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Targeted Social Transparency as Global Corporate Strategy

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Targeted Social Transparency as Global Corporate Strategy

*By Stephen Kim Park**

Abstract: Recent years have seen the emergence of mandatory disclosure regimes under U.S. federal securities law with the express purpose of advancing geographically defined, issue-specific social policy objectives, which I collectively refer to as "targeted social transparency" (TST) regimes. This Article addresses the appeal and shortcomings of mandatory disclosure as a means of regulating global corporate conduct—focusing on the unique challenges posed by TST. Two contemporary examples of TST are analyzed: (i) the "conflict minerals" provisions in the Dodd-Frank Act, which require the disclosure of minerals whose mining is associated with human rights violations in the Democratic Republic of Congo; and (ii) disclosure requirements under the Iran Threat Reduction and Syria Human Rights Act with respect to commercial activities associated with the Iranian government's suppression of human rights. This Article presents the concept of constructive discourse, which seeks to enhance the effectiveness of mandatory disclosure by addressing these related objectives: (i) how TST can catalyze internally driven changes in corporate behavior to the mutual benefit of MNEs and stakeholders; and (ii) how MNEs can use TST for strategic purposes. Using the concept of constructive discourse, this Article identifies and explores specific ways that TST regimes can shape socially beneficial, strategically rational corporate conduct.

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I. INTRODUCTION

Governance of the international economy increasingly hinges on awareness and knowledge concerning the activities of multinational enterprises (MNEs).[1] One mechanism to achieve this objective is mandatory disclosure of information by MNEs and other business entities to the public. Public concern about the noneconomic effects of global business has led to the growing use of mandatory disclosure to advance social goals—such as international human rights and environmental sustainability—under the rubric of social transparency. The concept of social transparency mandates the reporting of various adverse social and environmental impacts by the firm responsible for causing them.[2] Social transparency expands the scope of a company's obligations to a broader set of parties, often referred to as stakeholders, which can affect or are affected by its decisions.[3]

Within this broad context, this Article focuses on a new phenomenon with far reaching implications—mandatory disclosure regimes based on what I refer to as "targeted social transparency" (or TST). TST consists of government administered reporting systems that require the public disclosure of social impacts to fulfill geographically defined or issue specific noneconomic public policy objectives, or both.[4] Compared to other forms of social transparency, TST regimes target social impacts specific to individual countries, regions, or industries. TST has become a particularly

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[1] This Article uses "MNE" in reference to any firm or company with cross-border operations. As specifically noted herein, certain observations specifically apply to publicly held, multinational corporations, the most prevalent and prominent form of an MNE.

[2] This Article defines social transparency as public reporting of "information about the products a reporting company produces, the countries in which it does business, [and] the labor and environmental effects of the company's operations here and abroad." *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 n.5 (1999) (defining social disclosure qua corporate social transparency). In this Article, social and environmental impacts caused by MNEs are collectively referred to as social impacts unless otherwise indicated or qualified.

[3] *See* Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 256 (2010) (defining stakeholders); *see also* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 68–69 (1995) (identifying investors, governments, suppliers, trade associations, employees, communities, customers, and political groups).

[4] This term draws in part on research by Archon Fung, Mary Graham, and David Weil on the use of "targeted transparency," which they define as "public policies that . . . *mandate disclosure by corporations or other actors* of standardized, comparable, and disaggregated information *regarding specific products or practices* to a broad audience *in order to achieve a specific public policy purpose*." ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 37–38 (2007) (emphasis added); *see also* David Weil, *Targeted Transparency*, *in* ADVANCING EXCELLENCE AND PUBLIC TRUST IN GOVERNMENT 77 (Cal Clark & Don-Terry Veal eds., 2011).

prominent (and controversial) way of addressing international human rights through U.S. federal securities law. This Article identifies and examines two TST regimes: (i) the "conflict minerals" provisions in § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which require the disclosure of minerals whose mining is associated with human rights abuses in the Democratic Republic of Congo (the Congo);[5] and (ii) enhanced disclosure requirements mandated by § 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) on companies that engage in commercial activities associated with the Iranian government's suppression of human rights.[6] TST's narrow scope and relatively high compliance costs draw attention to the following important question that is largely missing from public debate on international business and corporate social responsibility (CSR): How does social transparency address the needs of MNEs and other business entities operating in the global economy?

To answer this question, this Article presents the concept of constructive discourse to identify ways that MNEs might benefit from TST regimes. Drawing on the insights of constructivist political theory, reflexive law, and the experiences of MNEs with CSR-inspired voluntary reporting schemes, constructive discourse focuses on the relevance and use of mandatory disclosure to the firm. Starting with the premise that MNEs will be increasingly subject to TST, this Article focuses on how MNEs and other firms can use the process and output of mandatory disclosure for their own benefit through constructive discourse.[7] While the specific examples of TST in this Article address the involvement of MNEs in violations of international human rights, these observations and arguments may also be relevant to TST regimes in other areas such as environmental sustainability, anticorruption, and labor.

This Article is organized as follows: Part I examines the purposes, applications, and limitations of social transparency through U.S. federal securities law. Part II describes the recent emergence of TST and analyzes contemporary applications of TST with respect to the Congo and Iran. It describes how TST is used as a means to address an indisputably important CSR objective: the complicity of MNEs in violations of international human rights. Part III outlines the concept of constructive discourse as a framework for understanding TST, focusing on how MNEs can use

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

[6] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 219, 126 Stat. 1214 (2012) [hereinafter ITRA].

[7] This Article largely—but not entirely—sets aside questions about the public policy justifications of specific TST regimes, which have been addressed by other legal scholars. *See, e.g.*, Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013) (analyzing the normative implications of using securities regulation to hold firms accountable for violations of human rights).

mandatory disclosure strategically to their benefit. Applying the concept of constructive discourse, Part IV suggests and explores potential reforms to current TST regimes. Finally, the Conclusion suggests potential areas for future normative inquiry and empirical research.

II. MANDATORY DISCLOSURE AND THE GLOBALIZATION OF CORPORATE SOCIAL RESPONSIBILITY

A. The Concept of Social Transparency

Information deficits occur when a firm has information regarding its operations—and various negative impacts and risks arising therefrom—not otherwise available to other parties.[8] Public disclosure of a firm's activities and impacts enhances social utility by providing investors, customers, creditors, and counterparties (i.e., users) with information necessary to reduce risks that they may face due to their direct or indirect interactions with the firm. As famously stated by Louis Brandeis, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[9]

From the perspective of firms as disclosers, the costs of disclosure are proportionate to the amount, scope, and level of detail of information provided to users, while the benefits of disclosure decline as the amount of information disclosed increases.[10] If private optimality converges with social optimality, then, everything else being equal, voluntary corporate disclosure will lead to the dissemination of all information that the public would find beneficial.[11] One important source of motivation to disclose is reputation. A firm's reputation is a valuable asset that is based on public perceptions of what it does, how its acts, how it handles crises, and how well it treats stakeholders (such as, for example, its customers and local communities affected by its activities).[12] Accordingly, firms are motivated by desire to strengthen their legitimacy and enhance their reputation though disclosure of information regarding their performance on a range of social issues.[13] Publicly held corporations, in particular, are driven by the social incentives of shareholders who want firms to disclose social harms that may

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[8] Timothy F. Malloy, *Disclosure Stories*, 32 FLA. ST. U. L. REV. 617, 629 (2005).

[9] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

[10] *See* Archon Fung, Mary Graham, David Weil & Elena Fagotto, *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 161–62 (2006).

[11] *See* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1343 (1999).

[12] *See* Terry O'Callaghan, *Disciplining Multinational Enterprises: The Regulatory Power of Reputation Risk*, 21 GLOBAL SOC'Y 95, 105–07 (2007) (describing the elements of corporate reputation and its financial and nonfinancial value).

[13] Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research, and Practice*, 12 INT'L J. MGMT. REV. 85, 99–100 (2010).

trigger penalties, liabilities, and future regulation.[14]

Aside from instrumental considerations, a firm may disclose a core element of CSR on the basis of its commitment to transparency.[15] CSR broadens the scope of a corporation's obligations from a single-minded focus on maximizing its shareholders' return to capital to a broader set of ethical, social, and environmental considerations affecting its stakeholders.[16] Corporations may subscribe to CSR principles based on the perceived value of certain public goods or the social utility of certain values.[17] Individual corporations have formulated and implemented social reporting processes that include disclosure as well as accounting and auditing of the social impacts of their activities.[18]

Disclosure practices based on CSR obligations are often implemented through adoption of codes of conduct, statements of best practices, industry guidelines, and similar nonbinding instruments.[19] In the past few decades, the CSR movement's foundation has shifted to voluntary reporting of social and environmental information by MNEs that exceed legal requirements.[20] In particular, the Global Reporting Initiative (GRI), established in 1997 by the Coalition for Environmentally Responsible Economies (CERES), has become the leading industry standard for corporate social reporting.[21] Governments have amplified the proliferation of the GRI by issuing voluntary guidelines on CSR reporting, many of which cite, endorse, or recommend the GRI guidelines.[22] The GRI framework requires that a participating company adopt a specific reporting format through which it

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[14] *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1445 (2006).

[15] *See* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 452 (2004).

[16] *See* William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 141, 148–52 (2012).

[17] *See* David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective,* 76 U. COLO. L. REV. 379, 388–90 (2005) (concerning the environment as a public good); Dhooge, *supra* note 15, at 460–61 (concerning the social utility of human rights).

[18] *See* David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 72–80 (1999) (examining social reporting conducted by The Body Shop and Ben & Jerry's).

[19] *See* David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 155–56, 159–61 (2004).

[20] *See* John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 4–5 (2005).

[21] *See* David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 BUS. ETHICS Q. 447, 453–56 (2008) (summarizing the history of social reporting and the background of the GRI); Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT'L L. 575, 590–97 (2013) (describing the emergence of the GRI as the leading standard for corporate sustainability reporting).

[22] Sarfaty, *supra* note 21, at 600 (referring to sustainability reporting initiatives by the Australian, Canadian, and Japanese governments).

makes available to the public economic, environmental, and social information.[23] As a result, thousands of MNEs in a broad array of industries are now accustomed to participating in quasi-regulatory initiatives based on social reporting and multistakeholder dialogues between MNEs, civil society groups, and governments.[24]

Notwithstanding these factors, market competition and CSR commitments do not provide sufficient incentives to firms to voluntarily disclose thereby leading to the systemic underreporting of useful information regarding the social impacts of business activities.[25] The potential loss of proprietary information; the exploitation of information regarding an MNE's activities by its competitors, suppliers, or customers; and other indirect costs may discourage a socially optimal level of disclosure.[26] Firms may choose not to voluntarily disclose due to the possibility of incurring civil liability.[27] In addition, voluntary CSR reporting is often hampered by a lack of operational utility due to vague, undefined terms and a lack of implementation and independent monitoring mechanisms.[28] The proliferation of different reporting standards—each with different applications, objectives, and biases—has led to legal and policy incoherence.[29] In many cases, firms are able to disclose favorable information while concealing unfavorable information, fail to put their disclosures in the appropriate context, or provide false disclosures while avoiding investor backlash.[30]

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[23] *See* Hess, *supra* note 21, at 456 (summarizing the disclosure guidelines in the third edition of the GRI).

[24] *See* Conley & Williams, *supra* note 20, at 11–23 (discussing the roles of participating MNEs, NGOs, governments, and investors); Sarfaty, *supra* note 21, at 597 (noting that approximately 4,000 companies issue CSR reports, one-third of which use the GRI guidelines).

[25] *See* Ribstein, *supra* note 14, at 1454–55 (describing why firms may lack an incentive to disclose negative information voluntarily); *see also* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 756 (2006) (summarizing the justifications for mandatory disclosure based on the misalignment between the private and social value of firm-specific information).

[26] Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2550–51 (1997) (identifying some of the private costs of disclosure to the firm).

[27] *See* Archon Fung, David Weil, Mary Graham & Elena Fagotto, *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* 16 (Ash Inst. for Democratic Governance and Innovation, Occasional Paper No. OP-03-04, 2004) (noting the prevalence of disclosers that underreport or deliberately hide risks); *see also* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 483 (2007) (identifying the substantial litigation risk that firms face from being sued by plaintiffs' attorneys for misrepresentations and omissions in their disclosure).

[28] *See* Dhooge, *supra* note 15, at 463–64.

[29] *See* Larry Catá Backer, *Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 MINN. J. INT'L L. 1, 50–51 (2013).

[30] *Id*. at 62–63 (describing how a firm's ownership of data makes it difficult for outsider users to verify or challenge CSR information disclosed by the firm); *see also* Hess, *supra* note 21, at 462–63.

Therefore, in order to compel reporting by firms of noneconomic social concerns, mandatory disclosure is often implemented.[31] Throughout the world, government regulators have implemented mandatory disclosure regimes to address a wide range of social policy objectives.[32] When market participants cannot themselves obtain such information—or can only obtain it by incurring undesirably high private transaction costs—and the information itself can further a compelling policy objective, government regulators may mandate disclosure.[33] Several distinct factors have spurred demand in using mandatory disclosure to compel reporting by firms of noneconomic social concerns. The increasing scope of cross-border business activity and growing public awareness of the social and geopolitical impacts of global business have coincided with calls for "shareholder democracy" through the exercise of shareholder rights by socially responsible investors (SRIs) and other investors that take interests in social issues.[34] Civil society organizations dedicated to advancing CSR in the areas of human rights, the environment, and other global social issues have become increasingly sophisticated in applying pressure on MNEs.[35] Many stakeholders express concerns about the effectiveness and even the very premise of voluntary CSR-based reporting schemes.[36] Instead of being a freestanding alternative to traditional governmental regulation, advocates believe that CSR practices should be viewed as a complement to regulation.[37]

Mandatory disclosure regimes are generally premised on the interactive effects triggered by the obligation to disclose as shown in the

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[31] *See* Cynthia Williams, *Text of Remarks on Panel: "Codes of Conduct and Transparency*,*"* 24 HASTINGS INT'L & COMP. L. REV. 415, 421 (2001) (suggesting that U.S. federal securities law can address international corporate behavior through disclosure of companies' international actions and liability for misleading or incomplete disclosure).

[32] *See* FUNG, GRAHAM & WEIL, *supra* note 4, at 74–90 (evaluating the effectiveness of corporate financial disclosure, restaurant hygiene quality cards, mortgage lending reporting, nutritional labeling, toxic release reporting, workplace hazards disclosure, patient safety disclosure, and workers' notification of plant closings).

[33] *See* Fung, Graham, Weil & Fagotto, *supra* note 10, at 156.

[34] *See* Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR?—A Path Paved with Good Intentions*, 22 FLA. J. INT'L L. 361, 370 (2010) (noting the impact of socially responsible investing on motivating social performance by corporations); Williams, *supra* note 2, at 1287–89 (noting the growing proportion of assets under professional management in the United States that are invested using social screening); *see also* Aaron A. Dhir, *The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47, 70–76 (2009) (arguing that social disclosure is most effective as a means of empowering human rights-conscious shareholders).

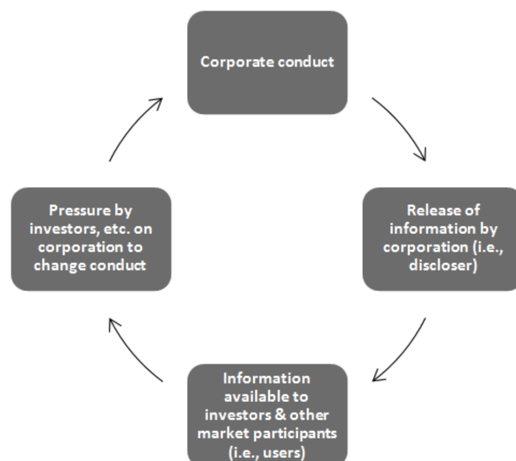
[35] *See* Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 466–67 (2004).

