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AIDS Is Risky Business: Examining the Effect of the AIDS Crisis on Publicly Traded Companies in South Africa and the Implications for Both South African and U.S. Investors

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ABSTRACT

The Author explores the implications of the AIDS epidemic for South African businesses. She discusses the financial impact of the disease on shareholder investments and what measures can, and should, be taken by South African businesses to assess the extent of the financial damage and to help prevent and treat infected individuals. The Author focuses on a new listing requirement recently passed by the Johannesburg Securities Exchange in South Africa that requires companies to implement corporate governance and responsible HIV/AIDS policies as a prerequisite for listing on the Exchange. In addition, she discusses a new "Socially Responsible Investment" index that the Exchange has launched in an effort to enhance corporate social accountability with regard to the disease.

The Author further analyzes the discourse surrounding social disclosure regulations in the United States and the potential impact the proposed regulation may have on this discussion. She addresses the current "materiality" standard imposed by the SEC and discusses how the new AIDS regulation crosses the lines of both financial and social materiality. Finally, the Author argues that the SEC can require companies to engage in social disclosure on matters that would be considered material to both fiscally and socially responsible investors. In particular, AIDS reporting is a matter of the utmost concern for the investor in international corporations and meets the SEC's "materiality" standard. The Author concludes that the SEC should require international corporations in countries with high AIDS infection rates to disclose their AIDS policies.

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I. INTRODUCTION

George Gailey, a small business owner in Botswana, is thrilled to get a contract with Debswana, a joint venture between Botswana's government and South African mining giant DeBeers.[1] With his modest staff of 168 workers, he is ready and eager to begin construction of single-sex barracks for Debswana's mining employees.[2] Gailey, however, is surprised to learn that before he can begin one iota of work on the project, he must demonstrate that he has a rigorous AIDS policy in place for his small company.[3] At first Gailey sees this requirement as an expensive hassle for his modest venture, but after losing ten employees to AIDS, he is a recent convert to the idea of corporate AIDS involvement.[4]

In South Africa, the debate rages over how much involvement companies should be required to have in the prevention and treatment of AIDS in their workforce. Some companies, like DeBeers, are shouldering some of the responsibility on their own and have enough market power to pressure smaller players into compliance as well. Still, there are many complicated issues surrounding policies like these. Are companies like DeBeers discriminating against smaller contractors who cannot afford to implement rigorous AIDS programs or who may not have a significant infection rate among their workforce? Are AIDS programs cost-effective, and if not, should companies nonetheless implement them in the name of social responsibility? Where does the government's responsibility toward infected citizens end and the responsibility of the employer begin? What is the best way to implement an AIDS program in light of concerns over employee privacy and human rights?

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1. Abraham McLaughlin & David S. Hauck, *Doing Business in Botswana? Job 1: Get an AIDS Policy*, CHRISTIAN SCI. MONITOR, Nov. 12, 2003, *available at* www.csmonitor.com/2003/1112/p01s03-waof.html.
2. Id.
3. *Id.*
4. *Id.*

The Johannesburg Stock Exchange (JSE) has answered some of these questions in favor of affirmative obligations for employers by requiring listed companies to document their compliance with the King Code on Corporate Governance.[5] The Code requires that companies report the steps they are taking toward AIDS prevention and treatment.[6] The new listing requirement has created a stir among South African business managers, as it marks the first time a stock exchange has explicitly required disclosure of "social" (i.e., non-financial) data. The debate is ongoing over whether this constitutes a slippery slope toward capital controls on private businesses or whether it stands as a beacon of social responsibility in an effort to curtail the devastating effects of AIDS on one of the world's hardest hit communities.

Part II of this Note examines the recent history of the effect of AIDS on South African businesses and the practical and constitutional concerns surrounding disclosure of AIDS-related data. Part III addresses the JSE's decision to require compliance with the King Code and the anticipated effects on listed companies. This section will look at the experiences of companies that are already engaged in AIDS-related prevention and treatment programs. Part IV will discuss the new "Socially Responsible Investment" index recently launched by the JSE and the potential effects this may have on businesses' attitudes toward the AIDS epidemic. Part V examines the debate surrounding social reporting in the United States, and in particular the proposals of Professors Cynthia Williams and David Hess for implementing social reporting requirements. Finally, Part VI of this Note argues that South Africa's new requirements address an issue that should satisfy the Security and Exchange Commission's (SEC) definition of "materiality" and, thus, the United States should follow South Africa's lead in implementing social reporting regarding AIDS. Specifically, the SEC should focus on international corporations with workforces derived primarily from areas with a high prevalence of AIDS.

