divide between nonprofit and for-profit entities.[98] The general goal of such efforts was to offer government-backed legitimacy and legal recognition to socially conscious for-profit corporations so that they could be more easily identified, could better protect their missions, and could more robustly attract values-based investment.[99] In particular, benefit-corporation statutes were thought to free managers from the perceived constraints of traditional corporate law's shareholder value maximization norm so that the corporations could integrate other stakeholders' interests.[100] Concerned that the pursuit of socially responsible corporate initiatives untethered to profits would expose managers to liability under the legal principles

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[95] J.P. MORGAN GLOBAL RESEARCH, IMPACT INVESTMENTS: AN EMERGING ASSET CLASS 6 (Nov. 29, 2010), *available at* http://www.jpmorganchase.com/corporate/socialfinance/document/impact_investments_nov2010.pdf.

[96] *See, e.g.*, *Center for Social Innovation*, STAN. BUS. SCH., http://csi.gsb.stanford.edu (last visited Feb. 19, 2016); *Social Enterprise Initiative*, HARV. BUS. SCH., http://www.hbs.edu/socialenterprise/ (last visited Feb. 19, 2016); *Social Impact Initiative*, U. PA. WHARTON SCH., https://socialimpact.wharton.upenn.edu/ (last visited Feb. 19, 2016).

[97] This effect has been called "greenwashing." *See* Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 589–90 (2012).

[98] *See* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 488–89 (2013).

[99] *See* Cummings, *supra* note 97, at 587–90.

[100] Haskell Murray, *Benefit Corporations: New Paradigm*, THE CONGLOMERATE (May 7, 2012), http://.theconglomerate.org/2012/05/benefit-corporations-new-paradigm.html (explaining that the benefit-corporation model was developed primarily "to break the persistent belief that directors should primarily focus on shareholder [value] maximization in their governance of corporations"); *see also*, *e.g.*, Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 340–41 (2009) (discussing the need for new legal structures); Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 818–19 ("Existing legal doctrines and entity structures cannot adequately meet the needs of what are essentially hybrid organizations that fulfill both for-profit and nonprofit functions.").

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upheld in corporate law's classic cases, social entrepreneurs sought a new corporate form integrating a broader conception of directors' fiduciary duties.

2. Purpose, Accountability, and Transparency of Benefit Corporations

Several states have adopted benefit-corporation statutes based on the Model Benefit Corporation Legislation ("MBCL"). The MBCL purports to differ from traditional provisions in states' corporate codes in three main respects: purpose, accountability, and transparency.[101] The purpose of a benefit corporation must be the advancement of a "general public benefit,"[102] defined as a "material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[103] A benefit corporation may assert additional "specific public benefits" in its articles of incorporation.[104] The MBCL allows corporations to protect this purpose by *requiring* the corporation's directors to consider a host of factors beyond shareholder value maximization.[105] These interests range from employees of the corporation's suppliers, to the global environment, to the local communities in which the corporation has offices or facilities.[106]

However, the MBCL is clear that only shareholders, along with a very limited class of other parties, have standing, derivatively on behalf of the corporation, to hold directors legally accountable for their failure to promote these wide-ranging interests.[107] Non-shareholding stakeholders, including those constituents whose interests *must* be considered by the corporation, are not able to bring such a suit unless the benefit corporation specifically identifies the category of persons and grants it standing in the corporation's articles.[108] A "benefit enforcement proceeding" is the exclusive forum for claims against the corporation, its directors, or its officers,

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[101] *See* MODEL BENEFIT CORP. LEGISLATION (2014); *see also* CLARK WHITE PAPER, *supra* note 94, at 15.

[102] MODEL BENEFIT CORP. LEGISLATION § 201(a).

[103] *Id.* § 102.

[104] *Id.* § 201(b).

[105] *Id.* § 301(a).

[106] *Id.*

[107] *See id.* § 301(d). In addition to shareholders and directors, owners of at least 5% of a parent of the benefit corporation may bring a derivative suit.

[108] *See also id.* § 301 cmt. (stating that the MBCL "negates any enforceable duty of directors to non-shareholder constituents" unless the corporation specifies a certain group in its articles under § 305(b)).

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not only with respect to a failure to pursue the general and specific public benefits, but also with respect to any breach of traditional fiduciary duties.[109]

The MBCL extends significant protection to a benefit corporation's directors, granting them a degree of flexibility to pursue the corporation's broad public welfare goals. For example, the MBCL explicitly shields directors from liability for considering, in the course of carrying out their duties, any of the interests enumerated in the MBCL or in the corporation's articles. That is, directors cannot be held personally liable for acts or omissions performed in the course of their duties "unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law"[110]—a departure from most states' application of liability for gross negligence with respect to the directors' duty of care.[111]

To yield transparency, a benefit corporation's board must appoint an "independent benefit director" to prepare and deliver to shareholders an annual benefit report.[112] The report must include detailed assessments of how the benefit corporation pursued the general public benefit, including a thorough evaluation of the overall social and environmental performance of the benefit corporation against a third-party standard.[113] The benefit corporation must file the annual report with the Secretary of State and must make the report publicly available on the company's website.[114]

The MBCL, and the states that have adopted statutes drafted off of it, place into the hands of corporate owners the decision of whether these deviations from traditional corporate law apply to their corporation. A new corporation's specification in its articles that the organization will be a benefit corporation committed to the purpose of a general public benefit triggers its election as such.[115]

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[109] *Id.* § 305(a) (stating that a "violation of an obligation, duty, or standard of conduct under [the MBCL]" includes traditional fiduciary duties).

[110] *Id.* § 302(e). The requirement that omissions involve willful violations of law or self-dealing in order for directors to face liability suggests a potential softening of the traditional duty of care. Additionally, the MBCL removes personal liability for monetary damages. *Id.* § 301(c).

[111] *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 898–99 (Del. 1985); Francis v. United Jersey Bank, 432 A.2d 814, 827–28 (N.J. 1981).

[112] MODEL BENEFIT CORP. LEGISLATION § 302(c).

[113] *Id.* § 401(a).

[114] *Id.* § 402.

[115] *Id.* § 103.

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An existing corporation can become a benefit corporation following a vote by at least two-thirds of the holders of each class of its shares to amend its articles.[116] Most significantly, a corporation that undergoes a "fundamental transaction," including a merger, consolidation, conversion, or share exchange, any of which results in either the creation or termination of benefit-corporation status, must receive approval by at least two-thirds of the holders of each class of its shares.[117] As such, the MBCL gives entrepreneurs and investors the ability to tie their corporations to an Odyssean mast, binding their own socially driven motivations tightly to avoid the subsequent temptation to strictly maximize pecuniary gains.

Delaware's statute similarly permits shareholders to tether corporations to the public-benefit spar.[118] Given the small state's central role in setting national corporate law trends, Delaware's adoption of its own corporate-benefit statute passed with great fanfare and lofty expectations. The law was extolled as a "solution to the systematic problem of short termism and an innovative approach . . . to solve our most challenging problems,"[119] providing sharp relief from the myopic pecuniary interests undergirding the 2008 financial crisis.[120]

C. *The Conflict Minerals Rule Resembles a Federal Benefit-Corporation Law*

On their surface, the federal conflict minerals rule and the state benefit-corporation statutes elicit clear parallels. Both classes of regulations were motivated by the respective governments' determinations that corporate operations affect the

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[116] *Id.* § 104(a).

[117] *Id.* §§ 104(b), 105.

[118] The Delaware legislature recently passed an amendment to decrease the percentage of voting shareholders required to approve a corporation's transition to a public benefit status from 90% to 2/3, rendering the state's statute consistent with the MBCL in this respect. 2015 Delaware Laws Ch. 40 (S.B. 75) § 363(a) (eff. Aug. 1, 2015) (amending DEL. CODE ANN. tit. 11, § 363 (2013)). Other provisions, however, continue to differ from the MBCL and underscore the private ordering emphasis of the state's statute. For example, public benefit corporations must assert specific public benefits in their articles rather that rely on a more amorphous "general public benefit" standard. DEL. CODE ANN. tit. 11, § 362(a)(1). Shareholders must own at least 2% of outstanding shares to bring an enforcement action. Moreover, Delaware does not require benefit-corporation reports to be publicly available on their websites. *Id.* §§ 366(c), 367.

[119] Governor Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST (July 22, 2013), http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html.

[120] Chrystia Freeland, *Capitalism, but With a Little Heart*, N.Y. TIMES, July 19, 2013, http://nytimes.com/2013/07/19/us/19iht-letter19.html?_r=1&.

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welfare of stakeholders beyond shareholders. An interest in alleviating the horrific humanitarian situation in the DRC fits well within the scope of the general public benefit that benefit corporations must pursue and the specific public benefits they may advance. Indeed, the SEC was very frank in its admission that the new law aims to shift corporate concern from profits to broader social goals: "[T]he[] objectives of Section 1502 appear to be directed at achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers specifically."[121]

The SEC's instructions to corporations using minerals originating in the DRC or neighboring countries, requiring the corporations to carry out due diligence on the source and supply chain of the minerals, resemble the MBCL's charge to directors to consider the effects of any action or inaction on "community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located."[122] As enacted, Section 1502's disclosure requirement mirrors the disclosure mandates in the MBCL: corporations affected by either set of laws must produce annual reports, must describe any failures in compliance, and must publish the information on their publicly accessible websites. And, as explained further below, the significant deference the D.C. Circuit extended to the Commission's analysis of the conflict minerals rule—holding that the agency's demonstration of some "'rational' explanation . . . [was] enough" to avoid challenges that features of the rule are arbitrary and capricious[123]—echoes the effect of the business judgment rule in corporate law.

This is all to say, the conflict minerals rule resembles federal adoption of corporate-law principles, and, in particular, benefit-corporation-law norms, in ways that depart from the traditional securities-law paradigm. The regulation aims to promote a public benefit informed by U.S. foreign policy goals (i.e., reduce violence in the DRC) by linking companies' stakeholder impact (i.e., how the use of conflict minerals might indirectly support the conflict in the DRC), investors' concerns (i.e., mandatory disclosures), and extraterritorial corporate behavior (i.e., due diligence). As the D.C. Circuit plainly explained, the specialized disclosure rule means to

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[121] Conflict Minerals, Exchange Act Release No. 34-67716, 298 (Aug. 22, 2012).

[122] MODEL BENEFIT CORP. LEGISLATION § 301(a).

[123] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 368 (D.C. Cir. 2014) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)), *adhered to after rehearing*, 800 F.3d 518 (D.C. Cir. 2015).

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"stigmatize and shape [corporate] behavior"[124] so as to "amerliorat[e] . . . a matter of foreign affairs."[125]

The state benefit-corporation framework provides a useful lens to see the conflict minerals rule as representative of "a creeping—but steady—federalization of corporate governance law,"[126] or at least of the federal government's attempt to appropriate state-law corporate-social-responsibility models. Other recent amendments to the Exchange Act, introducing reporting requirements in fields ranging from oil extraction to the internet, suggest that we are likely to see more instances of Congress "using the guise of securities laws"[127] to advance a broad range of foreign policy interests. These new laws, viewed alongside the growing number of benefit-corporation statutes, demonstrate that American legislatures, both federal and state, are increasingly encouraging corporations to participate in advancing public welfare objectives at home and abroad.

II. THE INSIGHTS OF THE STATE BENEFIT-CORPORATION TREND UNDERMINE THE LIKELY EFFECTIVENESS OF THE FEDERAL SPECIALIZED DISCLOSURE RULES

Although benefit-corporation statutes have been celebrated with great exuberance, closer analysis of the actual force of the legislation suggests that the laws might not bring substantive change. This is primarily because corporations are not as bound in practice to the shareholder value maximization principle as proponents of the new legislation fear. Furthermore, it is unclear how, or whether, courts will robustly enforce the standards for director actions set forth in the statutes. This analysis suggests that the benefit-corporation trend is built more on symbolism than substance.

Yet, this symbolism matters. The significant takeaway of the benefit-corporation trend is that legislatures both recognize that corporations express socially valuable messages and respect private-ordering corporate-governance models. This Part argues that these two features are absent from the federal benefit-corporation approach. Federal specialized disclosure rules, like the conflict minerals regulations, yield high costs but effect speech of little value, produce little change in corporate

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[124] *Nat'l Ass'n of Mfrs. v. SEC II*, 800 F.3d at 530.

[125] *Id.* at 525.

[126] Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REG., Spring 2003, at 26.

[127] *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372.

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behavior, and, consequently, are likely to bring about little advancement of the social causes the rules are meant to support.

A. Benefit-Corporation Statutes Provide More Symbolism than Substance

The business-corporation model is largely based on, as the Governor of Delaware emphasized the day he signed his state's statute into law, a perception that "existing corporate law . . . recognizes only one legitimate corporate purpose—to maximize value for stockholders."[128] A comment in the MBCL explicitly describes the rejection of this perceived shareholder value maximization norm to be "at the heart of what it means to be a benefit corporation."[129] This understanding guided the laws' journeys through most state legislatures. For example, a California Senate subcommittee described its proposed benefit corporation bill as "enact[ing] a fundamental change to the fiduciary duties of corporate directors," required because traditional corporate law does not account for "businesses['] need to have missions that are broader than simply maximizing profit, and . . . business leaders and investors['] need to be able to run their businesses in ways that focus on more stakeholders."[130]

And yet, this widespread perception is rooted in adherence to archaic business principles and exaggerated reverence for a few blockbuster judicial opinions.

1. Benefit-Corporation Statutes Address a Problem that Does Not Exist

At least two features of modern corporate law push against the widely touted motivation for benefit-corporation statutes. First, scholars have pointed out that the legal precedent for the shareholder value maximization norm in the common law of corporations is rarely enforced. Second, most states' business codes already accommodate corporate owners' ability to pursue a wide range of interests, through constituent statutes and the freedom to contract out of corporate law default rules.

While *Dodge v. Ford* remains a centerpiece of any corporate law textbook, there is growing doubt about the continued relevance of its holding that a "business

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[128] Markell, *supra* note 119.

[129] MODEL BENEFIT CORP. LEGISLATION § 301 cmt. (2014).

[130] *Hearing on Assemb. B. 361 Before the S. Banking & Fin. Insts. Comm.*, 2011–2012 Reg. Sess., at 8 (Cal. 2011) (citing the American Sustainable Business Council), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_cfa_20110613_121411_sen_comm.html.

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corporation is organized and carried on primarily for the profit of the stockholders [and t]he powers of the directors are to be employed for that end."[131] Cases have always stretched "that end," allowing companies to take steps that seemed adverse to shareholder value in the short term because there was some likelihood that residual claims would eventually and sufficiently flow to shareholders in the long run.[132] Indeed, our early common law did not import the maxim that "there are to be no cakes and ale," as Lord Justice Bowen of the English Chancery Court famously reasoned, "but there are to be no cakes and ale except such as are required for the benefit of the company."[133]

The increasingly tenuous nature of the link courts have found between these "cakes and ale" and the alleged corporate benefits indicates that the shareholder primacy rule has transformed into, at most, a loose standard.[134] Courts have permitted corporations to build tuberculosis hospitals,[135] make payments to improve a county's depressed economic conditions,[136] donate to business schools,[137] and improve agrarian health by canceling farm debts,[138] among other actions taken in support of general public benefits. In some cases, long before a benefit-corporation movement

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[131] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). The Michigan court rejected Ford's benefit-corporation-sounding testimony that companies ought to do "as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally to make money." *See* ALLEN NEVIS & FRANK E. HILL, FORD: EXPANSION AND CHALLENGE, 1915–1933, at 99–100 (1957) (quoting an interview). Though, some scholars have questioned this purportedly altruistic motivation, noting that because of the high tax rate during World War I, Ford personally benefitted from the deferment of any dividends given his large stock holding. *See, e.g.*, M. Todd Henderson, *Everything Old is New Again: Lessons from Dodge v. Ford Motor Company* 27 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 373, 2007). Nevertheless, "Ford's comments made deference difficult for the court." *Id.* at 2.