[36] *See* Conley & Williams, *supra* note 20, at 34–36.

[37] *See* Gerald F. Davis, Marina V.N. Whitman & Mayer N. Zald, *The Responsibility Paradox*, STAN. SOC. INNOVATION REV. at 37 (Winter 2008).

figure below.

Figure 1. Disclosure Feedback Loop: Compelled Action and Discretionary Reaction



Distinct functions arising out of the disclosure processes can be disaggregated and individually identified.[38] Social transparency relies on ambiguous signals by third-party users of disclosed information and discretionary responses thereto by firms in their capacities as disclosers.[39] Mandatory disclosure may enhance the ability of users of disclosed information vis-à-vis disclosers by reducing information asymmetries between managers and shareholders, thereby lowering agency costs that shareholders would otherwise incur to monitor firms.[40] It may improve corporate governance by bolstering managerial discipline insofar as corporate managers might act more diligently and honestly due to the possibility of public scrutiny of their actions.[41] Mandatory disclosure may alter the behavior of disclosers that seek to avoid the negative reaction of users (e.g., investors selling off securities, customers declining to buy a product). This *ex ante* effect may be seen in the ways that managers might act more diligently and honestly leading to the possibility of their actions

[38] *See* Malloy, *supra* note 8, at 631–36.

[39] Fung, Graham, Weil & Fagotto, *supra* note 10, at 158.

[40] Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 152 (2006).

[41] *Id.* at 169. One increasingly prominent area in which mandatory disclosure regulation has been applied to corporate governance is executive compensation. The Dodd-Frank Act, as part of its disclosure-oriented reforms, requires companies to disclose certain executive compensation incentives, comparative ratios between median employee and CEO compensation, and clawback provisions, among other information. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 951, 953, 955, 126 Stat. 1214 (2012).

being subject to public scrutiny.[42]

How might mandatory disclosure advance social goals? The application of mandatory disclosure to social transparency involves "information forcing" rules whose purpose is to compel the sharing of information by the actor best situated to hold or obtain such information (i.e., the firm) to the actors most likely to use it for the public good (i.e., regulators and civil society).[43] This information permits socially conscious corporate outsiders—e.g., SRIs and nongovernmental organizations (NGOs)—to independently monitor and scrutinize corporations' internal management and decision making.[44] By expressly requiring that firms disclose specific kinds of social impacts, mandatory disclosure compels the production of information that firms may otherwise not voluntarily provide. Using this information, investors can more accurately account for such risks and the market can more efficiently discount the firm's stock price accordingly.[45] Compared to voluntary social reporting, mandatory disclosure facilitates superior intercompany and interindustry comparisons as well as longitudinal study of a company's success in achieving social objectives over time.[46] Mandatory disclosure of adverse social impacts may have a socially beneficial effect on corporate conduct if corporate managers and boards seek to avoid moral disapprobation and act accordingly to avoid engaging in conduct that violates social norms.[47] Even if disclosed information does not lead to any legal sanctions under U.S. federal securities law, issuers may seek to change their behavior if they believe that such information would lead to reputational harm or other nonlegal sanctions.[48]

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[42] *See* Ripken, *supra* note 40, at 151; Williams, *supra* note 2, at 1280.

[43] *See* Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129, 139 (2011); *see also* Goshen & Parchomovsky, *supra* note 25, at 758 (justifying mandatory disclosure as a means to reduce search costs incurred by outsiders to obtain firm-specific information).

[44] Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37, 77 (2011).

[45] Williams, *supra* note 2, at 1279–80.

[46] *See* Hess, *supra* note 18, at 67; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 680 (1984) (observing that the value of mandatory disclosure lies in its ability to reduce informational costs by controlling the time, place, and manner in which firms disclose information to investors).

[47] David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1857 (2001).

[48] *See* Williams, *supra* note 35, at 495–96 (citing the expressive function of law and the ways that nonlegal mechanisms can enforce and enhance firm compliance).

B. Securities Regulation and Social Transparency

1. The Scope of Mandatory Disclosure Under U.S. Securities Law

One of the world's most prominent and far reaching mandatory disclosure regimes is found in U.S. federal securities law.[49] Its scope—covering many of the largest and most prominent U.S. and foreign MNEs in the world—arguably makes it the single most influential and comprehensive type of business regulation.[50] Mandatory disclosure is the core organizing principle of U.S. federal securities law.[51] U.S. federal securities law embraces a "market discipline" approach, which seeks to ensure that corporate issuers disclose sufficient information so that investors can make their own decisions.[52]

Mandatory disclosure under U.S. federal securities law is generally governed by the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act).[53] The Securities Act governs the disclosure requirements related to the issuance of securities in primary markets, primarily by requiring firms that wish to sell securities in the U.S. market to register with the SEC through the submission of a publicly available registration statement.[54] The Exchange Act governs the trading of securities in secondary markets and imposes ongoing disclosure requirements on companies through the filing of periodic reports with the SEC that are made available to the public.[55] Both registration statements

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[49] *See* Fung, Graham, Weil & Fagotto, *supra* note 10, at 167, 169 (characterizing corporate financial disclosure as an example of a highly effective transparency system); *see also* David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency*, 17 BUS. ETHICS Q. 453, 461 (2007).

[50] Foreign companies that sell securities in the U.S. markets are subject to disclosure requirements under U.S. federal securities law generally equivalent to U.S.-based issuers, notwithstanding the fact that such foreign companies may not be subject to other U.S. laws. *See* Amy Deen Westbrook, *Sunlight on Iran: How Reductive Standards of Materiality Excuse Incomplete Disclosure Under the Securities Laws*, 7 HASTINGS BUS. L.J. 13, 18 (2011).

[51] *See* Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 605–06 (2013).

[52] U.S. federal securities law operates in conjunction with state "blue-sky" securities laws, which, in contrast, are "merit-based"—i.e., they provide state-level government regulators with the authority to judge the soundness of securities. Although state blue-sky securities laws still apply to many types of securities transactions, their scope has been significantly curtailed. Westbrook, *supra* note 50, at 18 n.17 (citing and referring to the National Securities Markets Improvement Act of 1996 § 102, 15 U.S.C. § 77r(b)(1)(A)).

[53] *See* Williams, *supra* note 2, at 1209–35 (summarizing the legislative context and history of the Securities Act and the Exchange Act).

[54] Securities Act of 1933, 15 U.S.C. § 77a (2009).

[55] Securities Exchange Act of 1934, 15 U.S.C. § 78a (2012). Exchange Act reporting requirements apply to any company that has at least 500 shareholders and $10 million in assets, has made a registered public offering of securities in the United States, or has listed securities on a U.S. stock exchange

under the Securities Act and periodic reports under the Exchange Act must include extensive information regarding an issuer's management, risks, operations, and financial condition, among other information.[56] Moreover, the Exchange Act includes powerful antifraud provisions that impose standards on the veracity and completeness of mandatory disclosure. Most notably among them is § 10(b), which subjects an Exchange Act reporting company to civil liability for material omissions or misrepresentations in periodic reports filed with the SEC or any other document or information released by the company.[57] Rule 10b-5, promulgated under § 10(b), is one of the foundations of the disclosure-based regulatory approach of U.S. federal securities law.[58] Another source of liability is § 18(a), which establishes an express private cause of action against any person that makes a false and misleading filing.[59]

Until recently, social transparency has been very limited in U.S. federal securities law. Historically, disclosure of the adverse social impacts of a company's activities was required only where such disclosure would be necessary to protect investors' financial interests. The mandatory disclosure obligation under U.S. federal securities law is circumscribed by the principle of materiality. Under this principle, a company must only disclose a given piece of information if there is a substantial likelihood that a reasonable investor would deem it significant in the "total mix" of available information—i.e., what an ordinary, rational investor would

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(hereinafter an Exchange Act reporting company). *See id*. §§ 12(a), 12(g)(1), 13(a), 15(d).

[56] The broad, open-ended scope of the periodic reporting requirements under § 13 of the Exchange Act have proven to be fertile ground for TST as described later in this Article. *See infra* Part II.B.

[57] Section 10(b) of the Exchange Act requires that a plaintiff prove that a defendant made a material omission or misrepresentation connected with the purchase or sale of a security with scienter causing economic loss to the plaintiff due to reliance on that omission or misrepresentation. *See* Exchange Act § 10(b) (codified at 15 U.S.C § 78j(b) (2010)).

[58] Rule 10b-5 provides the following:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To *make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading*, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2010) (emphasis added).

[59] Under § 18(a), a plaintiff must demonstrate that he or she purchased the securities in reliance on a false or misleading filing and suffered damages directly as a result. Further, a defendant is not liable for any false or misleading statement in a filed document if the defendant can establish that it acted in good faith and had no knowledge that the statement was false or misleading. *See* Exchange Act § 18(a) (codified at 15 U.S.C § 78r(a) (2010)).

consider important information in an arm's length securities transaction.[60] Consequently, under this principle, companies are only required to disclose those social impacts that constitute a material business risk to the company itself.[61]

Regulation S-K, which specifies what information Exchange Act reporting companies must disclose in their periodic filings to the SEC, reflects this risk-oriented approach to disclosure.[62] Regulation S-K requires companies to disclose in their annual, quarterly, and other periodic reports certain risks including, *inter alia*, (i) material costs and other effects of compliance with law, including "any risks attendant to [their] foreign operations";[63] (ii) material pending legal proceedings;[64] and (iii) management's discussion of material trends, events, and uncertainties that are reasonably expected to have material effects on its operations, liquidity, or capital resources.[65]

In 2010, the SEC issued an interpretive release that clarified the applicability of securities disclosure requirements to climate change risks.[66] The SEC's guidance applied the principle of materiality by affirming that Exchange Act reporting companies are required to disclose climate change impacts and risks only to the extent that there is a clear and quantitatively material effect on the company's business.[67] The SEC has eschewed bright-line disclosure requirements in respect to social and environmental risks in favor of permitting companies to avoid disclosing such impacts on the basis that their costs are relatively small, ambiguous, or both.[68] This narrow approach has been criticized for failing to address the range of social concerns that do not meet the materiality requirement and for disregarding circumstances in which social concerns may later become economic concerns.[69] While the SEC continues to evaluate the implementation of a generalized social transparency regime under U.S. federal securities law, its realization remains far from imminent.[70]

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[60] *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Westbrook, *supra* note 50, at 26–27; Williams, *supra* note 2, at 1208–09.

[61] *See* Benjamin J. Richardson, *Enlisting Institutional Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives*, 28 N.C. J. INT'L L. & COM. REG. 247, 352–53 (2002).

[62] Regulation S-K consists of administrative rules adopted by the U.S. Securities and Exchange Commission in 1982. *See* 17 C.F.R. § 229.101 (2010).

[63] *Id.* § 229.101(d)(3); § 229.101 (Item 101).

[64] *Id.* § 229.103 (Item 103).

[65] *Id.* § 229.303 (Item 303).

[66] Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61,469, 75 Fed. Reg. 6290 (Feb. 8, 2010).

[67] *See* Westbrook, *supra* note 50, at 44–55.

[68] *See id.* at 59.

[69] *See id.* at 70–71, 74.

[70] *See* Sarfaty, *supra* note 21, at 602–03.

2. *Shortcomings of Social Transparency Under U.S. Securities Law*

The effectiveness of social transparency is hampered by a range of factors endemic to mandatory disclosure regulation. As described below, social transparency regimes based on mandatory disclosure may fall short of their objectives due to (i) weak compliance effects on disclosers, (ii) inconsistent informational value to users, and (iii) uncertain or even perverse incentives on disclosers.

First, mandatory disclosure may not sufficiently deter misconduct or incentivize virtuous behavior by firms. Since social transparency does not enforce substantive standards of behavior per se, its ability to positively affect business behavior depends on the capacity and willingness of the public to use and respond to disclosed information.[71] Therefore, the impact of social transparency relies on the ability of users of disclosed information to affect the interests of firms and the ability of firms to detect changes in user behavior.[72] However, disclosure in itself may not sufficiently persuade them of the need to change their modus operandi.[73] Ambiguous disclosure rules permit companies to engage in strategic noncompliance by disputing the applicability of a disclosure obligation and refusing to comply.[74]

Notwithstanding the prospect of civil enforcement, social transparency is arguably predicated on a moral community in which members share common values such that firms bear the reputational effects of disclosed information on the adverse social impacts of their activities.[75] This may pose a particular problem in respect to the activities of MNEs operating in global, multicultural business environments where there may not be universally held social values.[76] If MNEs have weak ties to a community and stakeholders do not have the capacity to react to disclosed information in the form of a social demand, then the deterrence value of any perceived

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[71] *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM. L. REV. 1315, 1344 (2012).

[72] Fung, Graham, Weil & Fagotto, *supra* note 10, at 164–65 (describing how mandatory disclosure regulation can incentivize disclosers to change their decision making based on the responses of users to disclosed information).

[73] For example, the "adopt-or-disclose" approach of many of the corporate governance reforms enacted by the Sarbanes-Oxley Act merely gives corporations the option *either* to comply with a substantive rule or disclose their noncompliance. Ripken, *supra* note 40, at 144. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

[74] Malloy, *supra* note 8, at 625.

[75] *See* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 380 (1999) (noting the role of punishment as an expression of a community's values).

[76] *See* Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 77–78 (2010) (observing that the effectiveness of shaming as a means of enforcing international human rights norms depends on the existence of a social context that will enable the shame to occur).

moral disapproval might be commensurately weak.[77] The weaknesses of social sanctions may similarly apply to investors, who may be insulated from their effects.[78]

Second, the ability of mandatory disclosure to ensure a socially optimal level of regulation is premised on the veracity of the efficient market hypothesis, which assumes that investors are fully rational and make collectively optimal decisions.[79] However, on a collective level, investors may not be able to influence corporations' behavior due to collective action problems.[80] Likewise, on an individual level, the analytical and structural problems that often impair investors' ability to use disclosed information have been the subject of considerable scholarly attention.[81] The intended beneficiaries of mandatory disclosure may be impaired, *inter alia*, by information overload, overconfidence, overoptimistic outlooks, and confirmation bias, all of which may affect both sophisticated and unsophisticated investors alike.[82] Indeed, even investors that are aware of such biases nonetheless find it difficult to undo such biasing influences.[83] The disclosure of analytically complex transactions presents particularly vexing cognitive problems resulting in oversimplification, incomprehensibility, and ambiguity.[84] Further, the logistical complexity of organizing, sorting, and comparing enormous amounts of disclosed information may hamper the investors' ability to utilize information that they are otherwise capable of assessing.[85] Depending on the nature of the

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[77] *See* Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 FORDHAM ENVTL. L. REV. 1, 46 (2010). However, the effectiveness of reputational sanctions in respect of social impacts such as international human rights may arguably be greater due to the tangible effects of corporate harms on vulnerable individuals and groups. *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 204–05 (1998) (arguing that norms involving prevention of bodily harm for vulnerable groups are more influential); Kevin T. Jackson, *The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights*, 22 MINN. J. INT'L L. 71, 125 (2013) (referring to the reputational ramifications of corporate malfeasance connected with basic human rights as "moral felonies").