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5. *South Africa: Listed Companies Must Comply with King II and GRI*, 60 BUS. RESPECT, (Corporate Social Responsibility), July 27, 2003, *available at* www.mallenbaker.net/csr/nl/60.html [hereinafter *Listed Companies Must Comply*].

6. INST. OF DIR. IN SOUTHERN AFR., EXECUTIVE SUMMARY OF THE KING REPORT § 5.1.1 (2002) [hereinafter KING REPORT].

II. BACKGROUND

A. *The Effect of HIV/AIDS on South African Business*

HIV/AIDS in South Africa has been called an "epidemic of shattering dimensions."[7] Now the single greatest cause of death in the country, the disease affects every facet of life, including business.[8] In the decade beginning in 2000, it is projected that there will be 5.23 million AIDS deaths, 1.53 million AIDS orphans, and that average life expectancy will drop by sixteen years.[9] Businesses in South Africa now share the serious consequences with a country in which roughly five million people are HIV-positive, about 11.7 percent of the population.[10] Four of the most prominent businesses (all diamond and precious metal mines) in South Africa estimate that twenty-five percent of their workforce is infected with HIV/AIDS.[11] The disease may be increasing the cost of doing business in South Africa by as much as eight percent.[12] One mine estimated AIDS-related death costs are as high as U.S.$18,500 per employee hired.[13] Several mining companies estimate losses as a result of the disease at two to five percent of profits.[14] In light of these figures, heavy-hitting investment banks are eager to acquire information regarding the financial consequences of HIV/AIDS in their investment plans. [15] Deutsche Bank, Dresdner Bank, and HSBC Holding have all expressed the need to take this information into account in their "financial forecasting, asset allocation, stock selection and risk underwriting."[16] Rival gold-producing regions such as North America, Australia, and

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7. Rob Dorrington et al., *The Impact of HIV/AIDS on Adult Mortality in South Africa*, Med. Research Council of S. Afr. 5 (2001).

8. Michelle Rotchford Galloway, *MRC Report Reveals Extent of Epidemic AIDS: 'The Single Biggest Cause of Death,'* 10 AIDS BULL. 3 (Med. Research Council of S. Afr.), Dec. 2001, *available at* http://www.mrc.ac.za/aids/dec2001/mrcreport.htm (last visited Nov. 13, 2002).

9. John G. Culhane et al., *Dealing with International AIDS: A Case Study in the Challenges of Globalization,* 35 J. MARSHALL L. REV. 381, 393 (2002).

10. Nicol Degli Innocenti, *South Africa to Increase AIDS Funding,* FIN. TIMES, *available at* http://news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&cid=1066565833016&p=1012571727172 (last visited Nov. 4, 2003).

11. Toby Heaps & Martin Whittaker, *HIV/AIDS Emerges as Big Investment Risk,* GLOBE & MAIL, Mar. 22, 2003.

12. Larry Schlesinger, *Businesses Count the Cost of the AIDS Epidemic,* MANCHESTER GUARDIAN WKLY., Jan. 29, 2003, at 24.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

New Zealand are looking like safer alternatives for many investors who are worried about the costs of AIDS incurred by sub-Saharan mines.[17] Chris Thompson, executive chairman at South Africa's Gold Fields mine notes that "[i]t is difficult to quantify the number of punters who have decided against buying Gold Fields shares because of the perception of the effects of the disease on South Africa's workforce."[18]

B. *Reporting Debate in South Africa*

Indeed, investors are increasingly insisting that companies report on the impact of AIDS. Still, it is unclear what is the best way to go about satisfying investors' concerns. One of the most hotly debated issues concerning HIV/AIDS reporting is whether companies need to take account of, or disclose, the prevalence of AIDS in the workplace.