[132] *See* ROBERT CHARLES CLARK, CORPORATE LAW 681–84 (1986); *see, e.g.*, Greene County Nat'l Farm Loan Ass'n v. Fed. Land Bank of Louisville, 57 F. Supp. 783 (W.D. Ky. 1944), *aff'd*, 152 F.2d 215 (6th Cir. 1945); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953); Steinway v. Steinway & Sons, 40 N.Y.S. 718 (N.Y. Sup. Ct. 1896). Even as the *Dodge* court ordered Ford to pay dividends, it reversed the trial court's injunction of the new factory construction, nodding to the evolving business judgment rule in its declaration that "judges are not business experts." *Dodge*, 170 N.W. at 684.

[133] Hutton v. W. Cork Ry. Co., 23 Ch. D. 654, 673 (1883).

[134] Larry D. Soderquist & Robert P. Vecchio, *Reconciling Shareholders' Rights and Corporate Responsibility: New Guidelines for Management*, 1978 DUKE L.J. 819, 826.

[135] People *ex rel*. Metropolitan Life Ins. Co. v. Hotchkiss, 120 N.Y.S. 649 (N.Y. App. Div. 1909).

[136] Kelly v. Bell, 254 A.2d 62, 64 (Del. Ch. 1969).

[137] Better Bus. Bureau of Detroit, Inc. v. First Nat'l Bank-Detroit, 296 N.W. 665 (Mich. 1941).

[138] Greene County Nat'l Farm Loan Ass'n v. Fed. Land Bank of Louisville, 57 F. Supp. 783 (W.D. Ky. 1944).

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began, courts normatively instructed corporations to consider interests beyond shareholder wealth.[139]

The scholarly debate over the potential conflict between corporate social responsibility and shareholder rights is hardly new.[140] Many academics hang on to Milton Friedman's normative view that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits."[141] Increasingly more difficult to argue, however, is some scholars' descriptive claim that courts not only still agree with this shareholder value maximization principle, but also are willing to hold directors liable for actions taken contrary to it.[142] While a few modern cases provide outlying support for a shareholder primacy norm, particularly in the takeover context,[143] it appears, empirically, that

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[139] *See, e.g.*, Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del. Ch. 1969) ("[U]nless corporations carry an increasing share of the burden of supporting charitable and educational causes . . . the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public.").

[140] Professors Dodd and Berle kicked off the academic debate in competing articles in the Harvard Law Review following the Great Depression. *See* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).

[141] Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

[142] *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–24 (1993) ("[T]he mainstream of corporate law remains committed to the principles espoused by the *Dodge* court."); *see also* MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995) (asserting that there is a scholarly consensus "that management's principle fiduciary duty is to maximize the return to the common shareholders"); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors . . . [is] the principal function of corporate law.").

[143] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010). Chancellor Leo Strine of the Delaware Chancery Court recently lent tentative support to this view, arguing in a law review article "that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders." Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012). Although Chancellor Strine qualified his argument by stating that he did "not mean to imply that the corporate law requires directors to maximize short-term profits for stockholders," his article demonstrates that the Berle-Dodd debate is still alive, even as many scholars recognize that courts rarely enforce the shareholder value maximization norm in practice.

Chancellor Strine's comment conflates two responsibilities by describing this shareholder value maximization norm as part of the duty of loyalty. The duty of loyalty certainly serves this norm, in that it prevents managers from placing personal benefit ahead of shareholder gain, just as the now-largely-procedural assurances of the duty of care also serve this norm. However, it is more apt to view the

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courts over the past several decades have rarely found breaches of directors' duty to maximize profits for shareholders.[144] "Although it is possible for shareholders to prevail on claims that the board of directors violated the shareholder primacy norm, such cases are extremely rare."[145]

Some scholars argue that these cases are rare in part because the holding of the bedrock case on which they are founded, *Dodge v. Ford*, concerns a narrow and unusual set of facts.[146] Under this view, the obligation to maximize shareholder wealth is a special duty owed between shareholders only in closely held corporations to prevent exploitation of minority shareholders.[147] However, a more likely reason for courts' reluctance to rest their holdings on a strict shareholder value maximization principle is their adherence to a robust business judgment rule.[148] The business judgment rule is a standard of judicial review that grants great deference to directors' substantive decision-making regarding business matters as long as the directors carry out their duties of care and loyalty.[149]

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shareholder value maximization norm, as traditionally understood from *Dodge v. Ford*, as a responsibility connected to, but also apart from, the duties of loyalty and care. Even as courts have hesitated to strictly enforce a shareholder-maximization principle, they have remained vigilant over violations of duties of loyalty and care. This is in part because of a strict business judgment rule. *See infra*.

[144] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303 (1999) ("[M]odern corporate law does not adhere to the norm of shareholder primacy."); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180 (2008) ("[S]hareholder [value] maximization is widely accepted at the level of rhetoric but largely ignored as a matter of policy implementation."); Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163 (2008).

[145] D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 288 (1998).

[146] *See* Blair & Stout, *supra* note 144, at 302.

[147] *Id.* (arguing that opportunistic behavior that exploits minority shareholders is less pervasive in publicly traded corporations because rationally passive shareholders are unified in their homogenous interest in share value maximization); *see also* Smith, *supra* note 145, at 285, 315.

[148] *See* Blair & Stout, *supra* note 144, at 303 ("[C]ase law interpreting the business judgment rule often explicitly authorizes directors to sacrifice shareholders' interests to protect other constituencies." (emphasis omitted)).

[149] *See* Smith v. Van Gorkem, 488 A.2d 858 (Del. 1985). Courts have even cited the business judgment rule to uphold directors' discretion to reject lucrative takeover bids based on concerns for the interests of the community or the firm's employees. *See, e.g.*, Cheff v. Mathes, 199 A.2d 548, 556 (Del. 1964) (permitting the board's actions, despite evidence that the directors of Holland Furnace Co. fought off a hostile acquisition in part to protect its employees); Paramount Commc'ns v. Time, Inc., 571 A.2d 1140, 1146, 1155 (Del. 1989) (deferring to the Time board's discretion even though the directors rejected

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Although the business judgment rule is not without limit—courts police managers' conflicts-of-interest transactions and managers' gross negligence in eschewing basic procedural standards[150]—the real teeth of judicial review resides in the scrutiny of the process the managers take to reach their decisions, not in the scrutiny of the outcomes. The business judgment rule effectively allows directors to serve non-shareholder interests, even at the expense of shareholders' potential profits—exactly what proponents of the benefit-corporation model argue the new legal structure would uniquely allow.

Furthermore, most state corporate codes actually empower corporations to explicitly pursue these beyond-profit-seeking interests.[151] Several states have corporate-constituency statutes that allow directors to consider a wide range of interests aside from those strictly maximizing shareholder wealth.[152] Pennsylvania passed the first constituency statute in 1983, allowing directors to consider a broad set of general interests nearly identical to the list of considerations that directors of benefit corporations must make according to the MBCL.[153] Over thirty states have adopted similar statutes, including many that have also enacted or are considering benefit-corporation legislation.[154] Moreover, courts have been willing to enforce the statutes, holding that the constituency provisions protect directors from liability

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Paramount's premium offer so they could pursue a different merger that would preserve the "Time culture" of journalistic integrity).

[150] Judge Winter, a prominent jurist on the Second Circuit, held that "the business judgment rule extends only as far as the reasons which justify its existence." Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982). Judge Winter recognized three reasons for the business judgment rule: (1) "shareholders to a very real degree voluntarily undertake the risk of bad business judgment"; (2) "after-the-fact litigation is a most imperfect device to evaluate corporate business decisions"; and (3) "it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions." *Id.* at 885–86.

[151] *See* 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 2:14 (3d ed. 2010).

[152] *See* Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 180–82 (2012). Most states' corporate codes resemble Delaware's statute, which generally permits articles of incorporation to contain "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders. . . ." DEL. CODE ANN. tit. 8, § 102(b)(1) (2013).

[153] Lacovara, *supra* note 100, at 835–36.

[154] *Id.* at 836; *see also* COX & HAZEN, *supra* note 151 ("[C]onstituency statutes and benefit corporation statutes both modify the fiduciary duties of directors, suggesting that the new benefit corporation statutes may be superfluous.").

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where directors pursued one of the statutorily permitted interests despite apparent conflicts with common law shareholder primacy norms.[155]

These decisions elucidate the reality that a director's fiduciary duty to maximize share value, to the extent it exists and is enforced by courts, is merely a default rule.[156] While constituency statutes show that legislatures can amend any shareholder primacy norm in the common law, corporate owners can themselves contract out of this default rule by specifying contrary provisions in their articles of incorporation.[157] Because the shareholders would have purchased their shares with the provision in place or with the knowledge of the prospect of such an amendment to the articles in the future, the share price should reflect any discount for the provision.[158]

Investors have taken advantage of these constituency provisions. Over 90% of corporations in Delaware have adopted provisions that remove liability in damages for breaches of the duty of care, effectively precluding any means of enforcing restrictions against non-profit-driven decisions.[159] Similarly, a considerable percentage of corporations have added provisions to their articles permitting directors to consider nonfinancial aspects of a merger.[160] And it is not uncommon for corporations to have veered from a shareholder value maximization norm by

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[155] *See, e.g.*, Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 265 (M.D. Pa. 1987) (allowing directors to select a "white knight" over a hostile takeover based on concerns regarding employment and other "social issues"); Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986) (permitting directors to evaluate the effects of a tender offer on the target company's "employees, customers, and community").

[156] Lynn A. Stout, *The Problem of Corporate Purpose*, ISSUES GOVERNANCE STUDS., June 2002, at 4.

[157] Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 859–60 (2005).

[158] *Id.* at 860 ("The answer might be different if the corporation first sold shares under a charter that did not contain any provision lifting these limits, and then in midstream tried to amend the charter to include such a provision. Such a midstream amendment would presumably be in the interests of the majority of shareholders who approved it, but it would expropriate the investment of other shareholders, who invested based on the default rule that allows only a limited degree of profit sacrificing. It is true that if shareholders know that the charter can be so amended at any time, their expectations will partly reflect that fact. Still, requiring controlling shareholders to pay off other shareholders for the value their shares held under the old provision would help assure that the change really increased shareholder welfare.").

[159] DEL. CODE ANN. tit. 8, § 102(b)(7) (2013); WILLIAM ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 255 (2003); Elhauge, *supra* note 157, at 861.

[160] Elhauge, *supra* note 157, at 861–62.

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inserting other interests into their charters.[161] Accordingly, most corporations already possess the same powers, or their shareholders at least already have the option to elect to have the same powers, that proponents of benefit-corporation legislation assert the novel corporate structure would grant.

2. Uncertainty over Benefit-Corporation Statutes' Protection of Fundamental Transactions

Since existing corporate-governance law largely already permits directors to pursue non-pecuniary interests, the most significant contribution of benefit-corporation legislation seems to be its fundamental transactions provisions.[162] These new business statutes seek to protect shareholders' interests in maintaining the corporation's general and specific public benefits through changes in the corporate structure, including mergers and acquisitions.[163] Given the novelty of the statutes, no benefit proceedings have been brought against directors alleging a breach of duty in this regard. However, even if such proceedings do occur, it appears unlikely that judicial protection of these corporations will meaningfully differ from the protection traditionally offered by the courts.

A classic line of cases in corporate law—*Cheff*, *Unocal*, and *Revlon*—apply the duty of care to a takeover context, holding that a simple business purpose must undergird directors' defenses. But courts have not been adamant about directors' need to demonstrate wisdom in their decision-making with respect to the actions that would likely contribute to the business purpose and have not demanded strict adherence to shareholder value maximization; managers are only required to show "good faith and reasonable investigation."[164] If courts already consider themselves ill-equipped to substitute their own judgment for directors' acumen with respect to the more identifiable and measurable goal of increasing share value, they surely will

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[161] *Id.* at 861 (offering the example of news corporations' common article provisions requiring managers to consider or maintain the editorial independence of their staff, even though such provisions may limit profits by offending key advertisers); Michael Lewis, *The Irresponsible Investor*, N.Y. TIMES, June 6, 2004, http://www.nytimes.com/2004/06/06/magazine/the-irresponsible-investor.html?pagewanted=all&src=pm (discussing Google's famously reinvesting profits into a charitable foundation).

[162] *See* Murray, *supra* note 98, at 485 (quoting Yvon Chouinard, founder of Patagonia: "[B]enefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership").

[163] MODEL BENEFIT CORP. LEGISLATION §§ 104(b), 105 (2014).

[164] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985) (allowing consideration of "constituencies other than shareholders" and expressing that "perhaps" the community in general could even be an appropriate consideration).

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have even greater difficulty assessing whether steps taken by directors reflect adequate consideration of a transaction's effects on more malleable and harder-to-define public benefit interests like improving the global environment or ameliorating local communities.[165]

Indeed, this is the broad takeaway from the limited number of cases in nonprofit law. Even when courts are charged with strictly enforcing a public benefit of nonprofit organizations, they generally struggle to determine whether organizations are remaining faithful to this established purpose when the organizations undergo fundamental transactions, such as dissolution or conversion.[166] And even when courts have determined that directors have not been faithful to the nonprofit organizations' purposes, courts often have been reluctant to impose any stringent punishment. In some instances, this softer stance has resulted in no liability for directors.[167] In others, even when judges impose some liability, an organization's pursuit of positive, nonprofit goals, even if not totally aligned with its established purpose, seems to have generated a "halo effect" that shields directors from any significant punishment.[168] While courts have applied a very strict trust-law-like standard in some nonprofit law cases,[169] this heightened standard is unlikely to be replicated in the benefit-corporation context given the major distinction between entities incorporated as nonprofits and entities incorporated as benefit corporations: the non-distribution constraint. This legal premise prevents nonprofit organizations

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[165] This parallels the explanation given by the D.C. Circuit for the deference it extended to the SEC's weak cost-benefit analysis of the effects of the conflict minerals rule. *See supra* notes 71–78 and accompanying text.

[166] *See, e.g.*, *In re* Multiple Sclerosis Serv. Org. of New York, Inc., 496 N.E.2d 861 (N.Y. 1985) (using the *cy pres* doctrine to try, but ultimately be unable, to resolve whether funding medical care for people suffering from multiple sclerosis adequately fit the organization's purpose, when faced with a challenge that the funds should instead be allocated to research on multiple sclerosis).

[167] *See, e.g.*, George Pepperdine Found. v. Pepperdine, 126 Cal. App. 2d 154, 158 (Cal. Dist. Ct. App. 1954) (commenting on the directors' actions: "A regrettable situation! But is it one that requires a burnt offering or that demands the swinging of human forms form the gibbet to gratify the rancor of intimate observers?").

[168] For example, even while the well-respected Judge Gesell purported to apply a corporate-law-like gross negligence standard, he only ordered directors who he found to have violated the duties of care and loyalty to read his opinion and undergo an audit for five years. Stern v. Lucy Webb Hayes Nat. Train. Sch. for Deaconesses & Missionaries, 381 F. Supp. 1013–19 (D.C. Cir. 1974) (reasoning that any more stringent punishment, like removal of the directors, would be "unduly harsh").

[169] *See, e.g.*, Nixon v. Lichtenstein, 959 S.W.2d 854 (Mo. Ct. App. 1997); Lynch v. Spilman, 67 Cal. 2d 251, 254 (1967).

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from distributing profits to the people who control the organization, a limitation that benefit corporations do not face, even as they are required to pursue public benefits.