[78] *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 798–99 (2005) (noting the insulation of corporate shareholders caused by their lack of information about the effects of a corporation's negative conduct on society).

[79] Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1065 (2011).

[80] *See* Elhauge, *supra* note 78, at 799 (arguing that dispersed public shareholders do not act on moral or social norms even if individual shareholders believe they are important). *But see* Ribstein, *supra* note 14, at 1449–50 (challenging Elhauge's assumption that shareholders will disregard social incentives).

[81] *See* Fung, Graham, Weil & Fagotto, *supra* note 10, at 158.

[82] *See* Ripken, *supra* note 40, at 160–76, 181–82.

[83] Prentice, *supra* note 79, at 1080.

[84] *See* Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 11–17 (2004).

[85] *See* Robert P. Bartlett, III, *Inefficiencies in the Information Thicket: A Case Study of Derivative Disclosures During the Financial Crisis*, 36 J. CORP. L. 1, 55–56 (2010). *But see* Davidoff & Hill,

adverse social impacts at issue, social transparency regimes may be similarly hindered by these cognitive shortcomings.

Third, mandatory disclosure may fail due to perverse or otherwise less socially desirable incentives to disclosers. Absent a fiduciary obligation above and beyond disclosure, the very act of disclosing may free corporate agents to act in even more self-interested ways by allowing them to rationalize their behavior as morally justified.[86] Similarly, firms may satisfy disclosure requirements while seeking to minimize changes in their substantive behavior.[87] A related concern arises from the possibility that unwanted conduct deterred by mandatory disclosure may lead to the worst of unintended consequences: a shift to even less desirable conduct.[88] A regulatory focus on one set of risks may create incentives for companies to shift their behavior towards other equally or more risky practices, or other jurisdictions that are not regulated by mandatory disclosure.[89]

III. TARGETED SOCIAL TRANSPARENCY AS A REGULATORY TECHNIQUE

A. The Emergence of TST

A new genus of social transparency has recently emerged. Targeted social transparency, or TST, consists of mandatory disclosure regulation that is crafted for the purpose of addressing noneconomic public policy objectives specific to individual countries, regions, or industries. TST represents both an evolution of social transparency as well as a major departure from generalized, broad-based social transparency regimes. In comparison to other forms of social transparency, TST's use of sharply focused disclosure requirements permits legislators and regulators to use disclosure for narrowly defined ends. Unlike Regulation S-K and other reporting requirements under U.S. federal securities law, TST regimes address narrowly defined social objectives through mandatory disclosure of specific nonfinancial information for the benefit of a range of noninvestor stakeholders. In contrast to the materiality standard governing Regulation S-K, mandatory disclosure under TST is triggered by explicit statutory and

supra note 51, at 628–29 (asserting that securities disclosure provides sufficient notice to sophisticated investors).

[86] *See* Prentice, *supra* note 79, at 1101–02.

[87] David Weil, Mary Graham & Archon Fung, *Targeting Transparency*, 340 SCIENCE 1410, 1411 (2013).

[88] Manne, *supra* note 27, at 485–86.

[89] *See* Weil, Graham & Fung, *supra* note 87, at 1411. The potential for this kind of risk-shifting behavior is a potential problem in respect of TST. *See infra* text accompanying note 146 (citing concerns that conflict minerals disclosure might simply incentivize MNEs to source these goods from other non-TST regulated jurisdictions).

regulatory requirements that are themselves based on social objectives.

The emergence of TST reflects the convergence of several interrelated factors in global governance, CSR, and financial regulation.[90] First, cross-border financial activity, international trade, and foreign direct investment have led to a growing awareness of the powerful role of corporations as global actors.[91] However, governments and MNEs have largely rejected the implementation of substantive requirements on global corporate conduct through international legal instruments. The failure of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights exemplifies the lack of consensus on the legal obligations of private nonstate actors.[92] Private rights of action against MNEs in domestic courts for violations of human rights, environmental, and labor standards are relatively narrow and limited.[93] As the need for cross-border governance increases while international legal reform remains stagnant, social transparency regimes provide an appealing means of addressing global problems.[94]

Second, TST also seeks to address the shortcomings of the New Governance model of regulation exemplified by the GRI and other voluntary reporting schemes. New Governance regulation emerged as a counterpoint to traditional top-down, command and control regulation dictated by government agencies.[95] Regulatory schemes based on New Governance principles adopt a participatory approach that embraces flexibility, experimentalism, localism, and reflective self-regulation.[96] New Governance-based securities regulation features communication mechanisms between regulators and firms to promote industry-based

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[90] A thorough descriptive analysis of the historical antecedents to TST is beyond the scope of this Article. Nevertheless, the following discussion identifies and briefly explores the political and economic circumstances that have enabled the recent emergence of TST regimes.

[91] *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461–65 (2001) (outlining the growing need and difficulty of attaching human rights responsibility on corporations).

[92] *See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Comm'n on the Promotion and Protection of Human Rights, 55th Sess., Aug. 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter UN Norms]; *see also* Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005) (analyzing the shift in how international law regulates private corporations marked by the UN norms).

[93] The Supreme Court's decision in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), substantially reduced the scope of the Alien Tort Statute (ATS) by excluding cases involving purely extraterritorial conduct. The ATS, which allows U.S. district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations," has been a highly celebrated (or much decried) jurisdictional basis for foreign plaintiffs to seek redress against multinational corporations for violations of international human rights law committed in foreign countries. 28 U.S.C. § 1350 (1789).

[94] FUNG, GRAHAM & WEIL, *supra* note 4, at 128.

[95] Dhir, *supra* note 34, at 58.

[96] *See* Hess, *supra* note 49, at 454–55.

learning within broad policy guidelines and regulatory goals.[97]

However, strategic behavior by MNEs has led to growing dissatisfaction with the GRI and similar corporate reporting schemes.[98] Social reporting, without regulatory oversight and enforcement, becomes a ritualistic practice that fails to meaningfully change firm behavior.[99] The threat of state regulation is often an insufficient means of compelling adherence with CSR norms.[100] This has spurred commentators to propose external monitoring schemes that assess and enforce implementation of New Governance principles.[101] TST, in this important respect, constitutes a huge step forward. By expressly and explicitly adopting social objectives within the mandatory disclosure framework of U.S. federal securities law, TST imposes greater control on the content and format of disclosed information in order to ensure that it addresses public goals.[102] TST regimes enforce an affirmative obligation to disclose with the threat of antifraud liability under the Exchange Act.[103]

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[97] *See* Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 28 (2008). Along similar lines, mandatory disclosure embraces the concept of "regulation by information" by requiring MNEs to produce information that they can use to review, benchmark, and improve their own social performance. *See* FUNG, GRAHAM & WEIL, *supra* note 4, at 130; *see also* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 186–88, 193 (2004) (describing regulation by information as governance premised on governments providing information to let individuals regulate themselves).

[98] *See* Chiu, *supra* note 34, at 376–92 (arguing that standardization and convergence in CSR reporting have led to weak and uncritical market-based governance); Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL'Y F. 67, 136–37 (2011) (noting how competition between private governance schemes for corporate participants frequently leads to lower minimum standards).

[99] *See* Sarfaty, *supra* note 21, at 608 (characterizing voluntary CSR reporting as "transparency for its own sake rather than actual improvements in behavior"); Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad*, 46 WAKE FOREST L. REV. 561, 567 (2011) (noting how a good score in the GRI may become an end in itself); Williams, *supra* note 35, at 501 (cautioning against disclosure as an end in itself).

[100] *Cf.* Thomas Risse, *Governance Under Limited Sovereignty*, *in* BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD 93 (Martha Finnemore & Judith Goldstein eds., 2013) (noting the voluntary implementation of CSR practices by MNEs).

[101] *See* Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 431–32 (2005) (proposing that governments promote oversight of MNEs' compliance with voluntary codes of conduct through the licensing of nongovernmental monitors); Ratner, *supra* note 91, at 533 (referring to efforts by NGOs and labor unions to include procedures for independent monitoring of corporate codes of conduct).

[102] *See* Hess, *supra* note 21, at 467–68 (proposing mandatory social reporting to reduce strategic reporting by MNEs); Shane M. Shelley, *Entrenched Managers & Corporate Social Responsibility*, 111 PENN ST. L. REV. 107, 128–29 (2006) (arguing that mandatory disclosure of CSR impacts reduces the "gaming" of social responsibility performance).

[103] *See* Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1464 (2004) (observing that in the absence of an express obligation to disclose social and environmental activities under U.S. federal securities law, corporations can simply choose not to disclose information about their overseas

Finally, TST reflects the appeal of extraterritorial regulation. Traditionally, U.S. federal securities law was based on the presumption that a country's laws apply only to acts or events occurring within its territory.[104] Increasingly, domestic law has been extended to regulate conduct outside of the United States notwithstanding recent U.S. Supreme Court decisions that have limited extraterritoriality.[105] U.S. federal securities law has been at the forefront of this phenomenon. Perhaps the most prominent application of extraterritorial regulation in U.S. federal securities law is the Foreign Corrupt Practices Act (FCPA), which imposes civil liability and criminal sanctions on U.S. persons as well as foreign Exchange Act reporting companies for bribery of foreign government officials even when such acts occurred offshore.[106] Similarly, the Dodd-Frank Act applies extraterritorial regulation in a range of areas.[107]

B. Examples of TST in U.S. Federal Securities Law

Although nascent in its current form, the implications of TST are already the subject of intense debate. U.S. federal securities law has begun embracing TST as a means of furthering foreign policy objectives in the area of international human rights. The following discussion examines two contrasting examples of TST in U.S. federal securities law to date: (i) "conflict minerals" reporting under § 1502 of the Dodd-Frank Act, and (ii) enhanced Iran-related reporting requirements mandated by § 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012.

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operations in order to avoid Rule 10b-5 liability).

[104] *See* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY 33–35 (2012); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (acknowledging the presumption against extraterritoriality as a principle of statutory interpretation).

[105] *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 846–49 (2009) (citing the use of extraterritoriality in antitrust, securities regulation, various areas of intellectual property law, corporate law, bankruptcy, tax criminal law, environmental law, civil rights, and labor law). In 2010, the Supreme Court rejected the extraterritorial application of Rule 10b-5 in so-called "f-cubed" lawsuits—i.e., securities fraud claims against foreign defendants by foreign plaintiffs who bought their securities outside the United States. *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010). The Dodd-Frank Act subsequently reaffirmed federal jurisdiction over such Rule 10b-5 suits brought by the SEC and the U.S. Department of Justice. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010).

[106] *See* Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (2006)); *see also* Woody, *supra* note 71, at 1342–43 (comparing the FCPA and the Dodd-Frank Act).

[107] *See* Sean J. Griffith, *Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation*, 98 MINN. L. REV. 1291, 1330–35 (2014) (describing the assertion of broad extraterritorial regulatory authority by the Commodity Futures Trading Commission (CFTC) in respect of swaps activities); Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 771–76 (2014) (examining the CFTC's extraterritorial regulation of swaps specifically in respect of international financial institutions and other state-owned financial entities).

1. *Conflict Minerals Disclosure Under the Dodd-Frank Act*

The "conflict minerals" provisions in § 1502 of the Dodd-Frank Act (DFA § 1502) require Exchange Act reporting companies to disclose to the SEC their internal measures to exercise due diligence and chain of custody of minerals mined in the Congo or adjacent countries which have historically been linked to civil strife, human rights abuses, and violence.[108] The overarching purpose of DFA § 1502 is evident in its prologue, which expressly states that it is intended to address "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo [that are used to help] finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, [that contribute] to an emergency humanitarian situation therein . . . ."[109] The human rights impact of conflict minerals directly and indirectly involves business. For example, local mining companies and their security providers are directly involved in human rights abuses such as forced labor.[110] Further, an array of companies—both locally based and MNEs—that buy, trade, transport, process, and finance the purchase of conflict minerals may fund and thereby perpetuate the conflict in the Congo.[111] DFA § 1502 seeks to restrict funding sources for armed groups in the Congo through the dissemination of information about the connection between their commercial activity and human rights violations.[112]

Under DFA § 1502, an Exchange Act reporting company must disclose in a new specialized disclosure report filed with the SEC whether any conflict minerals that are "necessary to the functionality or production of a product manufactured by such [company]" originated in the Congo or any country that shares an internationally recognized border with the Congo (i.e., Angola, Burundi, Central African Republic, Rwanda, Sudan, Tanzania, Uganda, and Zambia).[113] It designates columbite-tantalite (coltan), cassiterite, gold, or wolframite (or any of their respective

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[108] Dodd-Frank Act § 1502(b) (amending § 13 by adding a new subsection (p)).

[109] Dodd-Frank Act § 1502(a).

[110] *See* Laura E. Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. for Global Dev., Working Paper No. 284, 2012), *available at* http://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf.

[111] Ochoa & Keenan, *supra* note 43, at 131–33.

[112] *See id.* at 134, 137–38; *see also* Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249B) (citing statement of Senator Russ Feingold, one of its cosponsors).

[113] 15 U.S.C. §§ 78m(p)(1)(A), (2); *see also* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,280 (describing a new SEC form for such disclosure, Form SD).

derivatives) as conflict minerals if sourced from the Congo or contiguous countries.[114] These minerals are typically acquired by MNEs indirectly through intermediaries for use in manufacturing a wide range of products—most notably consumer electronics.[115] If an Exchange Act reporting company determines that it uses one or more minerals designated by DFA § 1502 either to manufacture a product or any such mineral is contained in a company manufactured product itself, then it must comply with DFA § 1502.[116] There is no exception for *de minimis* use of conflict minerals nor grandfathering for any companies, products, or industries.[117] Most importantly, disclosure under DFA § 1502 is not subject to the materiality standard.[118]

If an Exchange Act reporting company determines that it uses one or more conflict minerals, it must follow a multistep disclosure and due diligence process. First, the company must conduct a reasonable country of origin inquiry into their source of origin.[119] Upon completing this inquiry, if the company has determined that it uses conflict minerals, it must (i) exercise due diligence on "the source and chain of custody" of the conflict minerals, and (ii) arrange an independent private sector audit on the source and chain of custody of the conflict minerals through its supply chain and disclose a summary of the results thereof.[120] On the basis of these additional measures, as applicable, the company must disclose whether or not it uses conflict minerals and describe the measures that it has taken on Form SD.[121]

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[114] Dodd-Frank Act § 1502(e)(4)(A). These minerals are commonly referred to as "3TG" (tin, tantalum, tungsten, and gold) in the mining industry.

[115] *See* Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105, 107 (2012).

[116] In addition, there is an exception for a company that uses conflict minerals from recycled and scrap sources even if they were originally sourced from the Congo. *See* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,332 (codified at 17 C.F.R. pts. 240, 249b (2012)).

[117] Conflict Minerals Final Rule, 77 Fed. Reg. at 56,298 (codified at 17 C.F.R. pts. 240, 249b (2012)) (declining to include a de minimis exception through SEC rulemaking).

[118] *See* Conflict Minerals Proposed Rule, 75 Fed. Reg. 80,948, 80,960 (Dec. 23, 2010) (stating that nature and purpose of DFA § 1502 is "qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act"); *see also* Woody, *supra* note 71, at 1340–42 (criticizing the absence of a materiality requirement in DFA Section 1502).

[119] *See* 15 U.S.C. § 78m(p)(1)(A)(i)-(ii).