Acquiring the data necessary for AIDS prevalence reporting is no simple task. The JSE lists more than 460 companies and is the fourteenth largest stock exchange in the world.[19] In preparation for a potential prevalence and financial cost/loss reporting requirement, the JSE decided to assess the practicality of such a process by testing 210 volunteers from its own staff.[20] Of those tested, four were HIV-positive.[21] JSE President Russell Loubser told Dow Jones Newswires that the Exchange "wanted to go through the same sort of process that other organizations will have to experience down the line."[22] However, the prospect of that same physical testing on such a large scale raises potential human rights issues. Some argue that a purely actuarial analysis would suffice to satisfy a reporting requirement. But this raises many potentially unacceptable uncertainties.[23] Further, there are some who think that the requirements will have an unintentional backlash against smaller players.[24] For instance, the Global Reporting Initiative (GRI) guidelines for AIDS prevalence reporting call for fairly sophisticated techniques. If required to

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17. Stewart Bailey, *Gold Fields Counts the Cost of AIDS*, MAIL & GUARDIAN, July 27, 2001, *available at* http://www.aegis.com/news/dmg/2001/MG010706.html (last visited Sept. 9, 2004).

18. *Id.*

19. Angus Macmillan, *Interview: South Africa Bourse May Require HIV-AIDS Reporting*, DOW JONES INT'L NEWS, Apr. 1, 2003.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See infra*, Part II.B.1.b.

24. *See infra*, Part III.B.

employ such materials, smaller companies may be dissuaded from attempting to get listed.[25]

1. Prevalence Reporting Processes and Concerns

a. Physical Testing

Physically testing employees for HIV/AIDS raises some explosive human rights issues in a country with one of the newest, and perhaps most progressive, constitutions in the world.[26] Some believe that "compulsory AIDS prevalence testing, or even subtle pressure for 'voluntary' tests, is unconstitutional, an assault on human rights and a contravention of labour law."[27] Section 9(3) of the South African Constitution states that the government may not "unfairly discriminate directly or indirectly against anyone."[28] The Constitutional Court, the highest court in the country on all constitutional matters, whose decisions are binding on all organs of government,[29] recently determined that an individual's HIV/AIDS-positive status qualified as a protected ground under this section.[30] Under *Hoffman v. South African Airways*, the Court held that impairing the dignity of another person through exclusion and stigmatization can violate § 9(3).[31] In *Hoffman*, South African Airways refused to hire an HIV-positive individual solely on the basis of his HIV-status. The Court noted the particular significance of such a violation in the workplace, saying, "[t]he impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living."[32]

As a further hindrance to physical testing, § 7(2) of the Employment Equity Act prohibits testing an employee for HIV/AIDS unless the Labour Court specifically authorizes such a test under §

25. *Listed Companies Must Comply*, *supra* note 5.
26. Culhane et al., *supra* note 9, at 406.
27. *Effective AIDS Reporting Won't Infringe Rights*, S. AFRICAN PRESS ASS'N, Sept. 19, 2002 at ¶ 6, *available at* 2002 WL 26632799 [hereinafter *Reporting Won't Infringe Rights*].
28. S. AFR. CONST. ch. 2, § 9 (Constitution Act 108, 1996) *available at* www.concourt.gov.za/constitution/const02.html#27 (n.d.).
29. *Information About the Constitutional Court of South Africa,* Wits Law School, *at* www.concourt.gov.za/about.html (last visited Feb. 3, 2004).
30. Culhane et al., *supra* note 9, at 407.
31. 2000 (11) BCLR 1211, 1235 (CC), *available at* http://www.concourt.gov.za/judgments/2000/saa.pdf (last visited Nov. 13, 2003).
32. *Id.* at 28.

50(4) of that Act.[33] The strict constitutional requirements against HIV/AIDS discrimination, along with the stringent requirements for compulsory HIV-testing in the workplace, make compulsory physical testing of a company's workforce an unlikely option.