The likely result is that courts will apply an even stronger business judgment rule in cases involving benefit corporations, deferring even more emphatically to the directors' discretion than courts would in nonprofit or traditional for-profit corporation contexts. Indeed, the text of the MBCL suggests such an expansion in deference. The MBCL replaces the typical gross negligence liability standard with a willfulness standard for managerial breaches of duty, making it more difficult for shareholders to enforce the duties.[170]

Benefit-corporation statutes may ultimately encounter the same window-dressing criticism often lobbed at corporate law requirements that impose more process than substance on directors' duties as a precondition to the application of the business judgment rule. Faced with the impossible task of determining whether directors adequately pursued various non-pecuniary interests, courts may inadvertently steer directors to third-party consultants, like B Lab (the entity that sparked the benefit-corporation movement) to provide more "objective" evidence that the directors appropriately considered the general public benefit and any specific public benefits.[171] Given that the self-interest of third-party entities makes them particularly susceptible to manipulation by directors, however, such certifications run the risk of becoming dog-and-pony shows in the same way that fairness opinions have been characterized on Wall Street. The new statutes thus face the prospect of being perceived as little more than "Benefit Certification Full Employment Acts," just as *Smith v. Van Gorkem*,[172] a seminal corporate law case fashioning directors' duty of care as a primarily procedural one encompassing a requirement to seek expert advice, has been derisively characterized as the "Investment Bankers' Full Employment Act."[173]

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[170] MODEL BENEFIT CORP. LEGISLATION §§ 302(e), 301(c) (2014).

[171] Most states' benefit corporation statutes require regular evaluations using a third-party standard, but do not require a third-party certification. MODEL BENEFIT CORP. LEGISLATION § 401(a). The independent audit requirement of the conflict minerals rule serves a parallel function.

[172] 488 A.2d 858 (Del. 1985). *Smith v. Van Gorkom* is commonly referred to as the "TransUnion case," reflecting the name of the company involved in the dispute.

[173] Dierdre A. Burgman & Paul N. Cox, *Corporate Directors, Corporate Realities and Deliberative Process: An Analysis of the Trans Union Case*, 11 J. CORP. L. 311, 333 n.146 (1986).

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Ultimately, if courts pay any attention to the general public benefit purpose, it will likely only increase transaction costs, with little-to-no substantive adjustment to judges' traditionally deferential posture.

Moreover, the new benefit-corporation structure will likely tilt the fiduciary duty model of corporate law towards a more contract-based approach.[174] In many respects, this would hardly be a notable transition; it would be consistent with Sir Henry Maine's famous proposition that progressive societies have moved from "status to contract."[175] But this probable trajectory is significant in its apparent contrast with the benefit corporation's rhetoric, wherein expectations on managers to consider a host of interests beyond profits more similarly reflects the expansive language Judge Cardozo famously employed in *Meinhard v. Salmon* to erect an impossibly broad fiduciary duty.[176] Absent the guidance of a clear standard like profits or share value to assess directors' duty, courts are more likely to look to the terms that corporate owners' explicitly contracted for in the corporation's articles of incorporation. One would expect shareholders in benefit corporations to increasingly outline specific benefit purposes in their charters in order to emphasize the interests the shareholders want to protect.[177]

Ultimately, it seems very unlikely that courts will be willing to hold directors accountable for their circumvention of potential public benefit gains if the directors'

[174] Corporate law has always teetered between these two poles. In one camp, scholars like Schleifer and Vishney argue that shareholders take priority ahead of note-holders because the former are protected by a robust fiduciary duty whereas the latter are merely protected by contract. *See* Schleifer & Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997). In the other camp, jurists like Posner and Easterbrook argue that any fiduciary duties (not just those oriented toward profit-seeking) are nothing more than contract default rules. *See* Jordan v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir. 1987). Easterbrook writes for the majority and Posner writes in dissent; however, the two judges agree that fiduciary duty is just a contract default rule, despite disagreeing on the outcome of the case. *See id.*

[175] SIR HENRY SUMNER MAINE, ANCIENT LAW 151 (report. ed., Dorset Press 1986). However, many scholars have debated the meaning of Main's assertion and whether or not it is actually reflective of corporate law. *See* J. Russell VerSteeg, *From Status to Contract: A Contextual Analysis of Maine's Famous Dictum*, 10 WHITTIER L. REV. 669, 669 (1989).

[176] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . [T]he level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd.").

[177] This highlights the earlier point that the new statutes simply reinforce the power that corporations have always had to deviate from shareholder value maximization default rules. *See supra* notes 151–61 and accompanying text.

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actions could be perceived to support the pecuniary value of the equity shares.[178] This is especially true given the standard-like provisions in most benefit-corporation statutes, like Delaware's provision that calls on directors to manage the corporation's affairs merely "in a manner that balances" socially conscious interests alongside financial interests of stockholders.[179] In fact, this relatively loose standard may pose future danger for shareholders of benefit corporations, allowing directors to evade their duty of loyalty through the pretext of their pursuit of other interests affected. Corporate law provides a few cautionary examples that involve directors' theft of corporate opportunities facilitated, in part, by perceived public-interest protection, such as the majority shareholders' exploitation of informal wartime price controls on steel in *Perlman v. Feldman*.[180] Given this risk, courts are likely to be even more tentative about enforcing non-shareholder interests.

3. Benefit-Corporation Statutes Provide More Symbolism Than Substance

This analysis suggests that the benefit-corporation trend offers corporate law more symbolic value than substantive change.[181] The new statutes offer little actual powers or duties to shareholders and directors than those that already exist in most states' corporate codes or case law. However, the symbolism of the widespread benefit-corporation trend *does* importantly reflect the modern understanding of corporate governance law in two crucial respects. First, legislatures recognize that corporations can express messages untethered to the corporations' profit

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[178] Courts have already indicated a willingness to place the pecuniary interests of firms ahead of public interest principles set informally by the government. *See* Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947).

[179] 8 Del. Laws § 365(a) (2016) ("The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.").

[180] *Perlman*, 219 F.2d 173 (noting that Feldman independently earned interest on customers' payments to get on a waitlist for steel in future years). *See also Zahn*, 162 F.2d 36 (concerning directors' attempt to exploit price controls on tobacco during wartime).

[181] Other authors have reached a similar conclusion. *See, e.g.*, Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existant Problem*, 44 ST. MARY'S L.J. 617 (2013). *But see* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 828–29 (2012); J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485 (2013); Lacovara, *supra* note 100, at 834–40; *see also* Joseph Karl Grant, *When Making Money and Making a Sustainable and Societal Difference Collide: Will Benefit Corporations Succeed or Fail?*, 46 IND. L. REV. 581 (2013).

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motivations, and these messages (and the corporations' ability to communicate them) are valued by society. Second, legislatures respect private ordering, favoring corporate models that afford shareholders greater discretion to dictate the interests their corporation will serve. The remainder of this Article will discuss how the recent federal disclosure rule regarding conflict minerals engages these two symbolic features of the benefit-corporation movement.

a. Legislatures Recognize that Corporations Express Socially Valuable Speech

Legislatures' recognition that corporations hold interests apart from profit-seeking rests "at the heart" of the benefit-corporation trend.[182] The new corporate governance structure is designed to allow corporations to more easily, transparently, and forthrightly pursue these non-pecuniary interests. Implicit to this goal is an acknowledgement and a guarantee of corporations' ability to express messages linked to their general and specific public benefits to consumers, potential shareholders, and other constituents. The corporations' selection of certain public benefits in their articles, as corporations were already empowered to do in most states, and the directors' actions taken to serve these interests are themselves socially useful expressions of the public matters that capture shareholders' attention and concern. In this sense, the benefit-corporation statutes can be seen as a type of speech protection granted to socially conscious corporations and their managers. This signals a shift away from the prevailing understanding that profit maximization constitutes corporations' sole or even primary interest, and that the pursuit of profit precludes expression of socially valuable non-pecuniary messages.

The contrast is striking between the legal backlash to Henry Ford's public interest-driven comments leading up to and during his corporation's famous litigation, discussed above,[183] and the lack of shareholder response to—and, really, the public's expectation of—similar managerial statements frequently made today.[184] Of course, some scholars argue that corporations only make these statements and pursue the non-pecuniary interests the statements reflect because they ultimately benefit the corporations' bottom-line.[185] But the widespread passage of benefit-

[182] MODEL BENEFIT CORP. LEGISLATION § 301 cmt. (2014).

[183] *See supra* note 131.

[184] *See, e.g.*, Letter from Safra Catz, President and Chief Financial Officer of Oracle Corporation, *available at* http://www.oracle.com/us/corporate/citizenship/ccr-letter-president-1886335.html ("We are committed to using our resources to increase opportunity, protect the environment, advance education, and enrich community life.").

[185] *See, e.g.*, John C. Coates, IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 832–33 (1989).

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corporation statutes signals that legislatures disagree. The seemingly ubiquitous praise these new statutes have garnered—despite case law's evolution away from a strict shareholder value maximization norm, calling into question the substantive need for the new statutes—emphasizes legislatures' belief in the value of, and their intent to give protection to, some forms of commercial speech.

b. Legislatures Respect Private Ordering Corporate Governance Models

Similarly, the benefit-corporation trend highlights legislatures' respect for the private ordering model that these new statutes adopt. The business corporation laws afford shareholders greater ability to specify the purposes of the corporation and offer directors greater protection to meet those purposes. However, the actual purposes specified, including the general public benefit that all benefit corporations must consider, are wholly based on the election of the shareholders. As discussed above, conferment of benefit-corporation status is simply recognition that shareholders opted to contract out of shareholder value maximization default rules.

In the benefit-corporation governance model, the new statutes allow corporations to tie themselves to the masts they choose; the state provides the rope, but the corporation's shareholders do the tethering.[186] Even when shareholders direct corporate managers to consider other constituents, shareholders alone retain the right to enforce this consideration through the benefit enforcement proceeding. And just as important, shareholders determine when to loosen the rope, as most states require at least two-thirds of all classes of shareholders to approve any fundamental transaction that may result in termination of benefit-corporation status. Notably, Delaware's benefit-corporation statute demonstrates an even more robust respect for private ordering.[187]

Critics of the private ordering model may point out that most states' benefit-corporation statutes place additional requirements on corporations. For example, while constituency statutes merely allow directors to consider the interests of constituents other than shareholders, the MBCL requires directors to consider the general public benefit. Similarly, most states, with the notable exception of Delaware, require benefit corporations to file, and even publish online, regular reports on their overall social and environmental performance.[188] However, corporations only assume these duties by election of their shareholders, and the

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[186] *See* MODEL BENEFIT CORP. LEGISLATION § 104(a) (requiring a vote of two-thirds of all shareholders for an existing corporation to take on benefit corporation status).

[187] *See supra* note 118.

[188] *See* MODEL BENEFIT CORP. LEGISLATION § 401(a).

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measures are generally intended to promote the shareholders' ability to enforce the interests they set. For example, the reporting requirement is a feature chosen by shareholders to impose greater transparency so they can better determine if the purposes they have specified are being met. Furthermore, the MBCL explicitly notes that its terms are "generally applicable" to benefit corporations; there seems to be no reason why shareholders could not elect to contract out of any of these specific requirements.

Given that modern corporate law already permits owners to set the corporate purpose and specify the interests to be served, the fanfare that greeted passage of these new laws seems to be little more than a celebration of the renewed focus on shareholders' ability to privately order their interests free from the restraints that traditional corporate law may have imposed. Ironically, the movement to permit corporate consideration of non-shareholders' interests actually emboldens shareholders' ability to direct the corporation.

B. Federal Specialized Disclosure Rules Ignore the Dual Insights of the State Benefit-Corporation Model

Although the federal specialized disclosure rules and the benefit-corporation statutes are superficially congruent, both serving as government reinforcement of corporate social responsibility, the two valuable takeaways of the benefit-corporation approach call into question the likely effectiveness of the federal approach, particularly with respect to the conflict minerals rule. By ignoring the First Amendment implications of the benefit-corporation model, the federal regulations yield speech of scant value. By disregarding benefit-corporation laws' emphasis on private ordering, the federal regulations force upon investors an *ex-post* change in corporate structure that resembles the mid-stream recapitalization threat the benefit-corporation model intends to forestall. As a result, the federal rule is unlikely to advance its intended public benefit and may in fact harm the very stakeholders it means to help.

1. Federal Specialized Disclosure Rules Yield Speech of Little Value

Public reporting requirements are central to both the state benefit-corporation statutes and the federal regulations pertaining to conflict minerals. Both sets of disclosure schemes are presumably intended for the benefit of shareholders, consumers, and other constituents, rather than for the simple purpose of government oversight. Comments to the MBCL note that the annual benefit report is meant to provide greater transparency "so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and . . . whether . . . the shareholders should take other action to change the way the corporation is managed," and so that the corporation can signal to "consumers and the general

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public [that the] business is living up to its claimed status as a benefit corporation."[189] Congress's decision to call upon the SEC to implement Section 1502 similarly indicates Congress's presumption that the conflict mineral disclosure requirements would communicate helpful information to investors evaluating the corporations' stock. Section 13 of the Exchange Act, under which the conflict minerals rule was added, grants the SEC power to require reports "for the proper protection of investors."[190]

As discussed in Part I, though, conflict minerals legislation departs from the other disclosure requirements typically implemented under the Exchange Act in two ways. First, the regulations were actually enacted for the benefit of non-shareholder constituents, exceeding the scope of the Exchange Act and the Commission's expertise. Second, even if the disclosed information is intended for shareholder benefit, the requirement to publish the non-pecuniary information on the corporations' websites forces the corporations to adopt and express messages regarding a specific public benefit the shareholders did not themselves elect. While the public reporting requirements in the state benefit-corporation statutes reflect shareholders' own decision for the corporation to furnish such information for their benefit, the public disclosure requirement in the federal conflict minerals rule constitutes compelled speech that imparts little value.

The federal specialized disclosure rule relies on a commercial speech doctrine that is based on premises that the benefit-corporation model doubts and courts increasingly call into question. The D.C. Circuit implicitly flagged this uncertainty in *NAM v. SEC*, raising the possibility that strict scrutiny may apply to its review of the conflict minerals rule, but dodging analysis of the question by determining that the law did not even meet the lower, intermediate standard presented in *Central Hudson*.[191] That seminal First Amendment case stands for the proposition that restrictions on commercial speech (or regulations compelling commercial speech), unless false or misleading, should receive a level of judicial review that, though stronger than the rational-basis scrutiny applied to laws abridging unprotected areas of speech or content-neutral speech, is significantly less stringent than the strict

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[189] *Id.* § 102 cmt.

[190] 15 U.S.C. § 78m (2012).

[191] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 368 (D.C. Cir. 2014) (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)), *adhered to after rehearing*, 800 F.3d 518 (D.C. Cir. 2015).

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scrutiny applied to laws restricting noncommercial, content-based speech.[192] While the D.C. Circuit's opinion in *NAM v. SEC* certainly presents a review with more bite than the district court's earlier approach in the case,[193] a comparison of this conflict minerals ruling with *American Meat*, an en banc decision of the D.C. Circuit handed down around the same time,[194] indicates the court is grappling with a commercial speech doctrine that is in flux.

To be clear, *Central Hudson* represents a marked transition in the Court's evolution in its regard for the social value of commercial speech. Throughout the middle of the twentieth century, *Valentine v. Christensen* made clear the Court's earlier view that commercial speech fell outside the First Amendment's protection altogether.[195] *Valentine* projected the notion that commercial speech purely concerns economic inducement, an interest quite distinct from the free and open exchange of ideas the Court's protection of speech is meant to foster. Commercial speech did not place its foot in the First Amendment door until *Bigelow v. Virginia* over three decades later.[196] Although the direct impact of the case, involving a New York abortion clinic's newspaper advertisement in Virginia (a state that prohibited abortions), was somewhat cabined by its unique facts, Judge Blackmun's language—stating that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas"—could easily be mistaken for the rhetoric of benefit-corporation proponents.[197] The Court built on this precedent in *Virginia Pharmacy*, explicitly holding that commercial speech is entitled to some degree of protection.[198] Writing again for the Court, Justice Blackmun primarily based his reasoning on listeners' interests, arguing that even advertising carries socially valuable information.[199]

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[192] *Central Hudson*, 447 U.S. at 566.