[120] *Id.*

[121] In addition to filing Form SD, the company must attach a separate, more detailed Conflict Minerals Report as an exhibit to Form SD. Conflict Minerals Final Rule, 77 Fed. Reg. at 56,302 (codified at 17 C.F.R. pts. 240, 249b (2012)). The Conflict Minerals Report must include "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such [conflict] minerals, which measures shall include an independent private sector audit of such report." 15 U.S.C. § 78m(p)(1)(A)(i).

2. Human Rights Disclosure Under the Iran Threat Reduction and Syria Human Rights Act

Another example of SEC mandatory disclosure expressly justified by human rights objectives is found in the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA). ITRA builds upon a series of U.S. laws and executive orders that impose sanctions against Iran.[122] The U.S. sanctions regime against Iran has been motivated by a variety of concerns over the Iranian government's nuclear program and proliferation thereof, support for international terrorist organizations, and human rights abuses.

ITRA, in particular, implements a range of new measures relating to human rights abuses in Iran.[123] Such measures include the following: (i) requiring the President to report on the inclusion of Iranian political leaders as human rights abusers subject to sanctions;[124] (ii) imposition of sanctions on persons that knowingly provide Iran, the Iranian government, or for use in Iran, any goods or technologies likely to be used to commit serious human rights abuses against the people of Iran (e.g., firearms and ammunition, rubber bullets, chemical sprays, electroshock weapons, and surveillance technology);[125] and (iii) imposition of sanctions against persons who engage in censorship or assist others in the impairment of freedom of expression in Iran.[126]

Within this broad mandate, § 219 of ITRA (ITRA § 219) imposes new reporting requirements on Exchange Act reporting companies to assist the U.S. government in executing ITRA's human rights-based sanctions.[127] ITRA § 219 amends § 13 of the Exchange Act by requiring Exchange Act reporting companies to disclose any information concerning, *inter alia*, their assistance in the transfer of goods or technologies, or the provision of services, that are likely to be used by the Iranian government to commit serious human rights abuses.[128] If an Exchange Act reporting company has "knowingly engaged" in such activity, then it must include in its quarterly

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[122] *See* Iran and Libya Sanctions Act of 1996, Pub. L. 104-172, 110 Stat. 1541 (1996) (codified as amended at 50 U.S.C. § 1701); Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) of 2010, Pub. L. 111-195, 124 Stat. 1312 (2010). In addition, regulations promulgated by the Department of Treasury's Office of Foreign Assets Control (OFAC) restrict trade, investment, and financial activities with Iran by U.S. persons. *See* Westbrook, *supra* note 50, at 47–50.

[123] *See* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, §§ 401–403, 411–415, 126 Stat. 1214 (2012).

[124] *Id.* § 401 (amending § 105 of CISADA).

[125] *Id.* § 402 (adding a new § 105A to CISADA).

[126] *Id.* § 403 (adding a new § 105B to CISADA).

[127] ITRA § 219 went into effect on February 6, 2013. *See id.* § 219(b) (amending § 13 by adding a new subsection (r)); *see also* SEC, Compliance and Disclosure Interpretations, Section 147, Section 13(r), Questions 147.01 and 147.02 (Dec. 4, 2012), *available at* http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm.

[128] 15 U.S.C. § 78m(r)(1)(C)).

or annual filing to the SEC information concerning the nature and extent of the activity, any gross revenues and net profits attributable to the activity, and whether it or any affiliate intends to continue the activity.[129] Like DFA § 1502, there is no *de minimis* exception to ITRA § 219 disclosure requirements.[130] Further, an Exchange Act reporting company must concurrently file a separate notice of disclosure with the SEC, which upon receipt by the SEC shall be transmitted to the President and Congress.[131] The President is required to initiate an investigation to determine within 180 days whether sanctions should be imposed on the Exchange Act reporting company (or its affiliate) on the basis of the ITRA § 219 disclosure.[132]

3. Comparing and Contrasting Approaches to TST

DFA § 1502 and ITRA § 219 constitute two examples of TST under U.S. federal securities law currently in effect.[133] Other applications of TST follow similar approaches. Section 1504 of the Dodd-Frank Act, the counterpart to DFA § 1502, requires oil, gas, and mining companies to disclose certain payments made to governments for the commercial development of natural resources.[134] Its status remains uncertain.[135] A TST regime targeted at North Korea and modeled on ITRA § 219 is pending in Congress.[136] Other countries have recently enacted, or are considering

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[129] *Id.* § 78m(r)(2).

[130] *See* Brian Breheny, *Section 13(r) Disclosure Guidance for Public Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 21, 2013, 9:10 AM), http://blogs.law.harvard.edu/corpgov/2013/02/21/section-13r-disclosure-guidance-for-public-companies.

[131] 15 U.S.C. § 78m(r)(4).

[132] *Id.* § 78m(r)(5).

[133] Three industry associations—the National Association of Manufacturers, the Business Roundtable, and the U.S. Chamber of Commerce—challenged the SEC's implementation of DFA § 1502. On April 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Conflict Minerals Final Rule with the exception of the requirement that issuers state in the Exchange Act filings and on their websites that their products are "DRC conflict free," "not been found to be DRC conflict free," or "DRC conflict undeterminable." *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014). Following this decision, the SEC affirmed that Exchange Act reporting companies were required to meet the initial June 2, 2014 deadline for all other DFA § 1502 disclosure requirements. *See* Keith F. Higgins, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule (Apr. 29, 2014), *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994#.U9wfjyjBEgo.

[134] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376 (2010). Section 1504 complements the Extractive Industries Transparency Initiative (EITI), a voluntary stakeholder initiative that combats corruption by providing disclosure that enables comparison of what extractive companies pay governments with what governments say they receive.

[135] In 2013, a U.S. federal court decision vacated SEC Rule 13q-1, which implemented § 1504's disclosure requirements. *See* Am. Petrol. Inst. v. Oxfam Am., Inc., 953 F. Supp. 2d 5 (D.D.C. 2013).

[136] The North Korea Sanctions Enforcement Act of 2014, which was passed by the House of Representatives on July 28, 2014, seeks to strengthen financial sanctions against the government of

enacting, social transparency regimes under domestic securities law comparable to DFA § 1502.[137]

DFA § 1502 and ITRA § 219 raise a number of issues regarding the scope and purposes of TST. The following figure identifies the major differences between these two TST regimes:

Figure 2. Comparison of DFA § 1502 and ITRA § 219

DFA § 1502		ITRA § 219
Human rights abuses associated with conflict minerals trade and civil conflict in the Congo	*Scope*	Human rights abuses by Iranian government; *plus* Iran's energy sector, WMDs and other military capabilities, support for terrorism, money laundering
End involvement of armed groups in Congo-based conflict minerals commercial activity	*Objectives*	Expand and strengthen U.S. economic sanctions against Iran

North Korea. It targets firms, foreign governments, other entities, and individuals involved in human rights abuses committed by the North Korean government as well as the proliferation of weapons of mass destruction, money laundering and other illicit activities, sponsorship of international terrorism, censorship, and other sanctioned activities. *See* North Korea Sanctions Enforcement Act of 2014, H.R. 1771, 113th Cong. §§ 2, 101(a) (2014). Similar to ITRA § 219, it imposes new disclosure requirements under the Exchange Act that would require an Exchange Act reporting company to disclose its involvement in any sanctioned activity in its annual or quarterly report filed with the SEC. *Id.* § 302(a) (amending § 13 of the Exchange Act by adding a new subsection (s)).

[137] *See* Sarfaty, *supra* note 7, at 108 (describing legislation in Canada and the EU). In March 2014, the European Commission released a proposed framework for conflict minerals regulation. *See* European Commission, *Proposal For a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self-certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict-affected and High-risk Areas*, 2014/0059 (COD) (Mar. 5, 2014), *available at* http://trade.ec.europa.eu/doclib/docs/2014/ march/tradoc_152227.pdf; *see also* Karel De Gucht, European Commission, *Ensuring Minerals From Conflict Zones Are Sourced Responsibly*, STATEMENT/14/50 (Mar. 5, 2014), *available at* http://europa.eu/rapid/press-release_STATEMENT-14-50_en.htm (announcing the European Commission's proposed regulation).

Use of conflict minerals "necessary to the functionality or production of a product manufactured"	*Trigger*	"Knowingly engaged" in sanctioned activity
Disclosure on Form SD (and Conflict Minerals Report); country of origin inquiry; supply chain due diligence	*Requirements*	Disclosure in SEC periodic reporting; filing of separate notice of disclosure with SEC
Exchange Act liability for disclosure violations	*Penalties*	Exchange Act liability for disclosure violations; potential imposition of sanctions against company

Both TST regimes cover a broad range of activities and entities. Neither DFA § 1502 nor ITRA § 219 includes a materiality threshold for triggering mandatory reporting.[138] MNEs are subject to potential liability under the Exchange Act for any false or misleading information.[139] Neither regime establishes a bright-line rule that distinguishes domestic issuers from foreign private issuers—both domestic and foreign MNEs are subject to their respective disclosure requirements.[140] Comparable to supply-chain reporting required by DFA § 1502, ITRA § 219 requires Exchange Act reporting companies to disclose activities of any affiliate, which may include transactions and dealings with foreign customers, clients, vendors,

[138] *See* 15 U.S.C. § 78m(r)(2)(B) (providing that a company subject to ITRA § 219 shall disclose a detailed description of "the gross revenues and net profits, *if any*, attributable to the activity") (emphasis added).

[139] *See* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,304 n.342 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249B) (noting that issuers are subject to potential liability under §§ 10(b), 13(a) and (p), 15(d), and 18(a) of the Exchange Act as well as Rule 10b-5); *see also* text accompanying notes 57–59 (summarizing disclosure-related Exchange Act liability). Importantly, however, liability is still conditioned on the materiality requirements in these antifraud provisions. For example, under Rule 10b-5, a plaintiff may only sue an Exchange Act reporting company for misrepresentation or omission of a material fact in its DFA § 1502 disclosure documents. *See* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,304 n.342.

[140] *See* Conflict Minerals Final Rule, 77 Fed. Reg. at 56,287 (declining to exempt foreign private issuers from DFA § 1502); 15 U.S.C. § 78m(r)(1) (applying ITRA § 219 to all issuers).

and counterparties and the activities of corporate directors and senior executives.[141] Consequently, ITRA § 219 compels MNEs to provide disclosures regarding the activities of non-U.S. affiliates that are organized under the laws of non-U.S. jurisdictions. In many of these non-U.S. jurisdictions, it is legal to do business in Iran and to do business with the Iranian government.[142]

Compliance with both TST regimes imposes significant costs on firms. Their respective disclosure requirements involve various functions within MNEs, including legal counsel, financial reporting, audit and accounting, supply-chain management and procurement, manufacturing quality control, and public relations.[143] Related compliance costs—which may include supply-chain due diligence, third-party verification, external private audits, traceability schemes, and sourcing mechanisms—require external expenditures.[144] Aside from these direct costs, it is plausible that the information disclosed by MNEs regarding their use of conflict minerals may impose a variety of indirect costs.[145] Due to these costs, some observers have argued that TST regimes may simply divert MNEs to other regulatory jurisdictions and host countries that do not have comparable social transparency rules.[146]

DFA § 1502 and ITRA § 219 differ in several significant ways. Most importantly, DFA § 1502 is solely dedicated to advancing international human rights whereas the human rights goals of ITRA § 219 are

[141] Under Rule 12b-2 of the Exchange Act, an "affiliate" of a company is a person who directly (or indirectly through one or more intermediaries) controls, is controlled by, or is under common control with such company. The term "control" is defined as the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. *See* 17 C.F.R. § 240.12b-2.

[142] *See* Ben DiPietro, *Iran Sanctions Law Reporting Causing Confusion*, WALL ST. J. CORRUPTION CURRENTS BLOG (Feb. 20, 2013, 1:49 PM), http://blogs.wsj.com/corruption-currents/2013/02/20/iran-sanctions-law-reporting-causing-confusion.

[143] *See* David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. &. TECH. L. 327, 335–36 (2011) (describing the range of DFA § 1502 compliance costs).

[144] Woody, *supra* note 71, at 1332–33; *see also* Edward Wyatt, *Use of 'Conflict Minerals' Gets More Scrutiny From U.S.*, N.Y. TIMES, Mar. 19, 2012, at B1 (noting compliance costs ranging from $71 million estimated by the SEC to $9–$16 billion estimated by the National Association of Manufacturers).

[145] *See* Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 392 (2013) (citing the cost to shareholders resulting from DFA § 1502's effects on management and customer decision making); *see also* Ochoa & Keenan, *supra* note 43, at 146–47 (noting concerns about potential litigation under the ATS, complaints before National Contact Point bodies, targeted UN sanctions, and consumer boycotts).

[146] Sarfaty, *supra* note 7, at 112–13 (noting that mandatory disclosure may force companies to withdraw from the U.S. capital markets); Woody, *supra* note 71, at 1345–46 (arguing that DFA § 1502 may lead to a *de facto* embargo of all minerals from the Congo damaging the Congolese economy in the process).

intermingled with other nonsocial policy objectives of the U.S. sanctions regime against Iran.[147] Reflecting this divergence, ITRA § 219 imposes penalties on MNEs that comply with its disclosure requirements—i.e., the possibility of being subject to sanctions after investigation by the President). Further, unlike the stand-alone DFA § 1502, ITRA § 219 is accompanied by other nonmandatory SEC programs to address corporate complicity with state sponsors of terrorism such as Iran.[148]

IV. CONSTRUCTIVE DISCOURSE AND CORPORATE STRATEGY

A. The Integrative and Expressive Dimensions of Constructive Discourse

The broad mandate of TST and the limitations of mandatory disclosure pose particularly unique challenges.[149] In comparison to mandatory disclosure of economic and financial information under U.S. federal securities law, TST broadens the de facto audience for disclosed information beyond investors to all stakeholders. Moreover, in comparison to Regulation S-K and other generalized social transparency regimes, TST's disclosure requirements are more focused, exhaustive, and arguably contentious.

In light of concerns about the effectiveness and costs of mandatory disclosure, this Article presents the concept of constructive discourse. Drawing from constructivist approaches to public international law, applications of reflexive law, and the experiences of voluntary CSR reporting schemes referenced in the following discussion, constructive discourse helps conceptualize the ways in which MNEs use the process of complying with disclosure and disclosed information to recognize and respond to TST's geographically defined or issue-specific public policy objectives. The term "constructive discourse" reveals its dual conceptual foundations: (i) constructivism, originally formulated in political science and subsequently applied to legal rules and institutions, which focuses on the role of norms in shaping behavior; and (ii) discourse-based theories of international law and international relations theory, which emphasize the

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[147] ITRA § 219 also requires disclosure of transactions and dealings relating to Iran's investment in the petroleum and petrochemical sectors, development of weapons of mass destruction, or sponsorship of international terrorism. *See* 15 U.S.C. §§ 78m(r)(A), (B), and (D).

[148] *See* Amy Deen Westbrook, *What's in Your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151, 1217–21 (2010) (describing the accomplishments and failures of the SEC's Office of Global Security Risk).

[149] *See* Davidoff & Hill, *supra* note 51, at 634–36 (lamenting securities disclosure as a flawed alternative to substantive regulatory reform and specifically citing DFA § 1502); *see also* Part I.B.2.

ways in which communication influences how legal obligations are interpreted, applied, and enforced.[150]

What distinguishes constructive discourse from traditional conceptions of mandatory disclosure is that its value is not directly derived from external responses to disclosed information. Whereas predominant rationales for mandatory disclosure focus on the use of information by stakeholders, constructive discourse emphasizes how MNEs can benefit from TST through firm-level, internally generated change. Constructive discourse posits that mandatory disclosure works when it helps incentivize MNEs to facilitate communication with each other and stakeholders.