Voluntary testing may prove more workable. Physical tests have become much more feasible and inexpensive in recent years.[34] Today, many companies perform saliva tests, which are minimally invasive and cost only about three or four dollars for each employee.[35] The tests are voluntary and anonymous, so neither employee nor employer can find out who tests positive.[36] This anonymity is especially important, as many employees fear that they will be fired if found to have HIV.[37]

b. Actuarial Projection

Some have suggested the use of actuarial projections for assessing the impact of AIDS on a particular workforce.[38] Proponents of this method argue that physical HIV tests would not be necessary to fulfill an HIV/AIDS prevalence reporting requirement. These individuals think that an actuarial analysis would suffice to predict accurately the prevalence of AIDS among any given group. Applying estimates to a particular workforce is a less expensive way of assessing the impact of AIDS, but is arguably also less reliable.[39] Andrew Sykes of NMG-LEVY, Employee Benefits Consultants, states "in South Africa, HIV/AIDS has progressed to such a stage over such a long period that costs and consequences can be accurately predicted. . . . [R]eports and projections derived in this way would give shareholders an accurate assessment of present and future costs."[40] To predict accurately the future financial impact of AIDS on South African business, the South African Actuarial Society is working on developing formulas that will incorporate as much data as possible. [41] The hope is that an accurate prediction can be made that

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33. Employment Equity Act, 1998, Act 55 in GG19370 of 19 October 1998, *available at* http://www.parliament.gov.za/acts/1998/a55-98.htm (last visited Nov. 13, 2003).

34. Sydney Rosen et al., *AIDS is Your Business*, HARV. BUS. REV., Feb. 2003, at 81.

35. *Id.* at 83.

36. *Id.*

37. *Id.*

38. *Reporting Won't Infringe Rights, supra* note 27, ¶¶ 8, 11.

39. Rosen et al., *supra*, note 34, at 83.

40. *Reporting Won't Infringe Rights, supra* note 25, ¶¶ 8, 11.

41. Larry Schlesinger, *Social Reporting: The True Cost of AIDS*, FIN. DIRECTOR, May 12, 2002, *available at* http://www.financialdirector.co.uk/Features/1131788 (last visited Nov. 13, 2003).

will satisfy investors' need for risk assessment without infringing on the human rights of individual employees.

Even the best projections, however, may not give an accurate picture of the prevalence of AIDS because of some inherent flaws in the data-gathering structure.[42] Currently, the vast majority of data regarding the prevalence of HIV/AIDS in South Africa come from testing pregnant women who visit public prenatal clinics.[43] By contrast, the companies that are affected most by the disease, the mines, are staffed almost exclusively by men.[44] Although the projections of AIDS prevalence stemming from the prenatal clinic data have been consistent with mortality rates, there are some critics of the method and its accuracy.[45] Prevalence ratios need to be adjusted for individual companies because infection rates vary by gender, age, income, education, and living conditions.[46] For instance, a mining company at which predominantly male employees inhabit single-sex barracks far from their families is going to encounter higher prevalence rates because of the increased use of commercial sex workers and promiscuity.[47] As one writer notes, "[o]ne of the problems with reporting the prevalence of AIDS is that it gives only a snapshot in time of the situation in a company and does not show the level of sickness and absenteeism of infected staff, nor does it show which critical posts are affected, or what future levels might be."[48]

Willem Punt, Business Ethics Manager for the Ethics Institute of South Africa, believes actuarial figures would simply not satisfy a prevalence reporting requirement.[49] He advocates tackling the constitutional issues of confidentiality and informed consent head-on in order to garner accurate data.[50] "For the JSE to consider [AIDS reporting] as a listing requirement a number of constitutional issues regarding confidentiality and informed consent need to be worked out. . . . To make proper assessments you need proper data. You need to be able to test workers according to an opt-out routine testing programme."[51]

Despite the arguments against actuarial projection, current constitutional law will not permit employers to mandate AIDS testing