[193] Even while the D.C. Circuit declined to analyze whether strict scrutiny should apply in the case, the court's indication that the higher level of review might even be a possible consideration was a stark departure from the district court's opinion. *See* Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43, 77 n.26 (D.D.C. 2013) (assuming that the conflict minerals rule "fits within the framework" of commercial speech).

[194] Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014). *See supra* text accompanying note 84.

[195] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[196] Bigelow v. Virginia, 421 U.S. 809 (1975).

[197] *Id.* at 826.

[198] Va. State Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[199] *Id.* at 753−54.

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And yet, although *Central Hudson* illustrates the Court's evolution, the Court's sharp line of demarcation between commercial and non-commercial speech—and the D.C. Circuit's reliance on this analytical framework in *NAM v. SEC* and *American Meat*—manifests that the *Valetine* reasoning still carries considerable weight in First Amendment law. Commercial speech is simply afforded less protection than non-commercial speech.[200] Part of the reason for this disparity in treatment is the belief that commercial speech, which is thought to primarily concern the speakers' economic interests, carries less social value than non-commercial speech.[201] Several scholars continue to hold on to the criticism Justice Rehnquist expressed as the sole dissenter in *Virginia Pharmacy*, arguing that the Court's protection of commercial speech was tantamount to the Court's use of the First Amendment to substitute its own economic views for that of the legislature, as occurred in the much maligned *Lochner* era cases.[202] For example, Professors Thomas Jackson and John Jefferies assert that judicial analyses of commercial speech regulations fit more appropriately under a due process framework, whereby the regulations should only receive rational-basis scrutiny.[203] Jackson and Jeffries base their opposition to the protection of commercial speech on their understanding that "the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services," arguing that the majoritarian political process should control the latter.[204]

However, the benefit-corporation trend reveals that the distinction between these two markets is actually quite blurred—and, even more significantly, the state-law trend suggests that legislatures, acting in the majoritarian political process, desire to blur that distinction.[205] The speech that benefit-corporation statutes promote

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[200] *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64−65 (1983) ("[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.").

[201] *See* Caren Schmulen Sweetland, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471 (1997).

[202] *Va. State Pharm. Bd.*, 425 U.S. at 781−90 (Rehnquist, J., dissenting).

[203] Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30−31 (1979) ("[O]ne would expect to find the constitutional safeguards of economic liberty to be housed within the flexible contours of due process of law. Instead, economic due process is resurrected, clothed in the ill-fitting garb of the first amendment. . . . In short, the Supreme Court has reconstituted the values of *Lochner* . . . as components of freedom of speech.").

[204] *Id.* at 2.

[205] *See supra* notes 101–13.

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hardly seems to fall into the category of speech "which does 'no more than [concern] commercial transaction[s]'" and thereby "omits, by definition, any expression essential to self-government."[206] Indeed, this Article's prior analysis demonstrates that a transformation of the "definition" of corporations' interests, and of the speech corporations express to identify and pursue those interest, is precisely the symbolic force that the benefit-corporation movement imparts. The state-law trend can be regarded as a legislative effort to counter the lingering view that commercial speech does not implicate "political deliberation" in the same way that the Court has recognized other areas, like the arts and sciences, do, because "selling products and services serves private interest in profit, not public interest in government."[207]

Several jurists and scholars have long supported the effacement of the commercial/non-commercial free speech demarcation.[208] And a majority of the current Court seems more willing than ever to agree. In *Sorrell v. IMS Health, Inc.*, the Court held that a Vermont statute that restricted the disclosure of records containing the prescribing practices of individual doctors violated the First Amendment.[209] In so holding, the Court seemed to narrow the scope of what constitutes strictly commercial speech and raise the degree of scrutiny the Court will apply to it.[210] This outcome appears congruent with the Court's recent decisions regarding corporations' role in campaign finance, most notably the holding in *Citizens United*, which overturned prior rulings by declaring that the First

[206] Jackson & Jeffries, Jr., *supra* note 203, at 15 ("For this kind of communication, the structure of representative democracy yields no inference of inviolability because commercial speech concerns economic rather than political decisionmaking.").

[207] Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 130−31 (discussing the view that commercial speech does not fit within a self-government-based conception of the First Amendment).

[208] *See* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1595 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed . . . ."); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 775 (1993) (questioning the distinction between commercial and noncommercial speech). Additionally, a few circuit courts have been willing to approach corporate speech regulations with the same heightened scrutiny applied to noncommercial speech restrictions. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012) ("If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard. If it does not, then we . . . apply strict scrutiny." (internal citations omitted)); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651–52 (7th Cir. 2006) (analyzing whether the *Zauderer* test or strict scrutiny applied to compelled commercial speech).

[209] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2672 (2011).

[210] *Id.*

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Amendment prohibits restrictions on political expenditures by corporations.[211] Similarly, the Court's blockbuster *Hobby Lobby* decision, recognizing that closely held corporations' business operations can, in some situations, represent religious practice protected under federal law, is also consistent with this trend.[212]

Of course, this necessarily brief discussion oversimplifies the complicated issues posed in these cases and does not do justice to the many strong views criticizing them.[213] But the evolving jurisprudence suggests that *legislators*' confluence of corporations' commercial and public benefit interests, highlighted in the benefit-corporation movement, might anticipate similar convergence of the *courts*' treatment of corporations' commercial and ideological speech.

Yet, the federal specialized disclosure rules largely disregard this insight. While the state benefit-corporation model recognizes that corporate speech can import value to both "speakers" (the corporations and shareholders who own them) and "listeners" (investors and other stakeholders), the federal specialized disclosure requirements strip corporate speech of that value in both regards.[214] From the point of view of the speaker, the value of the disclosure is restricted because the companies are forced to adopt a message they do not want to convey, or at the very least, to communicate information in a manner they do not choose. From the point of view of the listener, the value of the corporate speech is tempered for at least two reasons. First, the communication does not indicate the company's actual commitment to the expressed mission—e.g., it is difficult for a listener to discern if a company's disclosure of conflict mineral use comports with likely action to curb future use. Second, because of the broad scope of these disclosure rules—e.g., the conflict mineral rule contains no *de minimis* exception and consequently covers a vast range of companies across multiple industries—the value of any one company's message is diluted in a cacophony of opaque disclosures.

This argument is consistent with the empirical results provided in Part III, finding that shareholders did not respond to the content of companies' first-year

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[211] Citizens United v. FEC, 558 U.S. 310 (2010). *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and partly overruled *McConnell v. FEC*, 540 U.S. 93 (2003).

[212] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[213] *See, e.g.*, James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006).

[214] This argument holds across the many different theoretical conceptions of interests the First Amendment protects, i.e., the promotion of a marketplace of ideas, of democratic self-governance, of autonomy, etc.

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conflict mineral reports.[215] The conclusion reveals a chicken-and-egg issue at the heart of the compelled commercial speech doctrine: Supporters of weaker corporate speech protection argue that corporate speech can be more heavily regulated under the First Amendment because it lacks value relative to non-commercial speech; yet, corporate speech, at least the speech mandated by the federal specialized disclosure rules, may lack value precisely because of the regulations compelling it. Consequently, as indicated in Part III, the speech prompted by the federal specialized disclosure rules is likely to be less effective at advancing the rules' social goals than the speech promoted by the state benefit-corporation laws.

2. Federal Specialized Disclosure Rules Are Unlikely to Significantly Change Corporate Behavior

The prominence of a private ordering model in the various states' benefit-corporation statutes illustrates legislatures' intent to afford shareholders greater control over the interests their corporations identify and pursue. This movement follows in the wake of expansive work in the field of law and economics to explore the rules and practices of private groups.[216] The legislatures' crafting of laws to empower these private decisions, and the courts' pledge to enforce them, seem to blend the efficiency arguments for private ordering with a recognition of the role the state can play to protect against associated market failures.[217]

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[215] Of course, as explained further in Part III, this empirical result might be less an indication of the value of specialized disclosures to "listeners" as it is a reflection of the type of speech that was actually compelled under the law. Following the D.C. Circuit's decision striking the requirement that companies use the specific phrase "DRC conflict free," companies' disclosures contained less politically laden messaging. *See* Higgins, *supra* note 86. Also, while investors are the "listeners" contemplated in most measures under the Exchange Act, for the reasons explained in Part II, all specialized disclosure regulations, including the conflict minerals rule, contemplate that the disclosures will influence other listeners, such as human rights agencies and consumers they might reach, that are not well captured by Part III's short-run empirical model.

[216] *See, e.g.*, ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW & SOC'Y REV. 759 (1991); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

[217] *See* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); *see also* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993); Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745 (1996).

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The benefit-corporation movement's emphasis on private ordering highlights the ways in which the SEC rules implementing Section 1502 depart from this model.[218] This discrepancy suggests that the federal regulations are inefficient with respect to investors and, consequently, are likely to be ineffective with respect to the humanitarian conflict they seek to assuage. This analysis yields a skeptical prognosis of the federal regulations' ability to meet both their purported goal, the protection of shareholders in the United States, and their actual goal, the support of stakeholders in central Africa.

a. The Conflict Minerals Rule Is Inefficient with Respect to Shareholders

Although Section 1502 is characterized as a simple disclosure mechanism, it requires the SEC to enforce substantive—and costly—corporate action meant to address the humanitarian conflict in the DRC.[219] As a result, the government's unparalleled use of Section 13 of the Exchange Act to steer socially responsible behavior in fact undermines the express purpose of that Act—to protect investors. The conflict minerals rule is inefficient with respect to shareholders because it places prospective shareholders' interests ahead of present shareholders' interests, imposing certain costs on the present shareholders that outweigh the speculative gains to be obtained by the prospective shareholders.

The burden the conflict minerals rule puts on present shareholders is underscored when compared with the benefit-corporation trend's protection of present shareholders' powers. The private-ordering emphasis in benefit-corporation statutes recognizes the control power that accompanies shareholding and the elevated stock value that corresponds. Even though benefit corporations' pursuit of non-pecuniary interests may result in lower profits, socially-conscious shareholders are willing to pay a premium for their ability to direct the corporation's interests toward public interests about which they care. The benefit-corporation statutes protect this model in a number of ways: (1) an expanded definition of directors' duties that allow

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[218] Critics might point out that, so far, the vast majority of corporations that have elected the benefit corporation form are closely held corporations, whereas the SEC regulations only affect publicly traded corporations. Private ordering models are arguably much easier to operate in a closely held corporation, where the individual shareholders' interests are more easily identified and directed. However, as the benefit corporation trend continues, publicly traded corporations are likely to take on the new status; several have already indicated interest. Furthermore, one could argue that private ordering is actually easier in the publicly traded corporation context because shareholders' interests tend to be more homogenous and less driven by personal conflicts, as can be the case with closely held corporations.

[219] *See supra* notes 35–38.

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directors to pursue the non-pecuniary interests that shareholders set; (2) benefit enforcement proceedings that allow shareholders to enforce consideration of these interests; and (3) transparency requirements to hold the directors accountable and signal the corporations' interests to potential investors.

Most significant, however, are benefit-corporation statutes' mandatory vote minimums with respect to benefit-corporation status changes, ensuring that corporations only adopt interests the shareholders elect. Delaware's benefit-corporation statute underscores this feature, requiring shareholders to specify which interests the corporation is pursuing rather than allowing the shareholders just to elect a general public benefit.[220] This aspect of the benefit-corporation trend serves to highlight the common law's insistence that contractual changes to default rules occur *prior* to the shareholder's having obtained the shares, or at least reflects the common law's hesitation about the permissibility of any such *ex-post* changes.[221]

The conflict minerals regulations obviously depart from this model in the sense that they impose on shareholders a public benefit interest the shareholders did not elect themselves or ever have an opportunity to elect. Instead, the conflict minerals rule imposes on corporations extensive, substantive steps they must take to consider the interests of constituents in central Africa. The SEC estimated that the country-of-origin inquiry, due diligence, reporting, and audit requirements of the conflict minerals rule would cost corporations between three and four billion dollars initially, and hundreds of millions of dollars in each subsequent year.[222] Consequently, the SEC rule can be characterized as forced midstream recapitalization, in which corporate wealth is diverted to carry out this new public-benefit interest.

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[220] Delaware's public benefit corporation statute also initially required that 90% of each voting class agree before the company's articles could be amended to bind the directors to a specific public benefit interest. This provisions was recently amended, however, to mirror the requirement provided in the MBCL that only two thirds of shareholders agree before such a transition can occur. *See supra* note 118 and accompanying text.

[221] *See* Elhauge, *supra* note 157, at 861 ("[T]he law is unsettled on whether [opting out of limits on profit-sacrificing discretion] would be permissible if adopted without unanimous shareholder consent. Likewise, the comments to ALI Principle § 6.02 indicate that a charter or bylaw provision committing a corporation to environmental protection or community welfare would, if adopted before the shareholder obtained shares, permit management to sacrifice a greater degree of shareholder profits in blocking takeovers than otherwise would be permitted.").

[222] *See supra* note 72 and accompanying text. This estimate does not include losses in equity value, which is the focus of the empirical analysis in Part III.

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This recapitalization lowers the value of the corporate equity shares, with some predictions totaling losses of over six billion dollars.[223] This Article's empirical results, introduced in Part III, support at least the direction of these predictions, demonstrating that first-year filings under the SEC rule correlate with a statistically significant drop in share value for affected companies. That the shareholders did not anticipate the recapitalization—because the SEC rule exceeds the scope of the agency's mandate—indicates that the share price at their time of purchase did not likely account for the possibility of this recapitalization. And given the absence of a *de minimis* exception, combined with the uncertainty of these supply chains and confusion of the conflict rule's legal status, many shareholders might not have foreseen application of the regulation to their companies before the companies filed, meaning the stock price might not have reflected this recapitalization even just before the filing deadline.

The SEC rule prioritizes prospective investors, who may be socially-conscious and so desire the forced consideration of the central African conflict, over present investors. However, the conflict minerals regulations impose net social costs with respect to all investors because the potential utility gains that the rules afford to prospective shareholders do not offset the pecuniary and general utility losses that fall on present shareholders. While the costs to present shareholders are concrete, the prospective shareholder gains are speculative and likely minimal: the required disclosures are significant enough to impose real costs on the corporations, but the publication mandates are not extensive enough to accurately signal to prospective shareholders, particularly rationally passive shareholders, which corporations are effectively taking steps to mitigate their negative influence on the conflict in central Africa. This is especially likely given the vast scope of corporations to which the regulations apply; it will not be immediately obvious to prospective investors, nor to prospective consumers of the corporations' profits, which corporations are affected by the new rule. In that sense, the disclosure requirements do seem more "designed to affect corporate social behavior" than to actually "provide information important to a reasonable investor."[224]

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[223] *See* Paul A. Griffin et al., *Supply Chain Sustainability: Evidence on Conflict Minerals*, 26 PAC. ACCT. REV. 28 (2014).

[224] BROWN, *supra* note 65, at 2B.12[1] ("Thus, the SEC is enforcing a disclosure requirement that makes no pretense at providing information important to a reasonable investor. Instead, the requirements are entirely designed to affect corporate social behavior.").