Rather than constituting a legal doctrine or specific operational practices, constructive discourse may be viewed as a set of principles to show how firms can use social transparency for their own ends. Facilitating firm level discourse augments the impact of stakeholder pressure on MNEs by channeling the potentially transformative effects of norms and ideas, which can lead to changes in the underlying interests of firms.[151] Therefore, the effectiveness of a given TST regime can be gauged by its ability to catalyze the corporate policymaking and self-regulation processes through which MNEs identify information concerning their social impacts, ascertain their significance and relevance, and reconcile them with other corporate objectives. The insights of constructive discourse suggest that TST regimes should focus on establishing procedures to guide the decision making of MNEs and communication between them instead of crafting disclosure requirements with the arguably false hope of achieving predetermined policy outcomes.[152]

Constructive discourse consists of two nonsequential, overlapping, and mutually reinforcing dimensions: an integrative dimension and an expressive dimension. The following figure summarizes the basic characteristics of each dimension.

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[150] The author of this Article has previously explored applications of a related concept in other international legal contexts. *See* Stephen Kim Park, *Talking the Talk and Walking the Walk: Reviving Global Trade and Development After Doha*, 53 VA. J. INT'L L. 365, 397–413 (2013) (examining how development-based human rights doctrine can serve as the basis for institutional communication in the global trade regime).

[151] *See* Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 54–56 (2012) (identifying as a source of power in international relations the ability to shape, through the spread of norms and ideas, what societies see as legitimate and acceptable).

[152] *See* Hess, *supra* note 18, at 61 (quoting Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 299, 310–12 (Gunther Teubner ed., 1986)) (calling for a legal approach that enables a corporation and its stakeholders to more effectively communicate and influence each other rather than seeking "utopian and unrealistic" comprehensive social planning).

Figure 3. Integrative and Expressive Dimensions of Constructive Discourse

Integrative		Expressive
How MNEs use disclosure to learn about their activities	*Purpose*	How MNEs communicate through disclosure
MNE internal actors (e.g., management, directors, employees)	*Targets*	Other MNEs and stakeholders

1. Integrative Dimension

The integrative dimension of constructive discourse focuses on what corporate managers learn about the MNEs' social impacts through the disclosure process. In order for MNEs to maximize the utility that they derive from complying with TST disclosure requirements, they must be able to recognize the extent to which the social values underlying the TST regime bear on their own self-conceptions.[153] Constructive discourse facilitates the integration of the competing values underlying firm-level profit maximization and society-level noneconomic objectives. These distinct values are frequently difficult to reconcile thereby leading to a cognitive-like dissonance among corporate managers.[154] This dissonance between MNEs dual institutional selves—as profit maximizers on the one hand versus virtuous global citizens on the other—may lead to doubt and conflict about how to fulfill their social obligations. A firm's perception of its social obligations is determined by prevailing social expectations among stakeholders and other external parties of what constitutes appropriate business behavior.[155]

[153] For example, the human rights aspirations of MNEs may range from a fear of negative publicity arising from gross violations of human rights to a deep-rooted normative commitment to human rights principles. In any event, there are potential conflicts between any such social values and other corporate objectives.

[154] *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L. ORG. 887, 904 (1998) (noting how self-awareness of discrepancies between words and actions and a consequent desire to enhance self-esteem lead to changes to norm-violating behavior by state leaders).

[155] Jackson, *supra* note 77, at 120. The instrumental effect of social expectations is evident in the concept of a "social license," which consists of the demands on and expectations for a business enterprise emerging from civil society. The demands of social licensors constrain corporate conduct independent of compliance with law. *See* Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308 (2004); *see also* Sarfaty, *supra* note 7, at 124–25 (noting the importance of social

For example, many corporate codes of conduct include express commitments to social values such as human rights.[156] Whether such codes are developed ad hoc for a specific firm (internal codes) or for multiple firms in a specific industry or generally (model or external codes), an MNE is expected to pledge itself publicly to a code's principles, standards, or guidelines.[157] Nonetheless, there are cognitive gaps between the MNEs' legalistic commitment to social values set forth in codes of conduct and their understanding of what is required to actually fulfill them.[158] The substance of disclosed information can help make tangible to MNEs the disjuncture between their rhetoric and their actions with respect to social values—i.e., when confronting themselves with information regarding their conduct, MNEs may realize that they are not who they claim to be.[159] Disclosed information regarding the adverse effects of MNEs on the protection of human rights, for example, can add social meaning to abstract legal mandates.[160] In doing so, MNEs and their corporate managers identify and define for themselves the prescriptive value of a given TST regime.[161] By linking specific situations to normatively meaningful social values, the act of disclosing may reduce ambiguity regarding the purpose of mandatory disclosure rules thereby enhancing the legitimacy of the TST regime itself.[162]

Beyond recognizing the relevance of norms, MNEs can use disclosure to facilitate creative and critical thinking about how to minimize the

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license to MNEs that operate in host countries with weak governments).

[156] *See* Murphy, *supra* note 101, at 400.

[157] *See id.* at 400–01. Many corporate codes of conduct include provisions on information disclosure by MNEs. Ratner, *supra* note 91, at 531.

[158] *See* Murphy, *supra* note 101, at 421–22.

[159] *See* Finnemore & Sikkink, *supra* note 154, at 903–04 (noting the role of conformity and self-esteem in shaping compliance with norms); Park, *supra* note 150, at 402 (noting the effects of rights-based norms on self-conceptions of state behavior).

[160] *See* Woods, *supra* note 76, at 65 (noting the impact of advertisements on triggering implicit attitudes).

[161] *See* Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 72 (2000) (arguing that law is persuasive when it calls upon legal reasoning to justify its processes and substantive goals); Finnemore & Sikkink, *supra* note 154, at 891 (identifying the quality of "oughtness" in norms that establish standards for socially appropriate or proper behavior).

[162] *See* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988) (defining legitimacy as the "quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*"); Christiana Ochoa, *Corporate Social Responsibility and Firm Compliance: Lessons from the International Law - International Relations Discourse*, 9 SANTA CLARA J. INT'L L. 169, 174 (2011) (applying Franck's legitimacy framework to CSR regimes); *see also* Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559, 592 (2004) (observing that a businessperson must believe "that the purpose behind the law is sufficiently noble" in order to be willing to forego pecuniary self-interest).

adverse social impacts of their cross-border activities.[163] The act of disclosing requires that the various divisions within MNEs coordinate with each other to create monitoring systems, implement industry best practices, modernize data collection, and strengthen internal controls and risk management functions. TST regimes are "reflexion" mechanisms, which are defined as internal firm procedures that facilitate self-critical reflection by MNEs about how to identify, substantiate, and fulfill normative understandings.[164] Disclosed information provides MNEs with strategically valuable knowledge about how they operate and the perceptions of their operations among stakeholders.[165]

2. *Expressive Dimension*

The expressive dimension of constructive discourse focuses on disclosure as the basis for social, interactive communication by MNEs. It focuses on processes through which MNEs use disclosure to communicate with each other and stakeholders regarding the implications of adverse social impacts. Political theorists and sociologists have analyzed the causal significance of argumentation, persuasion, acculturation, and other forms of socialization in influencing state compliance with international law.[166] According to these approaches, states comply with international human rights because they come to agree with their normative content through moral discourse.[167] Rhetorical commitments by states—initially driven by instrumental calculations based on reputation, power, and legitimacy—may eventually lead to the internalization of human rights norms.[168] Likewise, the ideas, values, and beliefs of MNEs are shaped through social processes

[163] *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983) (articulating the theory of reflexive law); *see also* Hess, *supra* note 18, at 66–72 (applying reflexive law principles to CSR reporting); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231–32 (1995) (identifying the application of reflexive law theory to environmental management).

[164] *See* Hess, *supra* note 18, at 51; Orts, *supra* note 163, at 1253.

[165] *See* Hess, *supra* note 18, at 81–82.

[166] *See* Hafner-Burton, Victor & Lupu, *supra* note 151, at 57 (identifying persuasion and communication as a source of power in international relations).

[167] *See* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms Into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 8–13 (Thomas Risse, Kathryn Sikkink & Stephen C. Ropp eds., 1999); Joel P. Trachtman, *Who Cares About International Human Rights?: The Supply and Demand of International Human Rights Law*, 44 N.Y.U. J. INT'L L. & POL. 851, 876 (2012).

[168] *See* Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT'L. L. 1079, 1084–85 (2013) (describing the "rhetorical entrapment" of governments through naming and shaming by human rights groups). *But see* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2006–07 (2002) (noting that, in absence of effective monitoring and enforcement mechanisms, a country may express its commitment to a human rights treaty while failing to meet its substantive requirements).

that generate shared understandings and mutual expectations.[169]

While theories of state-centric behavior should not be carelessly applied to MNEs, both share certain important characteristics.[170] Like states, processes of socialization between MNEs and other stakeholders influence how they act and on what grounds they justify their actions.[171] As with states and political leaders, the salience of social values to MNEs is premised on the ability of corporate managers to persuade others and a willingness on the part of corporate managers to be persuaded.[172]

The expressive dimension of constructive discourse reframes disclosure as an inherently social process both within and between MNEs.[173] Through the information gathering and due diligence activities that they require firms to conduct, TST regimes help shape what kinds of corporate conduct are seen as valid by defining the scope of socially legitimate behavior. Through its compliance with disclosure rules, an MNE makes a public commitment to the broader social values on which the TST regime is based.[174] By this measure, the more robust the disclosure requirement, the stronger the MNE's commitment to fulfill its goals.[175]

Further, references to social values, such as international human rights, in TST-mandated disclosure documents may influence the language used in

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[169] *See* Ochoa, *supra* note 162, at 171–75 (applying state-based international relations theory to the problem of MNE compliance with global CSR norms).

[170] *See id.* at 176 (cautioning that processes of socialization among MNEs require more formality and institutionalization in comparison to states); Andreas Georg Scherer, Guido Palazzo & Dorothée Baumann, *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505, 522 (2006) (noting the "striking parallel" between corporate and governmental reactions to accusations of human rights violations).

[171] Just as individuals are neither pure manifestations of self-interested *homo economicus* or cooperative *homo reciprocans*, both states and MNEs must also grapple with competing allegiances. Although governments and corporate management should not be casually attributed with human characteristics, their respective decision-making processes are driven by individuals and groups of individuals.

[172] *See* Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 14–16 (2000) (describing the conditions in which argumentative persuasion in international negotiations is feasible); *see also* Steven R. Ratner, *Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 572 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

[173] *See* Davidoff & Hill, *supra* note 51, at 632 (stating that "disclosure is importantly social"); *see also* Gerald F. Davis, *New Directions in Corporate Governance*, 31 ANN. REV. SOC. 143, 158 (2005) (observing that a firm's credibility concerning its accountability and transparency "is a matter of rhetoric").

[174] *See* Hathaway, *supra* note 168, at 2005 (noting the expressive function of treaties arising from what a country's membership in a treaty regime signals to other domestic or international actors); Woods, *supra* note 76, at 82–83 (suggesting that state compliance with a human rights norm is enhanced by the act of publicly declaring its commitment to the norm).

[175] *See* Woods, *supra* note 76, at 83–84 (arguing that human rights action plans can serve as commitment devices).

discourse among MNEs and between MNEs and their respective stakeholders.[176] This may be viewed positively or negatively. Spurred by external public pressure from NGOs, SRIs, and similar stakeholder groups that have access to disclosed information, the processes of socialization may lead to more frequent references to noneconomic values by corporate managers.[177] However, while the adaption of social rights language in securities disclosure may elevate the agendas of NGOs and other stakeholders, it also runs the risk of compromising future action to address adverse social impacts.[178] These language compromises may diminish the rhetorical power of disclosure by cloaking adverse social impacts in legal and technical jargon.[179] The potentially negative effects of assimilation suggest that regulatory oversight and bright-line rules limiting the autonomy of MNEs to determine how to comply with disclosure requirements are warranted.[180] Arguably, the transplantation of TST regimes into the relatively robust, far reaching enforcement mechanisms of U.S. federal securities law helps serve this purpose.[181]

In addition, disclosure is useful as a means to enable institutional learning by MNEs. MNEs can use the substance of disclosed information to generate a shared vocabulary with other MNEs and stakeholders on how social objectives should be balanced with other corporate objectives. Further, by facilitating the internalization of social norms within MNEs, the very act of using disclosed information to communicate externally facilitates evolutionary, iterative standard setting by MNEs.[182]

[176] *See* Jena Martin, *Business and Human Rights: What's the Board Got to Do With It?*, 2013 U. ILL. L. REV. 959, 992 (2013) (stating that articulating human rights as business risk may make it easier for firms to understand); Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57, 106 (2003) (identifying the evolution of a shared "pidgin" language between international human rights and economic actors).

[177] *See* Risse & Sikkink, *supra* note 167, at 25; Thomas Risse, *Governance under Limited Sovereignty*, *in* BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD 93 (Martha Finnemore & Judith Goldstein eds., 2013). The special role of in-house counsel as corporate managers with unique fiduciary duties and disclosure responsibilities is described later in this Article. *See infra* Part IV.B.2.

[178] *See* Ochoa, *supra* note 176, at 110–12; *see also* Katzenstein, *supra* note 168, at 1081–82 (arguing that governments are capable of shifting human rights discourse with NGOs in a manner to justify and reaffirm their own consequentialist justifications).

[179] *See* Davidoff & Hill, *supra* note 51, at 633 (arguing that lawyers have a "community of interest" in using disclosure "language that is technically accurate but manages to sound remote"); Ochoa, *supra* note 176, at 112 (arguing that language compromises between the human rights and international economic communities may preclude future action by formulating rights as economically based).

[180] *See* Ford, *supra* note 97, at 48 (proposing that deliberation and argumentation regarding regulatory compliance be subject to certain non-negotiable rules); Jackson, *supra* note 77, at 148 (advocating external verification of MNEs' human rights reporting).

[181] *See* Hess, *supra* note 18, at 72 (proposing regulatory oversight coupled with private enforcement of mandatory social reporting standards); *see also* Hathaway, *supra* note 168, at 2014 (suggesting that compliance with human rights treaties—and hence the substantive value of their expressive function—is bolstered by monitoring and enforcement mechanisms).

[182] *See* Ford, *supra* note 97, at 36 (describing one of the advantages of principles-based regulation).

Communication between MNEs and regulators, as well as information sharing among MNEs, facilitates the use of best practices and other forms of self-learning by firms.[183] By drawing from an array of particularized examples of ways in which they address the social impacts of their conduct, MNEs can use TST disclosed information to more effectively engage in dialogue with civil society, regulators, shareholders, and other MNEs about what is socially appropriate and necessary.[184]

While these actions are a potential source of value to MNEs on their own terms, they also serve the purpose of signaling to other MNEs their willingness to reconcile business and social values by following certain standardized, socially legitimated models of corporate behavior.[185] Acculturation shapes behavior by generating social pressure to conform with the expectations of a self-identified reference group.[186] In this vein, the proliferation of voluntary CSR certification schemes suggests that MNEs may seek to expressly acknowledge their conformity to global social values by "joining the club."[187]

B. Constructive Discourse and Corporate Strategy

One of the overarching purposes of constructive discourse is to harmonize the traditional regulatory foundations of TST and its New Governance aspects. The efficacy of TST depends, at least in part, on the MNEs' perception that they stand to individually gain from the visibility of their efforts to properly and thoroughly disclose information regarding their adverse social impacts.[188] Identifying positive synergies between disclosure requirements and firm-level utility will increase the likelihood that firms will improve the process, which will enhance both the sustainability and

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In this respect, the rules-based orientation of U.S. federal securities law arguably hinders the dynamic and insightful lawmaking carried out by firms in principles-based securities regulation regimes, such as the United Kingdom.