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42. *Id.*
43. Culhane et al., *supra* note 9, at 390.
44. Rosen et al., *supra* note, 34 at 85.
45. Schlesinger, *supra* note 41.
46. Rosen et al., *supra* note, 34 at 83-84.
47. *Id.* at 84.
48. *Id.*
49. E-mail from Willem Punt, Business Ethics Manager, Ethics Institute of South Africa, to Martha Salomon, 2005 J.D. Candidate, Vanderbilt University Law School (Nov. 25, 2003, 09:11:00 CST) (on file with author).
50. *Id.*
51. *Id.*

for their employees.[52] Loubser noted that if the JSE is unable to determine the prevalence of the disease, disclosure of its cost would be pointless.[53] The shift is now toward voluntary disclosure by employees, which, it is hoped, will become more prevalent with time.[54] In fact, it is believed that many companies already know the prevalence figures among their workforce but are reluctant to disclose the information for fear that their stock prices will plummet.[55] One recent study suggests that employers can achieve eighty percent participation in voluntary testing if they "launch awareness campaigns; involve employee trade unions, and staff associations in planning surveys; and share results with all employees" in order to encourage participation.[56]

2. Constitutional Concerns

a. Discrimination

Incorporating AIDS-related costs into financial reports is also a daunting monetary risk for many companies, especially the mines. "'The problem is that in Africa, where companies are not permitted to test, fire or screen out workers for HIV-AIDS, it is difficult to keep a sick worker away from work if he is desperate for money and gets paid for punching in his card."[57] The constitutional prohibition against discrimination on the basis of HIV-status puts companies in a particular quandary when it comes to reporting. The loss of profits because of AIDS-related deaths is now a seemingly unavoidable risk to South African companies.[58] Now, to add insult to injury, investors may be deterred from buying shares in a company with a high prevalence of AIDS because of the long-term costs associated with the disease.[59]

b. Constitutional Health Care Guarantees

Punt notes that foreign investors will likely be especially reluctant to pay for health services for which the state is ultimately responsible.[60] Especially in light of the current administration's

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52. Vernon Wessels, *JSE Will Not Demand HIV Disclosure*, BUS. REPORT., July 4, 2003, at front page.
53. *Id.*
54. *Id.*
55. *Id.*
56. Rosen et al., *supra* note 34, at 83.
57. Heaps & Whittaker, *supra* note 11, ¶ 7.
58. *See generally* Rosen et al., *supra* note 34.
59. *See supra* Part II.A.
60. Punt, *supra* note 49.

arguable foot-dragging in terms of making Highly Active Anti-Retroviral Therapy (HAART) and other treatments available to its citizens, this issue has the potential to be very politically charged.[61]

Further complicating all of these issues is the affirmative guarantee in the South African Constitution that every citizen has a right of access to health care.[62] Many would persuasively argue that it is thus the obligation of the state, not private companies, to address the AIDS problem and fund treatment for affected individuals. Even if companies decide it is in their economic interest to provide treatment for their employees, it is not clear, then, if they should also feel compelled to provide drugs to the employees' spouses and families.[63] Further, will investors balk at a company's assumption of what may be categorized as a state responsibility?[64] The Ethics Institute of South Africa lends its qualified support to a reporting regulation, provided that investors (and particularly, foreign investors) are made aware of the social and financial complexities surrounding the issue.[65]

South Africa's Constitution mandates that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."[66] *Grootboom v. South Africa* was the Constitutional Court's first opportunity to sort out the handling of these ambitious affirmative guarantees.[67] That case involved the right of indigent people to adequate housing.[68] The Court there found that the government did, in fact, have an affirmative obligation to make sure that each of its citizens had reasonable housing.[69] This case marked a shift in understanding the language of the South African Constitution as more than just lofty aspirations, but as tangible promises. The Court in *Khosa v. Minister of Social Development* noted that these affirmative obligations are limited by the ability of the government to meet the need, stating "[t]he rights to life, dignity and equality . . . have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness."[70]

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61. *Id.*
62. S. AFR. CONST. *supra* note 28, § 27.
63. Punt, *supra* note 49.
64. *Id.*
65. *Id.*
66. *Id.* at (2).
67. Case No: CCT 38/00, Constitutional Court, Sept. 21, 2000, *available at* http://www.concourt.gov.za/files/grootboom/grootboom.pdf (last visited Sept. 28, 2004).
68. *Id.*
69. *Id.*
70. Case No: CCT 12/03, Constitutional Court, Mar. 4, 2004, *available* at http://www.concourt.gov.za/files/khosa/khosa.pdf (last visited Sept. 28, 2004).