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b. The Conflict Minerals Rule Is Likely to Be Ineffective with Respect to Stakeholders

Despite the Exchange Act's expressed purpose to protect investors, the legislative history of Section 1502 and the substantive burden the SEC regulations place on corporations illustrate that the rule is actually intended to steer corporate behavior to address the conflict in the DRC. However, the conflict minerals regulations' marked departure from the private ordering model espoused in the benefit-corporation trend suggests that the federal rule is unlikely to be effective, and it may even hurt the very stakeholders the rule intends to help. This is because, with respect to this foreign policy goal, the rule simultaneously does both too much and too little. On one hand, the rule only compels corporations to take bare minimum steps that are unlikely to alter their actual consideration of their impact on the region. On the other hand, the rule threatens to be so costly that it precludes corporations from engaging the region.

i. The SEC Rule Does Too Little to Address the Conflict in Central Africa

Benefit-corporation statutes require directors of the companies that elect the new status to consider foreign constituents affected by the corporations' actions.[225] Although directors are allotted discretion to determine which actions best serve the public-benefit interests the shareholders set, the laws provide shareholders with a mechanism—the benefit enforcement proceeding—to ensure that the directors' consideration of such interests is adequate.[226] In contrast, the conflict minerals rule requires corporations to take specific steps to disclose whether the corporations indirectly finance the violent conflict in the DRC, but it does not mandate genuine consideration of these constituents beyond mere satisfaction of the requirements. Furthermore, the SEC regulations do not impose a penalty on corporations or managers who act against this public interest by using conflict minerals in their products. Unlike other laws meant to affect extraterritorial corporate behavior, the prototypical example being the Foreign Corrupt Practices Act, the conflict minerals rule does not impose any substantive liability; the only sanctions come from failing to accurately disclose use of the minerals.

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[225] *See* MODEL BENEFIT CORP. LEGISLATION § 301(a) (2014) (providing that directors "shall consider the effects of any action or inaction upon . . . community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; . . . [and] the local and global environment," among other interests).

[226] *Id.* § 305.

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Instead of legal penalties, the federal rule relies on public pressure to enforce the socially responsible behavior the government hopes the rule will bring about. But although the regulations mandate that companies note on their websites whether the products are "DRC conflict free,"[227] the rule does not require companies to directly label their products. So the rule places substantial responsibility on the shoulders of the human rights community and impact investors to alert the market, so as to name and shame corporations that persist in using "not conflict free" minerals. Even if naming and shaming happens, however, given the ubiquity of the minerals in an expansive scope of products across multiple industries, it is unclear that consumers and investors will be willing to pull back on their engagement of the products and/or stocks.

Furthermore, the difficulty corporations are likely to encounter in ascertaining the origin of the minerals and tracking the minerals' funding stream—either because the supply chain involves multiple links that are genuinely hard to verify, particularly for companies that manufacture end-products that may only contain a scintilla of the minerals, or because the corporations have cost incentives to take minimal steps to locate the information—may dilute the meaning of "not conflict free" or "conflict indeterminable." If all corporations are unsure, or unwilling, then it will be very hard for the market to distinguish and penalize them. In this way, the mandatory disclosures may actually have the opposite effect of the one intended: as more companies admit that they use conflict minerals, the cost of that admission, in terms of negative publicity, decreases. Additionally, perverse incentives for third parties to sign off on audits without complete information reinforces the likelihood that the rules may result in additional transaction costs but little substantive change for a region that has been ravaged by war. Finally, the regulations may allow the government to absolve itself of responsibility to act, viewing promulgation of the rule and dependence on the market response as sufficiently meeting its duty to address the conflict.

ii. The SEC Rule Does Too Much to Address the Conflict in Central Africa

At the same time that the conflict minerals rule runs the risk of doing too little to influence any meaningful change in central Africa, it also threatens to impose costs

[227] As discussed in Part I, the D.C. Circuit struck this provision of the SEC rule just prior to the first-year filings. *See supra* note 86. Companies are still required to carry out due diligence and file reports, but are not required to use the particular "DRC conflict free" language. *See supra* notes 86–87 and accompanying text.

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that preclude the corporations from engaging the region. This is particularly the case for those corporations that are relatively small, for which the transactional costs of tracking down the required disclosure information is not worthwhile. It might also deter those companies that are publicity-sensitive and do not want to risk being associated with the conflict, even if they could demonstrate with some certainty that the minerals they use had not financed the fighting. The rule could effectively lead to an embargo of the region by publicly traded U.S. corporations.[228]

This embargo would hurt the local population in two ways: by removing critical sources of economic development in the already impoverished region and by creating a vacuum that could be filled by non-American corporations that impose even less stringent human rights standards.

First, though a number of the DRC mines do fund rebel groups, several others provide a crucial source of funding for communities. Because it may be too costly for companies to discern with any certainty which mines fall into which category and which mines their minerals are sourced from, companies may end up leaving the region altogether. An effective embargo would hurt not just the livelihoods of the people who depend on these mines for employment, but would also have residual effects in the local economy. Indeed, early reports express that "*Loi Obama*"—Obama's law, as the rule is referred to locally—has "set off a chain of events that has propelled millions of miners and their families deeper into poverty."[229] Ironically, the law may be serving to strengthen the rebels' control and weaken the government's force as people previously legitimately employed in the mines increasingly turn to militias out of necessity.[230]

Second, U.S. corporations compete with international corporations for these same resources. If U.S. corporations pull out of the region, these foreign corporations may take over their contracts. Although this may temper the local economic effect of U.S. companies' departure, it would provide faint assurance that any human rights standards would prevail on the local extractive industries. For example, aid agencies have already expressed concern that Chinese corporations, whose extraterritorial

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[228] *See* Gettleman, *supra* note 18.

[229] Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST, Nov. 30, 2014, https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html (italicization added) (noting the decline in the price of minerals sourced from mines in the DRC).

[230] *See* Lauren Wolfe, *How Dodd-Frank is Failing Congo*, FOREIGN POL'Y (Feb. 2, 2015), http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/ (explaining that the conflict minerals rule is exacerbating the humanitarian crisis).

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humanitarian effects are largely unconstrained by Chinese law or by Chinese public opinion, continue to expand their influence in the region.[231] Unless an international effort is coordinated to ensure that other states, particularly those with corporations active in the mineral supply chain, enforce similar substantive disclosure requirements, the SEC's regulations could make the humanitarian crisis even worse.

III. ECONOMETRIC EXAMINATION OF THE CONFLICT MINERALS RULE'S EFFECT

The prior theoretical discussion qualitatively argues that the conflict minerals rule is an inefficient mechanism to help resolve the conflict in Central Africa, in part because the rule, as well as shareholders' likely responses to it, yield substantial corporate costs but produce speech of slight value and effect little change in corporate behavior. This Part offers an empirical examination of the market response to the first set of conflict minerals filings so as to test that argument.

Section A complements the prior Parts of this Article by briefly discussing pre-filing predictions based on other academic work. Section B describes the initial set of conflict minerals filings and the data used in this study, including various limitations. This section also explains the admittedly basic methodology of the two sets of empirical analyses conducted: an event study looking at the effect of the filings on share value relative to the market; and a cross-sectional regression comparing the changes in share value experienced by companies that filed Conflict Minerals Reports and companies that did not.

Section C reveals the findings of these two tests. The output of the event study demonstrates that the burden of disclosure has a statistically significant negative effect on share value. However, the output of the cross-sectional regression shows no statistically significant difference in effect on share value between firms indicating that their products might contain conflict minerals and firms definitively asserting that their products do not contain conflict minerals.

Section D analyzes these econometric results, arguing that they support the prior Part's argument that the conflict minerals rule is unlikely to achieve its goal of abating the DRC conflict. This section also recognizes and responds to potential criticisms of the basic empirical study.

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[231] *See Chinese Mining Industry Contributes to Abuses in Democratic Republic of the Congo*, AMNESTY INT'L (June 19, 2013), https://www.amnesty.org/en/latest/news/2013/06/chinese-mining-industry-contributes-abuses-democratic-republic-congo/.

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A. Predictions

For all the controversy surrounding the conflict minerals rule, there has been little empirical investigation of the initial filings. While several firms and interest groups have descriptively surveyed the specialized disclosure forms to draw out helpful general insight,[232] no rigorous academic effort has been conducted to analyze the market response to the filings. Companies and scholars seem to have largely resigned themselves to the assumption, made by the Commission and accepted by the D.C. Circuit, that the rule's costs are straightforward but its benefits are simply "immeasurable."[233]

In determining that the compliance costs of the final rule would fall between $3 billion to $4 billion in the first year alone, the Commission mainly focused on direct costs of implementing and overseeing compliance measures.[234] These expenses, representing a significant downward departure from the estimates submitted by industry commentators, range from necessary modifications in information technology to structuring in-house supply-chain investigations and contracting for independent audits.[235] However, while recognizing that these costs will be "borne by the shareholders of the company," the SEC stated that it did not "expect that the rule would negatively impact prospects of the affected industries to an extent that would result in withdrawal of capital from these industries."[236] The SEC reached this determination because it anticipated that any loss of allocative efficiency would be offset by potential increases in informational efficiency and by potential increases in demand for the companies' products and equity shares by

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[232] *See, e.g.*, Davis Polk & Wardell, Client Memorandum, A Review of the First Wave of Conflict Mineral Filings 3 (July 30, 2014), *available at* http://www.davispolk.com/sites/default/files/A.Review.of_.the_.First_.Wave_.of_.Conflict.Mineral.Filings.pdf (discussing how many issuers filed, what type of issuers filed, when they filed, and what the filings looked like, etc.).

[233] *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 370 (D.C. Cir. 2014), *adhered to after rehearing*, 800 F.3d 518, 530 (D.C. Cir. 2015); *see also supra* notes 71–78 and accompanying text.

[234] *See* Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,351–54 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240 & 249b).

[235] *See id.* The SEC does recognize several indirect costs of the rule, such as a possible rise in the price of the minerals and competition from companies that do not have to file reports. *Id.* at 56,350–51. However, aside from mentioning these costs, the Commission does not seem to factor them into its overall estimate. *See id.* at 56,353–54 (listing direct costs but not indirect costs in the calculations). Moreover, these costs also do not appear to include regulatory costs borne by the agency in overseeing a regulatory scheme that is beyond the Commission's traditional scope, such as the funds required to hire new staff or to divert staff attention from other matters.

[236] *Id.* at 56,350–51.

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socially conscious consumers and investors.[237] Because it did not foresee "a significant impact on capital formation," the Commission did not empirically analyze the potential effect of the rule on companies' share value.[238]

Professors Paul Griffin, David Lont, and Yuan Sun's important early work on conflict minerals disclosures suggests this was a mistake.[239] In the only academic paper that econometrically examines the market impact of Section 1502, the three scholars predicted the new rule would result in equity losses of several billion dollars.[240] Griffin et al. reached this finding after testing what they perceived to be the two possible market outcomes of compliance with the rule. They termed the first possibility the "transparency hypothesis," which predicted that disclosure would result in pure information transparency benefits that would raise a company's share value.[241] They termed the second possibility the "endogenic hypothesis," which predicted that disclosure would result in adverse effects on a company's share value because of direct compliance costs and customers' and investors' concerns about the social effects of the company's disclosed supply-chain practices.[242]

To test these opposing hypotheses, the authors used initial, voluntary disclosures from 2010 to 2012—that is, disclosures companies voluntarily made to the SEC after Section 1502 was enacted but before the Commission had issued a final, binding conflict minerals rule.[243] The paper's findings support its second, "endogenic hypothesis": the costs of conflict minerals disclosure exceed any transparency benefits, as illustrated by net negative effect in share value. Given the small sample size, voluntary nature of the filings, and pre-Final-Rule date of the filings, Griffin et al.'s study motivates further empirical analysis now that the initial filing deadline has passed.

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[237] *See id.* at 56,350. "Informational efficiency" entails the notion that the disclosures provide information that may be material to investors' understanding of the risk of investing in certain issuers or their supply chain, and therefore relevant to their pricing of the securities.

[238] *Id.* at 56,351.

[239] Griffin et al., *supra* note 223.

[240] *Id.* at 28, 48–49.

[241] *Id.* at 30.

[242] *Id.*

[243] *Id.* at 34. Because only fifty-nine companies made such disclosures before legally required to do so, the authors also compared this sample's results against the results of a matched group of non-disclosing companies, and controlled a number of variables that might affect the market response. By including this matched group, the authors tested a third hypothesis, which they call the "transfer theory," i.e., that the costs borne by disclosing companies would also be borne by non-disclosing but otherwise similar companies.

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The following sections of this Article develop two models to better understand the relationship between conflict minerals filings and share price. The first model tests the same general null hypothesis tested in Griffin et al.'s study, as applied to the filings made under the Final Rule—that is, the first model tests the Commission's prediction that there is no statistically significant relationship between a company's conflict minerals filing and its share price. However, even if a relationship were to be observed, it would be difficult from this test alone to know why the conflict minerals rule filings affect share value. For example, a correlation could be explained by the costs/benefits of the burden of disclosure itself—that is, the change in share value could simply be a reaction to shareholders learning that, just because a company is covered under the act, the company will undergo certain compliance expenses and shareholders will receive some offsetting benefits of being better informed. These costs/benefits, reflected in the dual hypotheses of Griffin et al.'s study, would occur regardless of the informational content a disclosure actually reveals.

But there is another possibility that Griffin et al. do not explore: an observed correlation could be linked to the actual content of the disclosure—that is, the change in share value could be a reaction to shareholders learning more about the company's corporate social responsibility practices related to conflict minerals. For the SEC rule to be effective as a benefit-corporation rule, one would expect the shareholders to care about the public benefit that motivates the law, reducing violence and instability in the DRC, and would expect the shareholders to steer their ownership interests accordingly. Consequently, the share value of companies that disclose use of conflict minerals could experience downward pressure because shareholders motivated by the benefit purpose behind the conflict minerals rule may sell equity in a company that discloses use of conflict minerals, either as a way to punish the companies or simply to disassociate themselves from such holdings. Conversely, companies that seem to be seriously addressing their prior use of conflict minerals could experience upward pressure on share value.

To determine whether any observed correlation is tied to the sheer *burden* of disclosure under the rule or due to the substantive *content* of the disclosures under the rule, the second test developed in the subsequent sections isolates the content of disclosure as a variable. This test compares the null hypothesis, that the content of the companies' conflict minerals disclosures does not have a statistically significant effect on share price, against the possibility that what the disclosures actually indicate about the companies' use of conflict minerals *does* systematically affect stock price.

The prior discussion in Part II supports the second null hypothesis and rejects the first: because shareholders did not appoint the public benefit purpose of the conflict minerals rule as one of the specific interests of the corporations, shareholders were unlikely to respond to the content of the disclosures. Given the conclusion that the conflict minerals rule represents midstream recapitalization, however,

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shareholders' expected concerns about issuers' costs of compliance with the specialized disclosure rule were likely to result in a loss in share value that outweighed any transparency benefits. These predictions, if true, suggest that the conflict minerals rule is not an effective tool for achieving its intended public benefit.

B. Data, Methodology, and Limitations

This Article presents original econometric work testing these two hypotheses based on market responses to the first set of mandatory conflict minerals filings under the June 2, 2014, deadline. This section surveys those filings, discusses the data and methodology used, and raises several limitations.

1. Survey of Initial Filings under the Conflict Minerals Rule

According to published reports, as of June 27, 2014, approximately 1,305 companies filed Form SD ("specialized disclosure report") with the SEC.[244] By filing Form SD, an issuer indicates that it is a publicly traded corporation that has reason to believe some amount of the listed minerals—gold, cassiterite-tin, columbite-tantalite, or wolframite-tungsten—is a necessary component of the products it manufactures or contracts to manufacture.[245] These companies necessarily conducted a reasonable country-of-origin inquiry to track their supply chains. Of these issuers, approximately 301 filed only Form SD and 1,004 filed a Conflict Minerals Report as an exhibit attached to Form SD.[246] A company must file a Conflict Minerals Report if it has reason to believe the minerals in its products[247] may have originated in the "covered countries." This means the company incurred a duty to conduct due diligence and signals the likelihood that the minerals in its products may not be "conflict free."