[183] Best practices involve regulated entities "devis[ing] practices to comply with relatively unspecific regulatory requirements," which are then selected and publicized as "best" by public regulators with the idea that these best practices will "be subsequently adopted by other regulated entities." *See* David Zaring, *Best Practices,* 81 N.Y.U. L. REV. 294, 308 (2006).

[184] *See* Hess, *supra* note 18, at 82–83.

[185] *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 667–68 (2004).

[186] *See id.* at 638; *see also* Trachtman, *supra* note 167, at 876–77; Woods, *supra* note 76, at 72.

[187] *See* Matthew Potoski & Aseem Prakash, *Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance*, 49 AM. J. POL. SCI. 235 (2005) (describing how corporate adherence to ISO 14001 environmental standards is driven by the appeal of the club's positive brand reputation).

[188] *See* FUNG, GRAHAM & WEIL, *supra* note 4, at 112 (observing that changing disclosers' perceptions of self-interest helps improve transparency systems and ensure their survival).

effectiveness of TST regimes.[189] The following discussion explores several ways that MNEs can strategically use constructive discourse. These strategic considerations fall into two broad categories: managing risk and enhancing competitive advantage. Both considerations rest on the instrumental value of social transparency—that is, as a means of increasing profits, enhancing shareholder value, and improving the financial interests of the firm.[190]

1. As Risk Management

Constructive discourse as risk management is based on the use of TST disclosure to prevent, identify, monitor, and mitigate adverse business outcomes.[191] These potential outcomes may be characterized as "risk"—contingent events that may potentially lead to future harm to the firm.[192] Risk management involves organizational processes through which a firm seeks to optimize the types and levels of risk with its strategic goals.[193]

The relationship between TST and risk management is manifested in two ways. First, MNEs must be cognizant of operational risk, which is defined as the "risk of loss resulting from inadequate or failed internal processes, people and systems or from external events."[194] Among the components of operational risk is compliance risk—i.e., risk of legal or regulatory sanctions, material financial loss, or loss to reputation as a result of a failure to comply with laws, regulations, rules, related self-regulatory organization standards, and codes of conduct.[195] MNEs may face several different forms of operational risk arising from their cross-border activities. First and foremost, MNEs must ensure their compliance with TST mandatory disclosure rules. Further, adverse social impacts, such as corporate complicity with international human rights, often present legal

[189] Hess, *supra* note 49, at 468; *see also* Ford, *supra* note 97, at 49 (asserting that a firm is more likely to comply when it is able to identify a link between its long-term business success and strong internal compliance processes).

[190] *See* Jackson, *supra* note 77, at 121.

[191] *See* Carroll & Shabana, *supra* note 13, at 97 (summarizing justifications for CSR practices based on reducing costs and risks to the firm).

[192] *See* Michelle M. Harner, *Barriers to Effective Risk Management*, 40 SETON HALL L. REV. 1323, 1328–29 (2010); Robert F. Weber, *An Alternative Story of the Law and Regulation of Risk Management*, 15 U. PA. J. BUS. L. 1005, 1010 (2013).

[193] Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 969 (2009).

[194] BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, PRINCIPLES FOR THE SOUND MANAGEMENT OF OPERATIONAL RISK 3 n.5 (2011), *available at* http://www.bis.org/publ/bcbs195.pdf.

[195] *See* BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, COMPLIANCE AND THE COMPLIANCE FUNCTION IN BANKS 7 (2005), *available at* http://www.bis.org/publ/bcbs113.pdf (defining compliance risk).

risks.[196] MNEs can address these risks by conducting ongoing due diligence of their activities, operations, and relationships. A prominent application is human rights due diligence, which involves the identification and investigation of relevant facts and then evaluation of those facts in light of a prevailing standard of care.[197] As an integral component of a corporation's enterprise risk management program, human rights due diligence overlaps with the common law duty of oversight, which requires that corporate boards attempt to ensure that an adequate internal information and reporting system is in place.[198]

Second, in the context of their adverse social impacts, MNEs must be concerned with risks to their reputation arising from negative publicity for failure to comply with social norms.[199] Reputation risks can be extremely costly albeit difficult to calculate as intangible assets.[200] MNEs are increasingly aware of risks to their global brands due to adverse human rights, environmental, and labor impacts in their global supply chains.[201] By formalizing social norms in the language of law, TST may augment reputational sanctions by making violation of norms more unambiguous.[202]

From a social welfare perspective, however, one objection to the use of TST as a risk management tool is that it suggests that adverse social impacts can be rationalized and contextualized.[203] According to these observers, risk management cannot be solely justified on instrumental

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[196] *See* Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 160 (2013) (referring to violations of local civil and criminal laws and domestic regulations in host country stemming from human rights abuses).

[197] Mark B. Taylor, Luc Zandvliet & Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach* 3–4 (John F. Kennedy Sch. of Gov't, Harv. Univ., Corporate Social Responsibility Initiative, Working Paper No. 53, Oct. 2009); *see also* Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451, 519 (2012) (describing the implementation of human rights risk management in accordance with the Guiding Principles).

[198] *In re* Caremark Int'l Inc. Deriv. Lit., 698 A.2d 959, 970 (Del. Ch. 1996) (establishing the standard of conduct for director oversight); *see* Ho, *supra* note 196, at 157–58 (describing the *Caremark* duty in the context of human rights due diligence); *see also* Harner, *supra* note 192, at 1332 (describing enterprise risk management (or ERM) as a "holistic approach to risk management that considers strategic and operational risks in addition to financial risks").

[199] *See* O'Callaghan, *supra* note 12, at 109 (identifying the environment, labor exploitation, indifference to the health and safety of workers, complicity in human rights abuses, and corruption and bribery as elements of reputation risk).

[200] *See id.* at 108–09.

[201] *See* Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L.325, 338–42 (2008) (describing the development of assurance services to certify that suppliers meet social standards in order to protect MNEs' "brand value").

[202] *See* Park, *supra* note 150, at 404, 406 (noting how rights-based discourse can enhance reputational sanctions).

[203] *See* Jackson, *supra* note 77, at 130–31 (arguing against the idea that the human rights responsibilities of business are defined by and justified with reference to social expectations).

grounds.[204] The convergence of "human rights" and "risk management" reflects the fact that the concept of risk management itself is defined by rhetorical and political practices that define what sorts of contingent events constitute a "risk" in the first place.[205] For example, the concept of human rights due diligence requires that firms evaluate risk from the perspective of potential victims not just risks faced by firms.[206]

TST regimes further reflect, highlight, and shape prevailing standards of corporate behavior.[207] The due diligence, monitoring, auditing, and supply chain management requirements in DFA § 1502 codify and incorporate principles of human rights due diligence.[208] By requiring firms to conduct due diligence, DFA § 1502 and ITRA § 219 force firms to integrate human rights impact assessments into their existing risk management systems.[209]

2. *For Competitive Advantage*

The use of TST for competitive advantage rests on the ability of MNEs to use social transparency to differentiate themselves from their competitors.[210] The social complexity of an MNE's relationships with its various stakeholders—defined by a web of overlapping, confusing, and sometimes conflicting legal obligations and social phenomena—can provide various opportunities for social transparency to be a source of sustainable competitive advantage.[211] TST enables firms to maximize and preserve their "reputation capital," which provides them with the credibility to profitably engage with regulators, NGOs, communities, and other

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[204] *See* Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739, 759 (2012) (arguing that corporations should have an affirmative obligation to help realize human rights, not merely respect them).

[205] *See* Weber, *supra* note 192, at 1063.

[206] *See* U.N. Human Rights Office of the High Comm'r, *Guiding Principles on Business and Human Rights*, ¶ 17 (2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf (providing that ERM must include risks to rights holders).

[207] *See* Gunningham, Kagan & Thornton, *supra* note 155, at 330 (noting how NGOs and other external stakeholders use compliance with regulation to judge compliance with social obligations).

[208] *See* Narine, *supra* note 145, at 371; Sarfaty, *supra* note 7, at 106 (referring to DFA § 1502).

[209] *See* Richardson, *supra* note 61, at 257 (arguing that translating environmental and ethical concerns as business risk through mandatory disclosure requirements helps facilitate corporate awareness of adverse social impacts).

[210] *See* Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 72 (2011) (identifying value, rareness, imperfect imitability, and the lack of an equal substitute as components of competitive advantage); Carroll & Shabana, *supra* note 13, at 97–99 (summarizing justifications for CSR practices based on gaining competitive advantage).

[211] *See* Bird, *supra* note 210, at 76 (defining social complexity as situations "when the source of a competitive advantage is known, but the method of replicating the advantage is difficult to identify due to social phenomena").

stakeholders.[212] While corporate efforts to strategically conform with social norms may lead to broader social benefits, that is not a precondition to its use by MNEs.[213]

For MNEs in industries where adverse social impacts are relatively common, the very act of complying with TST regimes may serve as an advantageous market signal.[214] While the "first mover" advantage accorded to firms may be diminished when disclosure is mandatory rather than voluntary, firms can augment the benefits of signaling by finding new means to communicate their culture of compliance to customers, investors, regulators, and other external parties.[215] An MNE can use disclosure to inform its stakeholders of its efforts to achieve the TST regime's policy goals by highlighting how it identifies, justifies, mitigates, and ultimately seeks to avoid adverse social impacts. A record of socially responsible disclosure practices may build trust with various stakeholders, thereby leading to potentially favorable legal treatment for MNEs.[216] Investors may value a corporation's willingness to disclose information regarding its social impacts resulting in shareholder support of management and increased interest from prospective investors.[217] Socially conscientious employees may value both the principle of transparency and greater knowledge about where they work.[218] Regulators may grant greater autonomy to socially transparent MNEs in implementing internal reporting and due diligence regimes.[219] SRIs may be more willing to add socially transparent MNEs to their selective lists of permitted investments or give such MNEs higher ratings.[220] NGOs may choose to cooperate with MNEs

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[212] *See* Gunningham, Kagan & Thornton, *supra* note 155, at 319, 320 (listing the use of reputation capital to obtain access to lawmakers, the trust of regulators, the tolerance of local communities, and the least risk of being targeted by NGOs).

[213] *See* Davis, *supra* note 173, at 153 (describing studies on strategic conformity by companies that do not lead to changes in the company's behavior).

[214] *See* FUNG, GRAHAM & WEIL, *supra* note 4, at 119–20 (noting that firms may gain "first mover" advantages from providing more information than competitors and then raising the bar of mandated disclosure); Babcock, *supra* note 77, at 36 (noting how companies that engage in voluntary environmental disclosure can curry favor from investors as early adopters).

[215] *See* James Rathz, *Compliance as the Competitive Differentiator*, 12 DUQ. BUS. L.J. 13, 23–24 (2009) (describing how financial professionals can use communication channels such as RFP responses, pitch books or prospect presentations, website profiles, newsletters, brochures, client reports, customer-service oriented communications, and proposed narrative-based SEC disclosure).

[216] *See* Carroll & Shabana, *supra* note 13, at 99 (noting that corporations can enhance their legitimacy and reputation though social and environmental disclosure).

[217] *See* Williams, *supra* note 2, at 1284–87 (describing the benefits of disclosure beyond compliance with existing legal requirements to corporations).

[218] *See* Babcock, *supra* note 77, at 37; Ribstein, *supra* note 14, at 1451–52; Faith Stevelman, *Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie*, 9 SANTA CLARA J. INT'L L. 101, 139 (2011).

[219] *See* Bird, *supra* note 210, at 76; Gunningham, Kagan & Thornton, *supra* note 155, at 331.

[220] Babcock, *supra* note 77, at 36.

instead of opposing them.[221]

The impact of reputation may be diminished by stakeholders' inability to compare MNEs across different industries, jurisdictions, organizational forms, and business cultures.[222] Arguably, the more detailed, vivid, and focused the disclosed information is, the more effective it will be in persuading investors and other stakeholders to respond to it.[223] Due to its specific focus and detailed procedural requirements, TST may help harness the power of reputation.[224] On a related note, legal scholars define relational contracts as the penumbra of planning, trust, and solidarity norms that exceed the terms of the legal agreement between parties.[225] TST regimes may be viewed as a means to nurture relational contracts among MNEs in the same industry or between MNEs and their institutional investors. The sharing of information—along with the attendant practices and rituals associated with such information sharing—constitute the basis for a particular kind of relationally based legal arrangement made possible by the act of disclosure.[226]

V. APPLYING CONSTRUCTIVE DISCOURSE TO TARGETED SOCIAL TRANSPARENCY

A. Analyzing the Current State of TST

TST regimes under U.S. federal securities law are an evolutionary step in social transparency. By implementing narrowly focused disclosure requirements for specific policy objectives, TST uses traditional regulatory techniques to address social objectives in a new way.[227] In comparison to voluntary CSR reporting schemes (such as the GRI) and other forms of social transparency (such as Regulation S-K), TST strips from firms a substantial amount of discretionary authority to decide what, when, and

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[221] Gunningham, Kagan & Thornton, *supra* note 155, at 326–27 (describing companies that engage with environmental NGOs and community groups).

[222] *See* Williams, *supra* note 2, at 1292–93 (noting how the relative lack of consistent, standardized social performance data reporting hinders meaningful intercompany comparisons and analyses).

[223] *See* Woods, *supra* note 76, at 77 (noting that reputational sanctions, such as shaming, works best where there is clear rights violation, a clear violator, and a clear remedy).

[224] *See* Patrick J. Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANSNAT'L L. 509, 557–60 (2008) (arguing that formal, specific ratings linked to regulations can shape firm behavior by assigning a value to reputation).

[225] Bird, *supra* note 210, at 77.

[226] *See* Goshen & Parchomovsky, *supra* note 25, at 760 (noting that increased disclosure bolsters relational investing—i.e., increased holdings for longer durations by large investors).

[227] *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 405–06 tbl. 2 (2004) (comparing traditional regulatory approaches to "New Governance" models based on reflexive law, soft law, democratic experimentalism, and similar principles).

how to disclose information. Current TST regimes under U.S. federal securities law both facilitate and hinder corporate strategic action in different ways.

The procedural components of DFA § 1502 have the potential to facilitate the integrative function of constructive discourse. If firms are able to use information collected through country of origin inquiries, internal due diligence, and external audits to understand their impact in the Congo, they will be able to more effectively manage commercial relationships with supply chain intermediaries and third-party contract manufacturers in a way that curbs the illicit trade of conflict minerals. Similarly, the various reporting requirements of ITRA § 219 may facilitate corporate awareness of the ways in which their responsibility to respect human rights in Iran relates to the other nonhuman rights objectives of the U.S. sanctions program.