South Africa's government has taken its first major step in the realization of these constitutional promises—including the promise of access to health care—with its declaration in August 2003 that it would provide HAART to all AIDS-infected citizens.[71] It remains to be seen whether the government's goals will be realized in a timely fashion. Further, § 27(2) of the Constitution limits the right to the government's ability to meet the need: "The state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of each of these rights."[72] In the meantime, many companies are feeling pressured to fill in the coverage gaps and implement health care programs of their own. In Gold Fields' 2003 annual report, the company detailed its commitment to providing HAART to infected workers, but mentioned that the government's recent announcement regarding the provision of the therapy to infected citizens was, indeed, "welcome."[73] In that same report, Gold Fields offered a glimpse into the tension that exists between the role of the employer and that of the government:

> The most pressing challenge facing both South Africa and Gold Fields remains the development of a credible, comprehensive, nationally-available and sustainable response to the prevention of HIV infection and the treatment, care and support of people affected by HIV/AIDS. This requires political will, commitment, initiative and leadership.[74]

It is hoped that the government will truly be able to realize its promise of HAART and that the resources will be able to sustain the demand, although this remains to be seen.

III. THE JOHANNESBURG STOCK EXCHANGE'S NEW LISTING REQUIREMENT

The Johannesburg Stock Exchange has recognized the need to keep shareholders apprised of the impact of HIV/AIDS on their investments. In response, the Exchange has implemented a new listing requirement pursuant to which companies must give investors some feedback in this regard, but need not go as far as engaging in prevalence reporting.

The Financial Services Board (FSB) is the governing body in South Africa that oversees the JSE, as well as the other major stock

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71. Reuters, *AIDS Behind Big Jump in S. Africa Deaths* (Mar. 3, 2004), *available at* http://www.msnbc.msn.com/id/4438421.

72. S. AFR. CONST., *supra* note 28, § 27(2)(emphasis added).

73. GOLD FIELDS LIMITED, 2003 SUSTAINABLE DEVELOPMENT REPORT 22-25, *available at* http://www.gold-fields.com/Sustainable_Development/sd_report03/pdf/complete_sd_report.pdf [hereinafter GFL SUSTAINABLE DEVELOPMENT REPORT].

74. *Id.* at 25.

exchanges.[75] The FSB has given the president of the JSE the ability to require listed companies to "disclose to him . . . any information . . . pertaining to . . . the affairs of [the] issuer which is in the public interest and . . . requires such issuer to disclose that information to the registered holders of the securities."[76] Russell Loubser, the JSE's current president, has decided that information pertaining to the public interest includes AIDS data, as evidenced by the Exchange's new listing requirements.

A. *The King Code*

The new requirements, released in September 2003, require companies to disclose the extent of their compliance with the King Code on Corporate Governance (hereinafter, King Code).[77] At present, only parts of the King Code are mandatory, but companies are still required to document their compliance with King Code principles.[78] Most of the mandatory King Code provisions deal with ensuring that a company's board of directors is truly independent.[79] The move by the JSE to require listed companies to document compliance with the King Code "puts the JSE at the extreme of stock exchanges requiring compliance with governance and social principles."[80] The JSE sees the adoption of the new standards as a tribute to its strict intolerance of corporate mismanagement:

> The JSE played a crucial role in raising the bar on corporate governance standards during the year under review. Not only did it provide valuable input into the formulation of the King II Code on Corporate Governance, it is the only exchange in the world to have adopted a code of this nature as part of its listings requirements. This means all JSE listed companies must abide by the King Code, or

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75. *See Welcome to the FSB*, Financial Services Board, *at* http://www.fsb.co.za (last visited Feb. 26, 2004).

76. Stock Exchanges Control Act of 1985 § 19(1)(a) (West 2004). The court states in relevant part that

> [t]he president may, by notice in writing, require any issuer whose securities are included in the list referred to in section 16 (a) to disclose to him, within a period specified in such notice, any information at such issuer's disposal pertaining to such securities or to the affairs of that issuer which is in the public interest and, after giving such issuer an opportunity of making representations to him, require such issuer to disclose that information to the registered holders of the securities specified in the said notice.