This brief survey of the first set of filings yields interesting initial observations. Far fewer companies filed Form SD than the Commission expected, suggesting that the SEC's prediction was off by close to 80% and/or that many issuers that are

[244] Amy L. Goodman, *The First Annual Conflict Minerals Filings: Observations and Next Steps*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Dec. 20, 2014), http://corpgov.law.harvard.edu/2014/12/20/the-first-annual-conflict-minerals-filings-observations-and-next-steps/.

[245] *See supra* notes 39–41 and accompanying text explaining coverage of the rule.

[246] *See* Goodman, *supra* note 244.

[247] For ease of reference, this analysis will tend to use the term "company's products" to refer to the products the company manufactures itself or contracts to manufacture.

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covered by the rule did not recognize their duty to disclose.[248] The latter possibility raises difficult questions (and costs) of enforcement for the Commission, particularly when the agency has acknowledged that basic implementation of the rule already exceeds the scope of the agency's traditional oversight.[249]

The percentage of affected issuers that filed Conflict Minerals Reports, around 77%, vastly exceeds the SEC's initial prediction but roughly matches the SEC's revised estimate based on industry comments.[250] Though the number of issuers that filed disclosures was lower than expected, those that did file reflect a wide range of industries. This spectrum includes industries that one might assume would use the covered minerals, such as the computing and electronics industries, but also includes industries that one would not immediately associate with products that use these minerals, such as those involving companies known for retail clothing (e.g., J.Crew) and food (e.g., Tim Hortons, a coffee and donut franchise).

The two sets of filings, Forms SD and Conflict Minerals Reports, vary widely in structure and approach, but they frequently contain quite generalized information.[251] For example, most issuers listed their affected products by "high-level category or operating segment (e.g., decorative accessories) or through a listing of product types (e.g., zippers, buckles[,] and buttons)," rather than naming specific products or models.[252] Similarly, most companies took advantage of the phase-in period and the SEC's partial stay of the rule, opting to employ general language to characterize the conflict-minerals content of its products rather than the language prescribed by the Commission.[253] Only four issuers obtained independent private sector audits ("IPSA") of their filings.[254]

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[248] *See supra* note 43.

[249] *See, e.g.*, Conflict Minerals Final Rule, 77 Fed. Reg. 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240 & 249b) (recognizing that conflict minerals regulations are "quite different from the economic or investor protection" rules the SEC typically oversees).

[250] *See id.* at 56,356. The SEC initially estimated that 20% of affected issuers would file Conflict Minerals Reports, but revised this to 75%. *Id.*

[251] *See* Goodman, *supra* note 244.

[252] *Id.*

[253] For example, in a survey of seventy filings, around 86% of issuers that filed Conflict Mineral Reports indicated that they could not determine the origin of the minerals, but only 23% used the prescribed term "DRC conflict undeterminable." *Id.*

[254] Intel Corp. and Koninklijke Philips N.V. obtained attestation engagements performed by certified public accountants. *Id.* at n.6. Kemet Corp. and Signet Jewelers Ltd. obtained performance audits conducted by non-CPAs. *Id.* Under a Public Statement of April 29, 2014, SEC guidance directs that only

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2. Data and Methodology[255]

Data were extracted from these filings to test the two hypotheses discussed above. Searches on Westlaw yielded a list of 1,327 Form SD filings that were submitted to the SEC between April 24, 2014, and April 1, 2015.[256] A refined search of these results produced a list of 1,013 issuers (around 76%) that attached a Conflict Minerals Report as an exhibit to their Form SD filings and a list of 314 issuers (around 24%) that filed only a Form SD. Additional data were collected for each issuer: filing date, market capitalization on the date of filing, and a PERMNO—a unique identifier used by the Center for Research in Security Prices ("CRSP") to access share value data.

These data were employed to conduct two sets of econometric analyses to test this Article's two hypotheses. First, a set of event studies was run in the Eventus program to determine whether the Form SD filings correlated with an aggregate abnormal return relative to the market.[257] Filing Form SD indicates that the issuer believes it is covered by the conflict minerals rule (i.e., its products contain at least one of the four minerals), which triggers disclosure requirements and, at least, a reasonable country-of-origin inquiry. The null hypothesis, asserted by the SEC, was that there would be no statistically significant difference between the change in share price of issuers that filed Form SD and those that did not file Form SD. An event study was separately run for those issuers that filed only Form SD and those issuers that filed Form SD and a Conflict Minerals Report. Next, the abnormal return data provided by the event study in Eventus were used to run a simple one-sample t-test

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issuers that declared their products to be "DRC conflict free" were required to obtain an IPSA. *See* Higgins, *supra* note 86.

[255] Complete data are on file with the author and can be made available upon request.

[256] Of course, some of these filings did not meet the June 2, 2014, deadline for Year One of the conflict minerals rule, and others were submitted well in advance of the filing deadline for Year Two. The vast majority of filings were submitted on the deadline, June 2, 2014. The Westlaw search initially yielded 1,330 results, but 3 of these represented issuers (CTS Corp., ICAHN Enterprises L.P., and Wells Gardner) that filed multiple exhibits to their Form SD, such as a company policy, in addition to a Conflict Minerals Report.

The statistical program used to determine whether the filings correlated with an aggregate abnormal return relative to the market only updates its data at year-end because of the time required to clean the data set (e.g., determine adjusted expectations, etc.). Therefore, only 2014 data were available. For this reason, only Year One filing is analyzed in this Article; subsequent work will examine Year Two data.

[257] Three distinct event windows were set, representing the range of dates, relative to the respective filing date, over which abnormal returns were tracked: (-1, +1); (0, +1); (-3, +3). The issuers' returns were compared to the Standard & Poor's 500 Composite Index ("S&P 500").

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regression in Stata on all the Form SD filings, wherein the abnormal return was the dependent variable, to confirm the results reached in Eventus.

Second, the same abnormal return data were used to compare the two samples—the issuers that filed only a Form SD and the issuers that filed a Form SD and Conflict Minerals Report—by running a cross-sectional analysis in Stata using a simple t-test. Finally, a regression analysis was run to determine whether Conflict Minerals Report filing, as a binary or dummy independent variable, had a statistically significant effect on abnormal return, the dependent variable, when the issuers' market capitalization on the date of filing was controlled. The null hypothesis of these two tests, implicitly rejected by the SEC rule but supported by the discussion in Part II, is that the filing of the Conflict Minerals Report, on its own and apart from the disclosure costs it signals, has no statistically significant effect on abnormal return.

3. Assumptions and Limitations

This econometric work is a humble attempt to complement this Article's prior theoretical discussions with original empirical findings. The results, offered and analyzed herein, are compelling; however, obvious limitations in the data and the simplicity of the econometric models caution against drawing definitive conclusions. Rather, these observations should serve to motivate further empirical analysis of future filings.

This study's models rely on a few assumptions. Issuers faced considerable confusion about the requirements of the initial filings under the SEC rule: because these specialized disclosures differ from the agency's typical rules, companies already had little guidance over what format the filings should take; furthermore, this uncertainty and non-uniformity increased after the D.C. Circuit's opinion and the SEC's subsequent guidance broadened the issuers' discretion. Given this imperfect information and the consequent difficulty of locating and measuring data with total accuracy and precision, several proxies are used for the variables meant to be isolated in the study. An issuer's filing Form SD serves as a reasonable proxy for the issuer's undertaking a disclosure burden. This variable does not fully capture all the issuers that may have carried out compliance measures but did not file Form SD because they determined their products do not contain traces of the listed minerals. Nor does this proxy capture companies that did not file in Year One because of uncertainty in the law, but who may be expected by the market to file in subsequent years and have therefore taken on an anticipated disclosure burden.

Similarly, this study treats an issuer's filing of a Conflict Minerals Report as a proxy for the likelihood that the issuer's products contain conflict minerals. Of course, most issuers that filed Conflict Minerals Reports effectively stated that they did not know the conflict status of the minerals in their products, and it is probable that many of these issuers do not actually manufacture or contract to manufacture

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products that use conflict minerals.[258] This variable may be particularly over-inclusive during this phase-in period because of the SEC's decision to stay the audit requirement for all issuers other than those that declared their products to be "conflict free"; even if issuers strongly suspected their products fit this label, they may have opted not to use it so as not to trigger the additional compliance costs.[259] So this variable is not a perfect substitute for issuer admission of conflict mineral use. However, relative to issuers that filed only a Form SD, issuers that attached a Conflict Minerals Report signaled a *greater likelihood* that their products contain conflict minerals, since they only had to file the report if they had reason to believe the relevant minerals in their products may have originated from the covered countries.[260]

Market capitalization is used as a proxy for "public float"—a variable that is controlled in the study because of its possible effect on abnormal returns. The Commission uses an issuer's public float to determine whether the issuer is a "smaller reporting company," a status that entitles the issuer to a four-year phase-in period relative to the two-year phase-in period for all other issuers.[261] Given that this increased discretion may affect shareholders' understanding of the expected costs of disclosure, one might predict that smaller reporting companies' conflict minerals filings would correlate with a slighter abnormal return relative to other issuers. There is a possibility that other variables systematically affected the abnormal returns for

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[258] Only four companies described their products as conflict-free.

[259] Similarly, companies that might have suspected the minerals in their products did not originate in the covered countries might have been willing to file a Conflict Minerals Report anyway, given that issuers were allowed to use very general language in this year's Reports. These issuers may have determined that the transaction cost of filing the Conflict Mineral Report with *vague* language was actually less than the transaction cost of filing just the Form SD but *definitively* asserting in it that the issuer did not have reason to believe its minerals were derived from the covered countries.

[260] It is possible that the Conflict Minerals Reports signaled other information that investors would find material to their evaluation of their shares' values. For example, media reports noted that 68 companies disclosed that their suppliers used gold refined by the Central Bank of the Democratic People's Republic of Korea. AMNESTY INT'L & GLOBAL WITNESS, DIGGING FOR TRANSPARENCY: HOW U.S. COMPANIES ARE ONLY SCRATCHING THE SURFACE OF CONFLICT MINERALS REPORTING 25 (2015), *available at* http://www.amnestyusa.org/sites/default/files/digging_for_transparency_hi_res.pdf. These disclosures reveal possible violations of U.S. sanctions, which could have an effect on share value apart from the disclosures' content regarding the conflict minerals rule.

[261] *See* Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,282 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240 & 249b) (defining "smaller reporting company" using "public float"). During the phase-in period, the issuers may describe their products' conflict-minerals-status as "undeterminable" and are not subject to the audit requirement.

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the two samples studied, but these variables were not controlled for various reasons. For example, though shareholder responses to the filings might correlate to the issuer's industry, this variable was excluded from the regression because including such a wide range of industry indicators likely would have upset the analysis.[262]

In addition to these limitations that are endogenous to the study—the model's assumptions, the proxies used to develop the independent variables, and the variables that were controlled—restrictions on the availability of data also introduced possible error. The databases used did not contain PERMNOs, market capitalization data (derived from share price and number of outstanding shares), or relevant event-window share return data for every issuer. Therefore, the number of observations in the analyses is slightly lower than the total number of identified issuers that filed.[263] However, because this sample's ratio of issuers that filed Conflict Minerals Reports roughly matches the overall population's ratio of such issuers,[264] and because the omissions do not appear to be correlated with whether an issuer filed a Conflict Minerals Report, any error introduced by these limitations should not be significant.

Finally, a possible source of error rests in the statistical tests themselves. A basic standard t-test was used to test the difference in the means of the abnormal returns for the various samples. However, this basic t-test assumes a consistent standard deviation, which is almost certainly not borne out in the data. Correlating the standard deviation to the market would yield a more econometrically robust model; this may be advised for analyses of future filings when increased guidance by the SEC and increased issuer understanding make the data more precise. Given the uncertainty in the law in Year One, and given that this econometric work is meant only to complement the theoretical arguments advanced in this Article, the basic statistical tests employed are sufficient for this initial study's purpose.

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[262] The data reflect over 250 industries, as represented by each issuer's self-reported SIC code. Such a high number, without any way to place the codes on a spectrum or otherwise categorize them, makes the data unusable in this model.

[263] The N value for the total sample was 1,239, slightly lower than the total of 1,305 issuers that reportedly filed with the SEC. *See* Goodman, *supra* note 244. The N value of the sample dropped even further, to 1,182, when market capitalization was controlled because this variable was not available for all issuers.

[264] The N value for the issuers that filed only Form SD was 276 (approximately 22% of the total population of covered issuers included in the study). The N value for the issuers that filed Conflict Minerals Reports was 963 (approximately 78%). This ratio roughly matches the ratio in the actual population (77%-to-23%, based on Goodman, *supra* note 244; 76%-to-24% based on this study's overall data).

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C. *Observations*[265]

1. Cost of Disclosure Negatively Affects Share Value

Below are the results of a number of statistical analyses conducted to test the first hypothesis that share value responds negatively to the burden of disclosure: (i) event study in Eventus determining mean cumulative abnormal returns relative to the market for issuers that filed Form SD and Conflict Minerals Reports ("Table 1"); (ii) event study in Eventus determining mean cumulative abnormal returns relative to the market for issuers that filed only Form SD ("Table 2"); (iii) one-sample t-test in Stata of all issuers that filed Form SD (i.e., the two samples in (i) and (ii) were combined), wherein the abnormal return was the dependent variable ("Table 3"). In each of these tests, the null hypothesis was that there would be no statistically significant abnormal return; the alternative hypothesis was that the abnormal return would be negative.

Table 1: Event Study of Issuers that Filed Conflict Minerals Reports

Market Adjusted Returns: Issuers Filing Conflict Mineral Reports (CMRs), Relative to S&P 500

CAR Event Window	N	Mean CAR	Precision Weighted CAAR	Patell Z	Generalized Sign Z
(-1, +1)	952	-1.02%	-1.03%	-8.534	-9.400***
(0, +1)	952	-0.69%	-0.65%	-6.647	-8.233***
(-3, +3)	952	-0.56%	-0.44%	-2.403**	-4.214***

The symbols *, **, and *** denote statistical significance at the 0.05, 0.01, and 0.001 levels, respectively, using a generic one-tail test.

[265] Full data, including outputs from Eventus and Stata, are on file with the author and can be made available upon request.

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Table 2: Event Study of Issuers that Filed Form SD Only

Market Adjusted Returns: Issuers Filing Form SD Only, Relative to S&P 500					
CAR Event Window	N	Mean CAR	Precision Weighted CAAR	Patell Z	Generalized Sign Z
(-1, +1)	274	-1.05%	-1.15%	-5.078***	-5.084***
(0, +1)	274	-0.84%	-0.85%	-4.594***	-5.689***
(-3, +3)	274	-1.04%	-1.42%	-4.111***	-4.359***

The symbols *, **, and *** denote statistical significance at the 0.05, 0.01, and 0.001 levels, respectively, using a generic one-tail test.