The expressive function of constructive discourse, however, is hampered by current TST regimes. Based on a hierarchical, rules-based approach to disclosure, both DFA § 1502 and ITRA § 219 may stifle meaningful dialogue between MNEs and stakeholders. Both impose the obligation to disclose on Exchange Act reporting companies that are frequently not best situated to obtain the information.[228] MNEs are often required to extract information from persons and entities with which they have extremely attenuated operational and legal relationships. In the case of DFA § 1502, these entities are suppliers along their conflict minerals supply chains, while for ITRA § 219, the entities may be foreign-domiciled and non-U.S. law governed affiliates with which they transact. The use of penalties for noncompliance with Exchange Act disclosure requirements may inhibit the ultimate objectives of TST by jeopardizing industry-generated, collaborative initiatives between MNEs, local companies, supply chain intermediaries, governments, civil society, and multilateral institutions.[229]

How might TST regimes be modified to enhance constructive discourse? A constructive discourse approach to social transparency seeks to reorient TST in the following ways: First, from external pressure to *internal assessment based on enlightened self-interest*. Instead of acting only in response to external pressure, such as the threat of civil liability, MNEs should be able to use information from disclosure to engage in a continual process of self-assessment that takes into account the range of risks and strategic opportunities that they face in their commercial relationships.

Second, from retrospective to *prospective*. Instead of merely telling what happened through discrete acts of disclosure, MNEs should seek to

[228] *See* Ochoa & Keenan, *supra* note 43, at 140.

[229] *See* Seay, *supra* note 110 (arguing that DFA § 1502 has stifled multistakeholder dialogue and initiatives in the Congo).

draw from prior experiences to improve internal controls and contractual relationships.

Third, from static to *social*. Instead of viewing disclosure as a series of discrete, onetime events, MNEs should engage in a broad array of interactions with each other and their respective stakeholders in the context of their social impacts.

Fourth, from a bright-line distinction between disclosure and regulation to a *nuanced*, *case-by-case determination of the social utility of disclosure*. Instead of viewing mandatory disclosure as a blanket alternative to direct government regulation, regulators should have the discretion to permit the alternate use of voluntary reporting mechanisms created by MNEs on a case-by-case basis.

B. Proposals for Improving TST

The concept of constructive discourse provides a template for improving current approaches to TST. TST can be modified in various ways to facilitate its use by MNEs for their strategic benefit while concurrently furthering the social objectives of TST. The following discussion proposes several different kinds of reforms and explores their potential implications.

1. Leveraging Voluntary CSR Reporting

A key challenge for regulators, stakeholders, and other interested external parties is to inform and convince MNEs of the potential gains from TST compliance. Voluntary CSR associations, established by MNEs in conjunction with NGOs, may play an important role in this learning process through the creation of targeted reporting and complaint mechanisms.[230] Alternatively, MNEs can take a positively reinforcing, proactive role through the use of privately trained and authorized audit and certification services that ensure compliance with social responsibility standards.[231] Third party assurance services help MNEs signal their commitment to social concerns to NGOs and SRIs.[232] Notwithstanding the fact that third-

[230] *See* Park, *supra* note 150, at 412; *see also* Ribstein, *supra* note 14, at 1458–59 (identifying NGOs as partners in gathering and disclosing information about social harms, developing standards for socially responsible conduct, organizing boycotts, and lobbying for political action).

[231] *See* Blair, Williams & Lin, *supra* note 201, at 333–34. For example, MNEs have established conflict minerals disclosure programs in anticipation of the implementation of DFA § 1502. *See* Quentin Hardy, *Combating Tech's Conflict Minerals With Disclosure*, N.Y. TIMES BITS BLOG (Apr. 15, 2013), http://bits.blogs.nytimes.com/2013/04/15/combating-techs-conflict-minerals-with-disclosure (describing Hewlett-Packard's smelter documentation initiative, which requires that HP's supply chain suppliers abstain from purchasing conflict minerals from a list of 195 ore smelters).

[232] *See* Blair, Williams & Lin, *supra* note 201, at 342–46. Specifically in the area of business and

party assurance services were initially developed in the context of voluntary CSR reporting, MNEs can benefit from multistakeholder oversight in respect of the same objectives addressed through a specific TST regime.

Public–private governance schemes based on multistakeholder dialogue between governments, firms and industry associations, and NGOs seek to bridge the gap between traditional governmental regulation and New Governance.[233] Perhaps most notably, the Kimberley Process Certification Scheme addresses the link between the diamond trade, child labor, and civil conflict in Africa.[234] Established in accordance with the mandate of the United Nations, the Kimberley Process is a nonbinding governance regime that restricts the trade of conflict diamonds through a government-run certification scheme.[235] Although the certification scheme is solely managed by its forty-nine member states, the Kimberley Process also includes NGOs and industry groups as observers, and collaborates with other multistakeholder initiatives such as the EITI.[236] The Clean Diamond Trade Act implements the Kimberley Process under U.S. law by banning the importation of non-Kimberley Process certified diamonds and establishing domestic certification and enforcement processes.[237]

The parallels between DFA § 1502 and the Kimberley Process have been addressed by numerous commentators.[238] Notwithstanding the success of the Kimberley Process, the viability of multistakeholder approaches as a universal means to address the shortcomings of TST is

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human rights, the Mazars & Shift Project establishes a twin set of standards for human rights reporting and assurance based on the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (the Guiding Principles), a voluntary, multistakeholder framework spearheaded by the Special Representative of the United Nations Secretary-General John Ruggie. The reporting standard requires a participating company to articulate and make public its fidelity with the Guiding Principles while developing internal metrics to track its progress toward full alignment. The assurance standard provides an external, third-party audit of the company's implementation of the Guiding Principles based on methodology developed by individual human rights assurance providers. *See* MAZARS & SHIFT, THE BUSINESS AND HUMAN RIGHTS REPORTING AND ASSURANCE FRAMEWORKS INITIATIVE ("RAFI") (Nov. 2013), *available at* http://business-humanrights.org/media/documents/rafi-framing-document-2013.pdf.

[233] *See* Stevelman, *supra* note 218, at 111 (noting the emergence of a multitude of multistakeholder initiatives in the area of business and human rights).

[234] Conflict diamonds (also commonly referred to as blood diamonds) are defined as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments." KIMBERLEY PROCESS CERTIFICATION SCHEME CORE DOCUMENT 3, *available at* http://www.kimberleyprocess.com/en/kpcs-core-document.

[235] *See* Diane A. Desierto, *Leveraging International Economic Tools To Confront Child Soldiering*, 43 N.Y.U. J. INT'L L. & POL. 337, 365–66 (2011).

[236] *See* Julie Elizabeth Nichols, *A Conflict of Diamonds: The Kimberley Process and Zimbabwe's Marange Diamond Fields*, 40 DEN. J. INT'L L. & POL'Y 648, 661–63 (2012).

[237] 19 U.S.C. § 3903(a) (2006).

[238] *See* Narine, *supra* note 145, at 395–96; Taylor, *supra* note 115, at 115–16; Woody, *supra* note 71, at 1347–51; Shannon Raj, *Blood Electronics: Congo's Conflict Minerals and the Legislation That Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 994–1000 (2011).

uncertain. The express foreign policy objectives underlying TST regimes render global regulatory uniformity unlikely thereby hindering the informal governmental coordination that characterizes the Kimberley Process.[239] This is particularly evident with respect to ITRA § 219. Its disclosure requirements concern the activities of a broad array of business actors that do business in Iran across a range of economic sectors.[240] Further, it is arguably unclear how MNEs view the urgency of human rights abuses in Iran compared to the conflict minerals trade in the Congo.[241] These factors render it unlikely that organic multistakeholder initiatives involving MNEs, local and regional companies, civil society groups, governments, and multilateral institutions will develop absent regulatory incentives.

To overcome these complicating factors, regulatory reforms should focus on leveraging existing voluntary CSR reporting in ways that enhance constructive discourse. MNEs can benefit from intersectoral collection and sharing of information between MNEs regarding their respective supply chains and affiliate relationships. To facilitate the use of best practices, centralized data repositories would help Exchange Act reporting companies share information regarding their respective due diligence and certification processes. These repositories could be comanaged by the SEC and private entities, provide information across multiple TST regimes, and be publicly accessible to stakeholders.[242] By integrating these information-sharing

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[239] The OECD has established a voluntary framework to guide firms in conducting due diligence in connection with supply chain management of conflict minerals. *See* ORG. FOR ECON. CO-OPERATION & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 3 (2d ed. 2013), *available at* http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf. DFA § 1502 requires that Exchange Act reporting companies use a nationally or internationally recognized due diligence framework to conduct their conflict mineral due diligence. *See* Conflict Minerals Final Rule, 77 Fed. Reg. 56274, 56,282 (codified at 17 C.F.R. pts. 240, 249b (2012)). One pair of commentators has suggested that the adoption of the OECD guidelines as the only DFA §1502-compliant due diligence framework may effectively crowd out smaller-scale local, regional, or national due diligence systems, including industry-based initiatives. *See* Jamie Darin Prenkert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 VAND. J. TRANSNAT'L L. 451, 487, 499–500 (2014).

[240] *See* Desierto, *supra* note 235, at 365–66 (contrasting the Kimberley Process's sole focus on the diamond trade to the various goods produced by child soldiers).

[241] *See id.* at 366–67 (noting the unique political circumstances precipitating the Kimberley Process).

[242] In the context of business and human rights, several private sector initiatives have emerged with the goal of disseminating best practices. The Human Rights and Business Dilemmas Forum, a project implemented in partnership with the UN Global Compact, seeks to facilitate intersectoral discussion of human rights dilemmas through case studies. *See* UN Global Compact, HUMAN RIGHTS AND BUSINESS DILEMMAS FORUM, http://human-rights.unglobalcompact.org (last visited Feb. 21, 2014). A private sector initiative, the Global Corporate Community of Practice (GCCP), seeks to help companies collect, develop, and share experiences of human rights due diligence and risk management. Launched by the UN Working Group on Business and Human Rights, the GCCP is aimed at assisting firms implementing the mandate of the Guiding Principles. *See* INT'L ORG. OF EMP'RS, GLOBAL CORPORATE COMMUNITY OF PRACTICE FOR BUSINESS AND HUMAN RIGHTS, NEW INITIATIVE OF THE UN WORKING GROUP ON

practices into mandatory disclosure requirements, TST regimes would help MNEs mitigate the operational risks they face worldwide while also deepening MNEs' commitment to the social values associated with specific TST regimes.

Further, to reduce firm-level compliance costs and facilitate industry-level best practices and regulatory experimentation, TST regimes should grant mutual recognition to alternate voluntary schemes that fulfill similar substantive purposes.[243] Several European countries have either permitted or encouraged the use of GRI guidelines to fulfill social and environmental reporting requirements.[244] The European Commission is currently considering measures that would require substantially enhanced mandatory disclosure by large European companies on various social matters, including environmental sustainability and human rights.[245] This proposal would permit EU reporting companies to use internationally recognized multistakeholder frameworks in lieu of EU-based or government-promulgated guidelines.[246] Most notably, if the EU conflict minerals regulations proposed by the European Commission in March 2014 are implemented, discussions regarding potential means to grant mutual recognition under DFA § 1502 should be explored.

2. Empowering In-House Corporate Lawyers

The effectiveness of TST depends on the usefulness of the disclosed information that it mandates. Within a corporation, this responsibility largely lies with management in charge of day-to-day operations. Not only must corporate managers ensure that the firm complies with mandatory disclosure requirements, they are also entrusted with exercising judgment

BUSINESS AND HUMAN RIGHTS FOR A GLOBAL CORPORATE COMMUNITY OF PRACTICE (2012), *available at* http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/ business_ and_human_rights/EN/_2012-10-15__G119_UNWG_BHR_Global_Corporate_Community_of_ Practice_ with_annex__website_.pdf (last visited Feb. 21, 2014).

[243] *See* Hess, *supra* note 21, at 472 (proposing that mandatory social reporting should be consistent with voluntary CSR reporting schemes such as the GRI). Mutual recognition could be also applied to TST regimes established by foreign regulators. *See* Sarfaty, *supra* note 7, at 125 (proposing international regulatory convergence around social transparency).

[244] *See* Sarfaty, *supra* note 21, at 599.

[245] *See Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC As Regards Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups*, COM (2013) 207 (Apr. 16, 2013).

[246] Among the guidelines expressly granted mutual recognition are national frameworks, EU-based frameworks such as the Eco-Management and Audit Scheme (EMAS), and international frameworks such as the GRI, the Guiding Principles, the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the International Organisation for Standardisation (ISO) 26000, and the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. *See id.* at 9–10, 12.

about whether to disclose, what to disclose, and how to use disclosed information for the corporation's benefit.[247] In comparison to voluntary CSR reporting, the mandatory nature of TST regimes reduces managerial discretion.[248] Nonetheless, managers have significant control thereby reinforcing concerns about their lack of accountability to shareholders and other stakeholders.[249] For example, corporate management may decide to disclose more than the bare minimum required by TST rules or to use TST-mandated disclosure to change its practices to further social goals, even if doing so means sacrificing short-term shareholder interests.[250] Alternatively, while there are situations in which benefits to stakeholders also enhance corporate profits and shareholder wealth, corporate management could alternatively disregard any social value for their own selfish ends.[251] On the other hand, greater managerial discretion may free managers to make case-by-case determinations for the benefit of society.[252]

In this context, lawyers—along with accountants, auditors and securities analysts—are entrusted with a core function of corporate governance: maximizing the effectiveness of regulatory compliance by reducing information asymmetries between corporations and outside parties.[253] As informational intermediaries, they are entrusted with ensuring the completeness, timeliness, and readability of mandatory disclosures.[254] To carry out these duties, they collect, organize, process, and disseminate relevant information disclosed by firms for the benefit of investors and

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[247] *See* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1628–31 (2005) (describing, *inter alia*, the duty of loyalty, duty of ordinary care, and the duty to provide information and assist directors in understanding the significance of reported information).

[248] *See* H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control Over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 107 (2012) (identifying DFA § 1502 as a prominent example of the use of mandatory disclosure to protect shareholder interests); *see also* Goshen & Parchomovsky, *supra* note 25, at 760 (noting the effects of disclosure on inefficient management).

[249] *See* Ribstein, *supra* note 14, at 1465; Shelley, *supra* note 102, at 116–18.

[250] *See* Ostas, *supra* note 162, at 590.

[251] *See* Ribstein, *supra* note 14, at 1460–61.

[252] *See* David P. Baron, *Private Politics, Corporate Social Responsibility, and Integrated Strategy*, 10 M.I.T. J. ECON. & MGMT. STRATEGY 7, 15 (2001) (noting the ability of altruistic managers to redistribute shareholders' wealth through policies and operating practices); Shelley, *supra* note 102, at 135 (acknowledging that certain kinds of managerial entrenchment may facilitate socially-beneficial corporate innovation). *But see* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (famously arguing that corporate executives that seek to address social goals at the expense of shareholder interests are abrogating their social responsibilities).

[253] *See* Merritt B. Fox, *Gatekeeper Failures: Why Important, What to Do*, 106 MICH. L. REV. 1089, 1089, 1091 (2008) (referencing John Coffee's thesis on the core contribution of gatekeepers).