Table 3: One-sample T-Test of All Issuers That Filed Form SD

One-Sample T-Test of Cumulative Average Returns: Issuers Filing Form SD

CAR Event Window	N	Mean CAR	Standard Error	Standard Deviation	[95% Conf. Interval]
(-1, +1)	1239	-.011053	.003573	.125757	-.018062 -.004044

H_0: mean = 0 t = -3.0938 degrees of freedom = 1238

H_a: mean < 0	H_a: mean! = 0	H_a: mean > 0
Pr (T < t) = 0.0010	Pr (| T | < | t |) = 0.0020	Pr (T > t) = 0.9990

CAR Event Window	N	Mean CAR	Standard Error	Standard Deviation	[95% Conf. Interval]
(0, +1)	1239	.000542	.001376	.048426	-.002158 .003241

H_0: mean = 0 t = .3936 degrees of freedom = 1238

H_a: mean < 0	H_a: mean! = 0	H_a: mean > 0
Pr (T < t) = 0.6530	Pr (| T | < | t |) = 0.6939	Pr (T > t) = 0.3470

CAR Event Window	N	Mean CAR	Standard Error	Standard Deviation	[95% Conf. Interval]
(-3, +3)	1238	-.011667	.003344	.117663	-.018228 -.005107

H_0: mean = 0 t = -3.4889 degrees of freedom = 1237

H_a: mean < 0	H_a: mean! = 0	H_a: mean > 0
Pr (T < t) = 0.0003	Pr (| T | < | t |) = 0.0005	Pr (T > t) = 0.9997

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The outputs shown in Tables 1 and 2 reject the null hypothesis: for issuers that filed Conflict Minerals Reports and issuers that filed Form SD only, the disclosures correlated with negative mean cumulative abnormal returns, between -.56% and -1.05%, relative to the market for each of the three event windows. The respective Patell-Z values indicate that these negative returns are statistically significant at the 0.001 or 0.01 levels.

The outputs of the one-sample t-test, shown in Table 3, largely support the event study results. For the first and third event windows (i.e., the periods one day before and one day after the filing, and three days before and three days after the filing), the combined sample of all issuers that filed Form SD experienced negative mean cumulative abnormal returns—a finding that is statistically significant at the 0.001 or 0.01 levels. Because the 95% confidence interval for the mean cumulative abnormal return for the second window (i.e., the period beginning on the day of filing and ending one day after) includes 0, the null hypothesis cannot be rejected with 95% confidence for this period.

2. Content of Disclosure Does Not Affect Share Value

Below are the results of two statistical analyses conducted to test the second hypothesis that the content of disclosure does not affect share value: (i) a cross-sectional analysis in Stata, using a simple two-sample t-test with equal variances, comparing mean abnormal returns for issuers that filed only a Form SD and issuers that filed a Form SD and Conflict Minerals Report ("Table 4"); and (ii) a regression analysis of the relationship between the filing of a Conflict Minerals Report (a binary independent variable) and abnormal return (the dependent variable), when controlling for market capitalization (introduced as another independent variable) ("Table 5"). The null hypothesis of the first test was that there would be no statistically significant difference between the two samples' mean abnormal returns; the alternative hypothesis was that the issuers that filed Conflict Minerals Reports would have a mean abnormal return that was more negative than the issuers that filed only a Form SD. The null hypothesis of the second test was that the filing of the Conflict Minerals Report, apart from the burden of disclosure, would have no statistically significant effect on abnormal return; the alternative hypothesis was that filing a Conflict Minerals Report had a negative effect on abnormal return.

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Table 4: Cross-sectional Analysis Comparing Mean Abnormal Returns of Issuers Filing Form SD Only and Issuers Filing CMRs

Two-Sample T-Test with Equal Variance

CAR Event Window	Difference = MeanCAR (Form SD Only) - MeanCAR (CMR)	Standard Error	[95% Conf. Interval]
(-1, +1)	.000791	.008590	-.016061 .017643
H_0: mean = 0 t = .3936 degrees of freedom = 1238			
H_a: diff. < 0 Pr (T < t) = 0.5367	H_a: diff! = 0 Pr (| T | < | t |) = 0.9267		H_a: diff. > 0 Pr (T > t) = 0.4633

CAR Event Window	Difference = MeanCAR (Form SD Only) - MeanCAR (CMR)	Standard Error	[95% Conf. Interval]
(0, +1)	-.0005905	.003308	-.007080 .005899
H_0: mean = 0 t = -0.1785 degrees of freedom = 1237			
H_a: diff. < 0 Pr (T < t) = 0.4292	H_a: diff! = 0 Pr (| T | < | t |) = 0.8583		H_a: diff. > 0 Pr (T > t) = 0.5708

CAR Event Window	Difference = MeanCAR (Form SD Only) - MeanCAR (CMR)	Standard Error	[95% Conf. Interval]
(-3, +3)	.005388	.008036	-.010379 .021154
H_0: mean = 0 t = .6704 degrees of freedom = 1236			
H_a: diff. < 0 Pr (T < t) = 0.7486	H_a: diff! = 0 Pr (| T | < | t |) = 0.5027		H_a: diff. > 0 Pr (T > t) = 0.2514

Table 5: Regression Analysis: Relationship between Conflict Minerals Report Filing, Market Capitalization, and Abnormal Return

Regression Analysis: Conflict Minerals Report (CMR) and Market Capitalization Variables

CAR Event Window	Indep. Variable	Coef.	Standard Error	t	P > | t |	[95% Conf. Interval]
(-1, +1)	CMR	-.000172	.008624	-.02	0.984	-.017093 .016748
(-1, +1)	MktCap	2.01e-10	1.08e-10	2.80	0.005	8.96e-11 5.12e-10
(-1, +1)	constant	-.012319	.007669	-1.61	0.108	-.027365 .0027266
No. of Observations = 1183 Prob > F = 0 .0204 R-squared = .0066 RMSE = .12334						

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CAR Event Window	Indep. Variable	Coef.	Standard Error	t	P > | t |	[95% Conf. Interval]
(0, +1)	CMR	.000818	.003432	0.24	0.812	-.0059152 .007552
(0, +1)	MktCap	5.51e-11	4.28e-11	1.29	0.199	-2.89e-11 1.39e-10
(0, +1)	constant	-.000845	.003052	-0.28	0.782	-.027365 .005143

No. of Observations = 1183 Prob > F = 0.4249 R-squared = .0014 RMSE = .04908

CAR Event Window	Indep. Variable	Coef.	Standard Error	t	P > | t |	[95% Conf. Interval]
(-3, +3)	CMR	-.004115	.007849	-0.52	0.600	-.0195143 .011284
(-3, +3)	MktCap	8.94e-11	9.79e-11	0.91	0.361	-1.03e-10 2.82e-10
(-3, +3)	constant	-.011659	.006978	-1.67	0.095	-.025350 .002033

No. of Observations = 1182 Prob > F = 0 .5751 R-squared = .0009 RMSE = .1224

The outputs from the cross-sectional analysis, revealed in Table 4, support the null hypothesis. Although the absolute value of the difference between the two samples' mean cumulative abnormal returns is positive, the upper and lower bounds of the 95% confidence intervals contain the 0-value for each event window, and the two-tailed p-values vastly exceed the 0.001 level, indicating that the difference is not statistically different than 0. Similarly, the outputs from the regression analysis, revealed in Table 5, support the null hypothesis. The coefficients for filing a Conflict Minerals Report are very small in each applicable period, falling within the standard error; the 95% confidence intervals likewise contain 0. The independent variable Market Capitalization is shown to have a very slight, positive effect on mean abnormal return that is statistically significant at the 0.01 level for the first event window only. Market Capitalization does not have a statistically significant effect in periods two and three.

D. Analysis: Shareholders Care About Costs of Disclosure but Not Content of Disclosure

These empirical observations support the theoretical arguments advanced in this Article, suggesting that the Conflict Minerals Rule is not an effective mechanism to reduce violence in the DRC because shareholders only care about the *costs* of disclosure and not the *content* of disclosure. This conclusion is consistent with the broader arguments, advanced above, that federal specialized disclosure regulations limit the value of corporate speech and dismiss the private ordering principles that undergird the state benefit-corporation model.

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It is perhaps most logical to analyze the results of the statistical tests in opposite order, looking first at the effect of content of disclosure (i.e., tests re: hypothesis two), which then helps to isolate the cost of disclosure as the variable primarily motivating the observed drop in share value (i.e., tests re: hypothesis one). Table 4 reveals no statistically significant difference between the mean cumulative abnormal return for issuers that filed only Form SD and issuers that attached a Conflict Minerals Report to their Form SD filing. As previously discussed, filing a Conflict Minerals Report is a reasonable proxy for the likelihood of the issuers' use of conflict minerals: issuers that file only a Form SD indicate that they do not believe their products' minerals originated in the covered countries, whereas issuers that attach a Conflict Minerals Report signal that they have a reason to believe their products may contain minerals sourced from the region.

The conflict minerals rule implicitly assumes that shareholders would respond differently to disclosures that communicate a greater likelihood of use of conflict minerals than to disclosures that communicate no, or very little, likelihood of use of conflict minerals. Given the SEC's mandate to protect investors and ensure fair markets, by delegating implementation of the rule to the SEC, Congress presumably assumed that the information conveyed in these mandatory specialized disclosures would, at least in part, materially inform investors' decisions about how to allocate capital. By either attracting capital to companies that responsibly source minerals or detracting capital from companies that irresponsibly source minerals, the rule implicitly relies on market responses to the disclosures to help steer corporate behavior in a way that curbs the violence in the DRC.

Table 4 casts doubt on the rule's ability to effectively operate in this way. Although share value declined for issuers that filed Conflict Mineral Reports, the abnormal returns were no different than for issuers that filed only Form SD—that is, shareholders seem to have responded no differently to the disclosure that an issuer may use conflict minerals sourced from the covered countries than to the disclosure that an issuer definitely does not use conflict minerals sourced from the covered countries. The results presented in Table 5 reinforce this skepticism of the rule's ultimate effect. Attaching a Conflict Minerals Report to a Form SD, even though it serves as an admission of possible use of conflict minerals, had no statistically significant effect on the abnormal return. This result held constant when market capitalization and filing a Form SD were controlled.

The determination of which documents to submit to the SEC under the conflict minerals rule—no filing at all, a Form SD only, or a Form SD and a Conflict Minerals Report—was the clearest communication an issuer could make about its use of conflict minerals. Because these statistical analyses reveal no difference in market responses to the latter two categories of communication, one can assume that shareholders do not significantly care about the content of the disclosures. As argued in Part II, the compelled corporate speech seems to import little meaning to investors.

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Without facing any pressure from shareholders to source minerals responsibly, and absent any additional sanctions by the government[266] or by the public broadly, the specialized disclosures are unlikely to motivate companies to take costly steps to change their supply chains.

Shareholders did respond differently, however, to issuers that employed the first communication option—no filing at all—relative to the issuers that filed Form SD (including those that filed Form SD and a Conflict Minerals Report), suggesting some other variable is at play. Given that the conflict mineral status of "no filing" and filing a Form SD only essentially communicates the same message—both indicate that there is no likelihood of the issuer's use of conflict minerals sourced from the covered countries—the content of the disclosure cannot be the variable influencing the abnormal return for the latter. Instead, the statistically significant negative abnormal return for issuers that filed Form SD (Form SD only and Form SD with a Conflict Minerals Report attached), as illustrated in Tables 1 and 2, suggests that the market responded to the costs triggered by the burden of disclosure, rather than to the disclosure itself. This conclusion has implications for both of the ways, discussed above, in which the federal specialized disclosure rules depart from the state benefit-corporation model: these results support the contentions that the SEC rules limit the value of corporate speech and that the SEC rules are an inefficient transfer of corporate costs.

As explained in Part II, compliance with the conflict minerals rule's disclosure requirements involves substantial expenses, ranging from information technology upgrades to new training to internal investigations. Reflecting the criticism that federal specialized disclosure rules ignore the private ordering principle inherent in the benefit-corporation trend, incumbent shareholders likely perceive these costs as midstream recapitalization rather than as business expenses that are necessary to achieve a specific public benefit already captured in the share price. Indeed, Tables 1 and 2 show that the simple act of submitting a disclosure form is correlated with statistically significant negative mean cumulative abnormal returns.

The results of the one-sample simple t-test, shown in Table 3, contribute further support to the event studies' conclusion. With great confidence, the data reject the Commission's stated assumption that issuers' capital formation would not be affected by the conflict minerals rules: when measuring one day out from either side

[266] Issuers filing under the conflict minerals rule are subject to general liability for misleading statements made in disclosures, but are not subject to any penalty for continuing to use conflict minerals as long as the use and mitigating measures are disclosed. *See* 15 U.S.C. § 78r (2012).

of the filing or three days out from either side of the filing, the burden of disclosure is statistically significantly correlated with negative mean abnormal returns.[267]

These findings complement Griffin et al.'s prediction that the costs of disclosure would exceed any transparency benefits derived from shareholders' access to additional information, but these results, interpreted in light of Tables 4 and 5, attribute those costs to the direct implementation and compliance expenses inherent in the *burden* of disclosure rather than to indirect costs from the shareholders' response to the *content* of disclosure. This econometric work supports the argument that the conflict minerals rule imposes costs on companies but is unlikely, by itself and based on the company's speech and the shareholders' effect/motivation, to advance any substantive change in corporate behavior to achieve the law's purpose.

However, it is necessary to address a few obvious criticisms that qualify this conclusion:

1. Criticism One: This Analysis Misinterprets the Statistical Results

First, one might critique the interpretation of the results. It is possible that, as the Commission asserted, shareholders *do* care about the content of the conflict minerals disclosures, but their concern affected their responses in a way that resulted in no significant change to share price. Some shareholders may have purchased additional shares of issuers whose Conflict Minerals Reports indicate that they are taking steps to responsibly adjust their supply chains, while other shareholders may have withdrawn their capital from issuers whose Conflict Minerals Reports indicate they are not taking steps to responsibly adjust their supply chain. One may also imagine that some activist shareholders could have increased their holdings of issuers in this latter category to try to effect the socially responsible changes. Therefore, these shareholders' actions might have cancelled each other out, explaining why the results in Tables 4 and 5 are not statistically significant.

This criticism may have merit—certainly, a test that incorporated indicators of issuers' future actions regarding supply chain management as an independent variable, in addition to their current supply chain management status, would yield more robust results. However, this alternative interpretation is tempered by the

[267] The null hypothesis could not be rejected at the 95% confidence level for the second event window, beginning on the date of filing and ending one day later. This may be an anomaly, or it may signal that the initial date of the window matters; for example, shareholders might learn of the disclosure burden before the day of filing, which could have an earlier effect on share price. Nevertheless, given the consistency of event study results across all windows and the parallel findings of the one-sample t-test, this outlier does not appear to be significant.

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results of Table 2: if shareholder response was primarily guided by the content of disclosure, one would expect no statistically significant abnormal returns for issuers that filed Form SD only, since these issuers indicated that there was no reason to believe their products use conflict minerals sourced from the covered countries. But the negative abnormal returns shown in Table 2, statistically significant at the .001 level for each event window, indicate that the market did respond negatively to the disclosures, even though these issuers effectively disclosed that their products' minerals are conflict-free.

These abnormal returns indicate that a variable other than the disclosures' content drove the shareholder response. Because issuers that file Form SD, even Form SD only, must undertake significant implementation and compliance measures that issuers that do not file Form SD do not have to undertake, the costly burden of disclosure likely explains the returns' statistically significant departure from the market. Of course, this finding does not refute the alternative interpretation that shareholders' divergent responses to such disclosures had a neutralizing effect. But even if that was the case, these results suggest that the cost of disclosure was a more meaningful factor than the content disclosed.

If cost of disclosure was the primary determinant of abnormal returns, this does beg the question of why issuers that filed Conflict Minerals Reports did not experience abnormal returns of greater magnitude than issuers that filed Forms SD only. The former group must undertake more strenuous due diligence measures to examine their supply chain, whereas the latter group may only have to conduct reasonable country-of-origin inquiries—a presumably less expensive endeavor. The finding that there was no significant difference between the two samples may reflect that even the country-of-origin inquiry was expected to be quite burdensome, particularly in Year One of this disclosure regime, when many issuers admitted to scant initial insight into the source of their minerals. The result could also indicate that the wide discretion afforded to issuers under the phase-in period and the SEC's partial stay of the rule lessened the costs associated with filing a Conflict Minerals Report (i.e., no audit necessary, no requirement to categorically define products, etc.), such that the disclosure burden for issuers filing Conflict Minerals Reports was not significantly different than the burden facing issuers filing Form SD only. A third possibility is that, given the uncertainty around the rule, shareholders did not seek to discern between issuers that did and did not file Conflict Minerals Reports; the only factor that shareholders looked to was whether the rule placed any disclosure burden on the corporation.