[254] *See* Preeti Choudhary, Jason D. Schloetzer & Jason D. Sturgess, *Boards, Auditors, Attorneys and Compliance with Mandatory SEC Disclosure Rules*, 34 MANAGERIAL & DEC. ECON. 471, 472 (2013) (defining mandatory disclosure compliance as the extent to which mandatory SEC disclosures are complete, timely, and readable).

other stakeholders.[255] These gatekeepers verify the quality of securities disclosure on the basis of their ability to acquire more information about a firm than outside parties and their reputation for integrity, thoroughness, and accuracy.[256]

Lawyers, in particular, are uniquely equipped to facilitate constructive discourse in TST regimes through their profession-specific skills and values. Both outside counsel and in-house corporate counsel are responsible for preparing and reviewing the narrative and other textual parts of disclosure documents.[257] Above all other kinds of gatekeepers, lawyers play an indispensable role in condensing, conceptualizing, and organizing information regarding an MNE's operations.[258]

In addition to their technical skills, lawyers must also exercise independent judgment and ethical sensibility in determining how to balance private corporate interests with the public interest.[259] For these nontechnical tasks, in-house corporate lawyers are capable of helping embed compliance with mandatory disclosure requirements into corporate decision making processes, thereby consolidating their effectiveness in shaping corporate conduct.[260] Due to their knowledge of their clients' unique risk appetites, strategic priorities, and organizational cultures, in-house counsel can communicate in the firm-specific and industry-specific language necessary to influence corporate management to comply with mandatory disclosure obligations.[261]

The value of in-house counsel is particularly high with respect to TST regimes. For MNEs subject to heightened scrutiny from regulators, shareholders, and the public, inadequate internal communication and coordination channels can materially impact their ability to comply with TST regimes that require substantial information gathering, internal controls, and due diligence processes.[262] In-house lawyers directly

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[255] *See* FUNG, GRAHAM & WEIL, *supra* note 4, at 122–25; Easterbrook & Fischel, *supra* note 46, at 687–89; Hess, *supra* note 49, at 466–67.

[256] *See* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006) (defining gatekeepers); *see also* Stephen M. Bainbridge, *Corporate Lawyers as Gatekeepers*, 8 U.C.L.A. SCHOLARLY PERSP. 1, 5 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980975 (comparing the gatekeeping role of lawyers to auditors).

[257] Choudhary, Schloetzer & Sturgess, *supra* note 254, at 472, 477.

[258] See Choudhary, Schloetzer & Sturgess, *supra* note 254, at 482–83 (finding empirical evidence that corporate attorneys are predominantly responsible for the readability of mandatory disclosure documents).

[259] *See* Manne, *supra* note 27, at 482–83.

[260] The concept of embeddedness measures the degree to which information produced by mandatory disclosure causes new responses by its users and then changes in the decision-making processes of disclosers. *See* Fung, Weil, Graham & Fagotto, *supra* note 27, at 15.

[261] *See* Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 117–18 (2011).

[262] *See* Martin, *supra* note 176, at 988–90 (identifying the importance of board-level information

participate in the management and improvement of compliance systems.[263] In this capacity, in-house counsel can help change perceptions of the perceived value of TST-mandated disclosure to other corporate goals. Buttressed by the risk of civil and criminal enforcement for noncompliance with U.S. federal securities law, TST may help in-house counsel convince otherwise skeptical or uncertain internal clients of the importance of social transparency to the firm.[264]

On top of ensuring a firm's compliance with TST requirements, in-house lawyers are well suited to contribute to internal deliberations about how social responsibility should be incorporated into broader business strategies.[265] Due to their knowledge of legal lexicon, argumentation, and procedures, in-house lawyers are capable of translating legal rules into the system-specific language necessary to influence senior management.[266] Lawyers are uniquely equipped to use their persuasive and rhetorical skills to reframe the social goals of TST in a manner that reinforces their value and importance to the firm's business.[267] In other words, in-house lawyers can—and should—help their clients identify, understand, and implement the strategic dimensions of constructive discourse.

The ability of in-house lawyers to properly discharge their gatekeeping functions can be compromised by cognitive bias, groupthink, and other behavioral impediments that diminish their cognitive independence.[268] In addition, the effectiveness of lawyers' gatekeeping function heavily depends on the authority of in-house lawyers within a firm. This may vary

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gathering to ensure that directors can effectively address conflicts between business and human rights); *see also* Malloy, *supra* note 8, at 633 (noting the potential impact of regulation in facilitating review and adjustment of internal operating procedures that impede non-compliance with disclosure obligations).

[263] *See* Simmons & Dinnage, *supra* note 261, at 121 (noting the routine monitoring and crisis intervention functions of in-house counsel).

[264] *See* Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 488–89 (2008) (noting the positive effect of the Sarbanes-Oxley Act on the authority of general counsels vis-à-vis board directors and senior managers); Patrick Schmidt, *The Ethical Lives of Securities Lawyers*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 221, 238–39 (Leslie C. Levin & Lynn Mather eds., 2012) (documenting how securities lawyers use the fear of liability to advocate for greater disclosure by their clients).

[265] Simmons & Dinnage, *supra* note 261, at 125–26.

[266] *See* Karin Buhmann, *Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-Based Construction of the 'Protect, Respect, Remedy UN Framework,'* 1 INT'L L. RES. 88, 94 (2012) (showing how stakeholders can influence corporate conduct by translating CSR mandates, such as the Guiding Principles, into system-specific language that MNEs can understand and implement).

[267] *See* Joe W. (Chip) Pitts III, *Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 BERKELEY J. INT'L L. 479, 494–95, 497 (2008) (arguing that lawyers can use storytelling and story appreciation, among other skills, to strengthen the business case for CSR).

[268] *See* Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 508–15 (2012) (identifying the cognitive biases that blinded in-house lawyers to the risks posed by subprime mortgages).

widely based on seniority, their relationship with senior corporate management, the deference accorded to in-house lawyers on discretionary decisions of a legal nature, and the extent to which disclosure-related duties are given instead to outside counsel.[269] Due to their proximity to corporate management, in-house lawyers may be particularly vulnerable to pressure from their clients qua colleagues to "get the deal done"—i.e., in respect of mandatory disclosure obligations, to disclose only as much as their business-side clients want.[270] This may lead lawyers to use standardized, cautious, and ultimately less useful language in their disclosure—i.e., the oft-maligned, but often useful, boilerplate.[271] The indiscriminate use of boilerplate by lawyers may adversely and unpredictably affect the ways in which users of information process and respond to disclosure.[272] Risk-averse behavior by lawyers is also enabled by the ambiguity of many disclosure rules under U.S. federal securities law—most notably, the concept of materiality.[273] By not requiring materiality in order to trigger disclosure, DFA § 1502 and ITRA § 219 remove discretion from lawyers thereby eliminating one potential source of client pressure.

To overcome the challenges described above, in-house lawyers can draw on the shared set of beliefs and knowledge that define them as members of an epistemic community. An epistemic community is "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[274] In a similar vein to the international treaty making and policy coordination between governments described by Robert Haas, corporate policy making can benefit from the engagement of like-minded professionals who can converse in a shared vernacular, gather and disseminate information, and convince leaders of their value.[275]

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[269] *See* Choudhary, Schloetzer & Sturgess, *supra* note 254, at 475; Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 128–32 (2006) (characterizing lawyers as "dependent" gatekeepers whose responsibility to third parties is often in tension with their responsibility to clients).

[270] *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 471 (2000).

[271] *See* Schmidt, *supra* note 264, at 240–42 (documenting the use of boilerplate by securities lawyers in disclosure documents); *see also* Davis, *supra* note 173, at 158 (describing the "cynical adoption of token gestures decoupled from actual practice" as an impediment to the effectiveness of regulatory requirements on corporate governance).

[272] *See* Schmidt, *supra* note 264, at 241–42 (asking how securities lawyers can produce legally compliant language in disclosure documents while refraining from pressuring clients to produce meaningful information to the public).

[273] *See* Laby, *supra* note 269, at 149–50.

[274] Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992). Haas further defined an epistemic community as based on a shared set of normative and principled beliefs, shared causal beliefs, shared notions of validity, and a common policy enterprise. *Id.*

[275] *See id.* at 15–16 (noting the ability of epistemic communities to define the self-interests of a state

Epistemic communities of in-house lawyers defined by industry, issue area, or regulatory focus can serve as a means for enhancing substantively meaningful TST disclosure by firms.[276]

In the case of in-house counsel, their membership is driven by a combination of (i) a lawyer's professional training, (ii) externally imposed disclosure requirements to which the firm is subject, and (iii) the internally modulated judgment exercised by the lawyer to satisfy these externally imposed requirements in respect of a given set of facts.[277] A key characteristic of this epistemic community of in-house counsel is that its group function and the individual obligations of its members are defined by their dual identity as employees of a corporation and as professionals.[278] The functional and normative coherence of epistemic communities' group norms may be enforced through peer pressure and reputational awards among themselves.[279] Their shared professional ties may be strong enough to compel compliance through "soft" community-imposed sanctions.[280] Coinciding with the emergence of TST regimes, numerous initiatives to inculcate in-house counsel on global social values have emerged in recent years.[281]

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or factions within it); *see also* Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992) (describing the impact of an ecological epistemic community in influencing policymakers to respond to ozone depletion); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997) (suggesting that epistemic communities consisting of international organizations, NGOs, and private foundations help compel state compliance with international human rights).

[276] *See* Shaun Barnes, Kathleen G. Cully & Steven L. Schwarcz, *In-House Counsel's Role in the Structuring of Mortgage-Backed Securities*, 2012 WIS. L. REV. 521, 543 (2012) (noting that industry associations can serve as valuable sources of expertise that in-house counsel can draw on in crafting compliance systems). This approach does not obviate the potential value of externally enforced certification schemes and similar measures to improve the quality of mandatory disclosure. *See, e.g.*, COFFEE, *supra* note 256, at 347–52 (proposing that issuers be required to appoint outside counsel to monitor and certify the issuer's disclosure documents, which would be subject to SEC discipline for failure to do so); Fox, *supra* note 253, at 1108–10 (proposing that investment banks instead of law firms serve this role); Laby, *supra* note 269, at 160–61 (proposing that securities lawyers be required to certify to the SEC that they are not aware of a material violation or have reported any such violation "up the ladder" as required by the Sarbanes-Oxley Act).

[277] *See* Schmidt, *supra* note 264, at 227–28 (referring to a "community of practice" of securities lawyers and describing the difficulty in accurately identifying its members).

[278] *See* Nelson & Nielsen, *supra* note 270, at 478; Schmidt, *supra* note 264, at 237–38.

[279] *See* Charles K. Whitehead, *What's Your Sign?—International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 707–12 (2006); *see also* Ostas, *supra* note 162, at 593 (observing that a corporate manager's social responsibility is shaped by the social impact of his or her actions rather than by a duty to obey the law).

[280] The ABA's professional responsibility code clarifies the fiduciary-like duties of lawyers to stakeholders, including providing that "[a] lawyer . . . is . . . an officer of the legal system and a public citizen having a special responsibility for the quality of justice." *See* Pitts III, *supra* note 267, at 491 (citing and quoting the preamble to the American Bar Association Model Rules of Professional Conduct).

[281] For example, the International Bar Association and the UN Global Compact have collaborated on

3. *Incentivizing Social Transparency Through Competition*

Social transparency can be a competitive process—rather than merely a "box-checking" compliance function—if the market recognizes and rewards MNEs for producing a positive social impact.[282] One way to leverage the positive effects of market competition is to implement ratings and other metrics of social performance.[283] TST has the potential to go a step further by incentivizing MNEs to disclose by using the carrot of competition instead of the stick of compliance.[284] This "carrot" approach does not exempt MNEs from mandatory disclosure but rather conditions the imposition of TST requirements on the MNE's decision to enter a new market or business.[285]

A carrot-based approach to TST is evident in connection with the lifting of U.S. trade and investment sanctions against Burma in July 2012.[286] Since 1997, the U.S. government has imposed a wide range of sanctions against Burma for political oppression and widespread human rights abuses committed by the Burmese military government.[287] Under the Burma Responsible Investment Reporting Requirements, a U.S. company may invest in Burma subject to the submission of an annual report on their activities in the country.[288] The disclosure requirements address a wide

a module-based video training manual targeted to in-house counsel interested in human rights, labor, the environment, and anticorruption. *See* Int'l Bar Ass'n & UN Global Compact, *Lawyers as Leaders – Business and Human Rights Module, Lawyers as Leaders: The Essential Role of Legal Counsel in the Corporate Sustainability Agenda*, INT'L BAR ASS'N, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=60827E49-44DF-43DE-94B2-11157DB1FDB9.

[282] *See* Fung, Weil, Graham & Fagotto, *supra* note 27, at 15 (noting the potential impact of disclosure when firms perceive benefits to disclosure vis-à-vis their competitors).

[283] *See* Keenan, *supra* note 224, at 557–59 (proposing the creation and use of human rights ratings by international financial institutions). *But see* Sarfaty, *supra* note 21, at 616 (warning that quantitative data is insufficient to capture the full meaning of human rights).

[284] *See* Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, For Law* 37 (Edinburgh School of Law Working Paper Series, 2009/03, 2009) (citing the Hampton Review in the United Kingdom, which proposed less regulatory inspection for companies that demonstrate themselves to be responsible); *see also* PHILIP HAMPTON, HM TREASURY, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT, REPORT, 2005, ¶ 2.24 (2005), *available at* http://www.berr.gov.uk/ files/file22988.pdf (noting the use of "earned autonomy" by U.K. regulators).

[285] *Cf.* Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 383 (2013) (justifying carrots for sellers to reveal information only when it is unclear which party is the least-cost information gatherer).

[286] *See* Press Release, The White House, Statement by the President on the Easing of Sanctions on Burma (July 11, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/07/11/statement-president-easing-sanctions-burma (announcing the "easing [of] restrictions to allow U.S. companies to responsibly do business in Burma").

[287] *See* U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMA SANCTIONS PROGRAM (2014), *available at* http://www.treasury.gov/resource-center/sanctions/Documents/burma.pdf.

[288] *See* Burmese Sanctions Regulations, 79 Fed. Reg. 37,106, 37,119 (amending 31 C.F.R. §

range of social impacts associated with U.S. business investment in Burma, including human rights, labor rights, land rights, community consultations and stakeholder engagement, environmental stewardship, anticorruption, arrangements with security service providers, risk and impact assessment and mitigation, payments to the Burmese government, any investments with the Myanmar Oil and Gas Enterprise (MOGE), and contact with the Burmese military or nonstate armed groups.[289] In contrast to the TST regimes under U.S. federal securities law examined in this Article, the Burma Responsible Investment Reporting Requirements use mandatory disclosure as a means to promote discretionary business activity, rather than as a condition to continued business activity. Future initiatives to implement TST under U.S. federal securities law may be amenable to this carrot-like approach.

VI. CONCLUSION

The observations in this Article present a number of interesting empirical and normative questions concerning the use of constructive discourse and TST. In particular, one area for future scholarly exploration concerns the effectiveness of TST along several differentiating factors: (i) noncorporate business organizations, most notably various types of partnerships; (ii) different policy objectives, such as environmental sustainability and labor rights; (iii) the interaction of multiple policy objectives within the same TST regime, exemplified by the various statutory mandates of ITRA § 219; and (iv) the impact of TST regimes on MNEs' existing relationships with different stakeholder groups.

The use of mandatory disclosure as a means of facilitating social transparency reveals the challenges of global governance. TST regimes such as DFA § 1502 and ITRA § 219 have emerged in the context of an increasingly diverse, and sometimes conflicting, array of mandatory and voluntary corporate social reporting systems. The integrative and expressive dimensions of mandatory disclosure, evident in the concept of constructive discourse, suggest specific ways that MNEs can use the process and output of TST for their own benefit.

537.530); U.S. DEP'T OF STATE, OMB NO. 1405-0209, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS (2013), *available at* http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf. This annual reporting requirement applies to any new investment in Burma over $500,000.

[289] *See* U.S. DEP'T OF STATE, FACT SHEET: BURMA RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS (2013), *available at* http://www.humanrights.gov/2013/06/19/fact-sheet-burma-responsible-investment-reporting-requirements.