2. Criticism Two: This Model Is Myopic

The lack of clarity and consistency in the initial filings points to a second criticism—that the study itself is myopic and consequently its observations have little bearing on the long-term impact of the law. As has already been mentioned, the

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confusion surrounding the conflict minerals rule likely discounted any transparency benefits the rule was meant to provide to shareholders in Year One. Consequently, just as shareholders' clouded understanding of the costs of compliance might explain why the market did not respond differently to the disclosure burdens imparted by filing a Conflict Minerals Report relative to filing just a Form SD, lack of clarity in the filings might also explain why shareholders did not respond differently to the conflict-status communicated by the two samples of filings. This criticism emphasizes that these disclosures do not actually provide a very discernible message about current mineral use.

Accordingly, one could argue that these results speak less to the limiting effect specialized disclosure rules have on the value of corporate speech to "listeners" generally, as argued in Part II, than to the type of speech that was actually compelled under the rule. Following the D.C. Circuit's decision that specific "conflict free" labels could not be imposed, the initial disclosures contained dense and disorganized information that would have been difficult for investors to parse, particularly in the short run. The ironic conclusion under this criticism would be that a court opinion guided by the First Amendment's protection of potentially valuable speech actually had the effect of rendering the speech less valuable by prohibiting the regulations that would have made the disclosed information more digestible.

This critique is fair: as discussed above, simply filing a Conflict Minerals Report is not a perfect proxy for the content of disclosure. Focusing on filings in Year One alone, when this variable is least precise, does cabin the broader applicability of these results. It is possible that shareholders recognized that many issuers filed Conflict Minerals Reports because the issuers themselves were not yet certain of their products' conflict-minerals status; the lack of a statistically meaningful effect of the filings may not so much reflect apathy toward the content of disclosure as it reflects shareholders' taking a wait-and-see approach. As filings become more precise in future years, both because the requirements of the rule become more defined and because companies' own understanding of their supply chain improves, share value may become more sensitive to the filings. Under this view, it might make sense that costs now incurred by issuers' disclosure compliance would have a measurable short-term impact, but discerning any meaningful effect of the content of the disclosures, and what that content indicates about a company's willingness to adjust its supply chain, demands a long-term perspective.

The shortsightedness of the study not only limits an understanding of the shareholders' direct response; the focus on the short-run equity market effects of the rule also ignores the impact the disclosures might ultimately have on customers and, indirectly, investors, through advocacy groups. As discussed in Part I, advocacy organizations like Amnesty International championed Section 1502's enactment and argued for its legality in court. These groups likely will use the information conveyed in the disclosures to apply pressure on issuers to mitigate their use of conflict

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minerals. Indeed, Amnesty International and Global Witness recently published a report on the first set of filings, praising some companies for "making real progress toward[] sourcing conflict free minerals" but criticizing nearly 80% of companies that filed for making "little effort to understand their supply chains and to take steps to ensure that they are not contributing to harm."[268]

In the specialized disclosure realm, these human rights groups may serve a similar function to market analysts, upon whom investors traditionally rely to scan and digest regulatory filings and direct trading behavior. But it may take some time for these groups to prove to be effective. This empirical study's narrow focus on the immediate market impact of the rule does not account for the eventual impact these organizations' public relations efforts may have on customers and investors, which could ultimately orient corporate behavior toward the conflict minerals rule's objectives.

This points to a broader criticism of this study's basic assumption that share value is a good indicator of corporate decision-making and that shareholders represent the appropriate class of "listeners" whose interests inform the value of corporate speech. The corporate-social-responsibility trend is premised on the notion that corporations can and should care about stakeholder interests rather than just stockholder profits. Given that this Article characterizes Section 1502 as a federal corporate-responsibility measure, one might criticize the framework of the econometric analysis for its inference that corporate behavior is primarily driven by corporate share value. Part II argues at length that corporate managers are not constrained by a shareholder value maximization norm: just because share value may not respond to the content of disclosure and may respond negatively to costs of disclosure, corporate managers are not foreclosed from taking steps to make a corporation's supply chain more socially responsible. The two meaningful symbolic features of the benefit-corporation trend—the notion that corporations care about more than just profits and the notion that corporations should recognize shareholders' beyond-profit-seeking interests—indicate that, in fact, there is a growing willingness for corporate managers to do just that.

These criticisms—that the myopic model does not account for investors' long-term interest in obtaining and acting on clear information, advocacy groups' capacity to mobilize market changes, or corporate managers' own ability to deviate from a shareholder value maximization norm—may be well placed, but each rests on speculative grounds. Absent direct equity market responses to conflict minerals disclosures, several steps would have to fall into place for the disclosures to advance

[268] AMNESTY INT'L & GLOBAL WITNESS, *supra* note 260, at 5.

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the rule's purpose of reducing violence in the DRC. First, advocacy groups must do a much better job of sifting through the disclosures, highlighting the salient information, and publicizing which companies are taking effective measures and which are not. A year after the first filing deadline, only one report has been published that evaluates whether companies have met the conflict minerals rule's requirements, and it sampled only 100 issuers and provided only general information.[269] For advocacy groups to have any impact on corporate decision-making, the organizations must be able and willing to disseminate information specific to each company.

Second, customers and investors, either directly or indirectly by influence of customer trends, must respond to the disclosed information even if it is made clear. Given the ubiquity of minerals sourced from the covered countries and used by a range of companies in a number of products that customers regularly depend on, like phones and computers, demand may not be very elastic. Widespread disclosure of conflict mineral use, without any non-market-based liability for such use, may actually be counterproductive: if all companies in a given industry admit use of conflict minerals, none will feel any pressure to change its practices.

Third, corporate managers must care about the specific public benefit the rule intends to effect. The benefit-corporation trend *does* emphasize that managers can pursue beyond-profit-seeking interests, but it also underscores that shareholders elect and drive those interests. As argued in Part II and indicated by the apparent indifference of shareholders to the content of conflict minerals rule disclosures (Tables 4 and 5), Section 1502 differs from the state benefit-corporation laws in that shareholders generally have not appointed mitigation of the DRC conflict as a specific public benefit. Given the wide discretion afforded under the business judgment rule, managers certainly could work to make their supply chains more socially responsible, but doing so would be less economically efficient than if shareholders also derived utility gains from the measures.

Finally, perhaps the biggest assumption of both this study *and* the criticism that it is too myopic is that even if corporations are eventually compelled to consider the source of their conflict minerals, changes to their supply chains will have a meaningful impact on the conflict in the DRC. Part II casts doubt on this assumption, given the magnitude of the problem, the frayed social and economic fabric of the region, and the fact that other countries have so far not followed suit in similarly mandating disclosure of their companies. If the conflict minerals rule is eventually effective in steering corporate behavior, the result may not be the resolution of the

[269] *Id.* ("This is the first analysis of its kind.")

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conflict in central Africa, but the regional replacement of U.S. companies by foreign corporations that are even less attentive to their social impact.

So, while the alternative hypothesis undergirding this criticism largely rests on speculative factors, this criticism does highlight two certainties about the rule. One is that the costs it imposes on companies is significant: even the corporations themselves have little information on their mineral supply chains, and it might take years for clearer understandings to develop. The costs of implementation and compliance seem disproportionate relative to the scant information collected, even if this is only an early snapshot of the rule's effect. Second, this criticism underscores how far outside the SEC's traditional scope and expertise, and how removed from the benefit-corporation trend, the conflict minerals rule is. Section 1502 is more about shaping investors' concerns than protecting or advancing their concerns.[270] While this might ultimately effect some purpose of the rule—dependent on the speculative factors listed above—it would do so inefficiently, if at all.

3. Criticism Three: This Study Relies on Inappropriate Statistical Tests

Finally, in addition to criticizing the interpretation of the results and the shortsighted nature of the study, advocates of the conflict minerals rule might challenge the statistical tests employed. The choice of an event study suffers the same criticism that the analysis is too focused on a narrow timeframe. Despite some confusion about the rule, between the time when Section 1502 was passed in 2010 and the filings were due in 2014, the market might have developed a sense of which companies would be affected. This could be especially true given that most issuers had to take costly measures to comply with the mandatory disclosure rule long before its deadline, and certainly before the three-day, pre-deadline window the third event study evaluated. Accordingly, one would assume the share price would already reflect the expected costs and content of disclosure. Therefore, the lack of any statistically significant difference in abnormal returns between issuers that filed Conflict Minerals Reports and those that filed Form SD only (illustrated by Tables 4 and 5) may be less a reflection of shareholders' apathy toward the content of the disclosures than a reflection of the shareholders' lack of surprise.

However, this criticism is not substantiated by the results in Tables 1, 2, and 3, which show that issuers that filed Form SD did experience meaningfully negative abnormal returns relative to the market for the time periods examined. If shareholders were able to predict whether the issuer would have to file a Conflict Minerals Report, one would assume that shareholders also would have been able to predict the

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[270] *See supra* notes 58–67 and associated text.

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applicability of the even lower threshold of filing a Form SD. This raises the possibility that shareholders' pre-deadline expectations might have been *over*-inclusive: given that only around one-fifth of the total number of companies the SEC predicted would be covered by the rule actually filed Form SD, shareholders might have anticipated that many other companies would be subject to the disclosure requirements. If so, the negative returns revealed in Tables 1, 2, and 3 may be more of an indicator of the market's response to learning that some issuers did *not* face a disclosure burden. Under this possibility, companies that had been expected to disclose were effectively rewarded for not doing so, while those companies that were expected to disclose and did disclose were effectively penalized. In any case, the consistent statistical significance of the findings across all three tests muffles concerns about the use of the event study model.

The simple t-tests used to generate the results in Tables 3 and 4 are admittedly unsophisticated, not taking into account the varying standard deviations of the corporations. Similarly, the basic regression model used to generate the results in Table 5 is not very precise.[271] Nevertheless, it is difficult in any study to accept a non-result with great confidence; more advanced regression models and tweaks to the variables could support more definitive results.[272]

Despite these fair criticisms, though more sophisticated models would be unlikely to reach different overall conclusions. The fact that many of the Tables serve to reinforce each other's results lends greater confidence to the observations. These empirical results, albeit basic, humbly complement the general theoretical argument advanced in this Article that the conflict minerals rule is an inefficient and likely ineffective mechanism to reduce violence in the DRC, in part because the federal rule ignores the primary insights of the state benefit-corporation trend. As future filings offer more precise information about companies' mineral supply chains, more advanced statistical tests should be employed to continue to track the effect of the disclosures on issuers' share values.

CONCLUSION

Comparing the state benefit-corporation statutes to the conflict minerals rule shows that the federal regulations are well meaning but inefficient, ineffective, and potentially harmful. Section 1502 of the Dodd-Frank Act essentially shifts upon

[271] The low R-squared value indicates that the model is not a strong fit, but this value is also consistent with this Article's argument that the data—Conflict Mineral Report filings and abnormal returns—are not correlated.

[272] For example, the regression model could be improved by capturing data from all issuers, not just those that filed Form SD, and by including an independent variable for Form SD filings alongside the variables for Conflict Minerals Report filings and market capitalization.

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corporations the government's foreign policy responsibility and hoists upon the SEC a function it is not equipped to handle. As such, the conflict minerals rule masks forced corporate social responsibility as investor protection, increasing corporations' transaction costs but unlikely engendering any positive transformation in the affected region in Africa.

This conclusion is reached theoretically through a qualitative examination of how the federal rule generally resembles the benefit-corporation model but rejects the First Amendment and private ordering principles at the heart of the state-law trend. It is illustrated empirically through econometric analyses of the first-year filings under the rule, which suggest that shareholders only care about the *costs* of disclosure and are not significantly affected by the *content* of disclosure. And it is tragically revealed in the early reports of increased poverty and expanding militias in the Democratic Republic of the Congo.[273]

As a result, the expanding regime of federal specialized disclosure rules stands to ultimately undergo the same experience as the state benefit-corporation trend. That is, the measures' symbolic and optical value—conveying the notion that the government cares about these foreign policy interests—may well eclipse the empirical reality. Furthermore, by ignoring the primary insights from the state benefit-corporation model—and thereby yielding speech of slight value and producing little change in corporate behavior—the federal specialized disclosure rules handicap the social goals the rules target. As the stakeholders who were meant to benefit from the conflict minerals rule have realized, "[t]he intention of the law was good, but in practice, it was not well thought-out."[274] Indeed, the alarming situation in central Africa demands more robust legal and policy responses that are less equivocal and more effective.

Comprehensive recommendations for how to better address the role of mineral extraction in the DRC conflict exceed the scope of this Article. However, the likely inefficiencies and ineffectiveness of the SEC rule compel brief mention of at least four alternative approaches that are worth further exploration.

1. A Comprehensive Foreign Policy and Internationally Coordinated Effort. The United States should adopt a more comprehensive foreign policy toward the region that holds the local governments accountable and seeks global consensus. Although Section 1502 does call on other agencies to take various measures, these actions are ancillary to the ineffective securities rules at the heart of the law.

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[273] *See* Raghavan, *supra* note 229; Wolfe, *supra* note 230.

[274] Raghavan, *supra* note 229 (quoting Eric Kajemba, director of a regional nonprofit group).

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Similarly, although the predecessor to Section 1502 called for greater action by the United Nations to address the issue, little has been done.

The SEC has been candid about its lack of expertise over this issue; other agencies, most notably the State Department and, in particular, the Special Envoy for the Great Lakes Region, must take more assertive leadership roles. Should the United States persist in requiring substantive disclosures, the United States should coordinate with other governments to encourage similar compliance regimes applied to foreign corporations, in the same manner the United States has worked to promote foreign complements to other extraterritorial corporate laws like the Foreign Corrupt Practices Act. At the same time, increased support must be given to the DRC to mitigate the economic effects of declining mineral prices.

2. Import/Export Controls or Certification Processes. The United States could seek to restrain corporations' use of conflict minerals through import/export controls or a certification system, similar to how the Kimberly Process has alleviated the "blood diamonds" problem. Because these legal vehicles carry the same risk of effectively causing an embargo, however, the substantive international cooperation described above is essential.

3. Tax System. The Internal Revenue Code is constantly employed to steer behavior at the individual and corporate levels. Most notably, this occurs in the nonprofit context as rules regarding tax-exemption encourage attitudes and actions that support public benefits. The tax system could work similarly to motivate companies to make their supply chains more socially responsible. For example, the government could supply tax credits to corporations that carry out audits of their minerals and/or assess a tax on corporations that do not obtain an audit. This system would incur some of the same inefficiencies of the SEC rule, but would have the advantage of not using investor protection as a pretext and not relying on investor concerns to motivate corporate actions. Plus, tax credits could help to offset some of the costs of disclosure, effectively removing the expense of the foreign policy goal from companies, where the SEC rule currently places it, and returning it to the government.

4. Civil and/or Criminal Penalties. If the United States is serious about its commitment to curbing the use of conflict minerals, the government could impose actual civil or criminal penalties on corporations and individuals who knowingly participate in or indirectly support a supply chain that finances the conflict in central Africa. This sanction was included in the first Congo-related legislation sponsored by Senator Brownback in 2008, but the Senate lacked the will to enact it. These sanctions would better align Section 1502 with other laws designed to steer extraterritorial corporate conduct, such as the Foreign Corrupt Practices Act.

Unless these or other approaches are adopted, the conflict minerals rule will continue to be an irresponsible vehicle for addressing the situation in the DRC,

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overpromising a public benefit it likely cannot effect while underestimating private costs it surely imposes.

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