Id.

77. INSTITUTE OF CHARTERED SECRETARIES AND ADMINISTRATORS, *Amendments to the JSE Securities Exchange South Africa Listings Requirements* 2003, at 7, *available at* http://www.icsa.co.za/assets/downloads/amendments.

78. *Id.* at 1.

79. *Id.* at 7-8.

80. *Listed Companies Must Comply*, *supra* note 5.

> provide valid reasons for lapses. The benefits of this are already evident in improved reporting standards and a growing recognition by companies that they are answerable not just to shareholders, but also to employees, customers, creditors, communities and the broader society.[81]

One of a company's King Code reporting responsibilities under the new listing requirements includes complying with the section on "Sustainability Reporting."[82] This section of the King Code calls for the disclosure of certain non-financial information, including, specifically, "the nature and extent of the strategy, plan and policies adopted to address and manage the potential impact of HIV/AIDS on the company's activities."[83] While the King Code requires a company to report at least once a year on its social, transformation, ethical, safety, health, and environmental policies,[84] it leaves it to the board of each company to decide what it deems relevant for disclosure in "regard to the company's particular circumstances."[85] Further, listed companies do not have to take any prescribed action; rather, companies are only required to document to what extent they are responding to the AIDS epidemic in their workplace.

The King Code was drafted in the wake of (and in reaction to) the Enron and WorldCom calamities in the United States, along with some of South Africa's own collapses of companies like Leisurenet and Regal Bank.[86] While the U.S. Congress responded with the Sarbanes-Oxley Act, South Africa developed the King Code. The operation of the King Code becomes effective through the JSE's decision to make documentation of compliance with its provisions a requirement for listing on the Stock Exchange. This differs from Sarbanes-Oxley, which garners compliance through the threat of legal sanctions.[87] Not everyone agrees that such self-censoring techniques will be effective. Said the Cape Town-based Frater Asset Management's William Frater, "[w]hile one system promotes the employment of an army of lawyers to find the best possible ways around a plethora of laws, the other involves employing an army of consultants to address how the principles will be best applied to an organization."[88]

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81. Johannesburg Stock Exchange, *Review of Operations*, *available at* http://www.jse.co.za (n.d.).

82. KING REPORT, *supra* note 6, § 5.1.4.

83. *Id.*

84. *Id.* § 5.1.1.

85. *Id.*

86. William Baue & Graham Sinclair, *Johannesburg Securities Exchange Requires Compliance with King II and Global Reporting Initiative*, SOCIALFUNDS.com, July 16, 2003, *at* http://www.socialfunds.com/news/print.cgi?sfArticleId=1174 (last visted Sept. 8, 2004).

87. *Id.*

88. *Id.*

B. *Global Reporting Index*

The Code further specifies that the disclosure of data must be made in accordance with the Global Reporting Initiative (GRI) guidelines, which were developed in order to "disseminate globally applicable Sustainability Reporting Guidelines."[89] South Africa is acting as the pilot site for these new GRI guidelines, which, it is hoped, will soon be recognized as the international AIDS reporting standard.[90] As of July 2003, only ten South African companies followed the GRI guidelines in full.[91] Others criticized the GRI's strict standards for "placing the bar too high."[92] Now that the JSE has mandated that listed companies comply with the GRI, these critiques are likely to rise to a feverish pitch. The GRI guidelines represent an attempt by that organization to facilitate standardized reporting of a company's AIDS policies and programs in order to allow for public inspection of the adequacy of the corporate response to the disease.[93] Under the GRI's guidelines, there are four performance indicators:[94]

1) Good Governance: policy formulation, strategic planning, effective risk management, stakeholder involvement
2) Measurement, Monitoring and Evaluation: prevalence and incidence of HIV/AIDS, actual and estimated costs and losses
3) Workplace Conditions and HIV/AIDS Management
4) Depth/Quality/Sustainability of HIV/AIDS Programs

Under the "Measurement, Monitoring and Evaluation" heading, the reporting guidelines indicate that companies should describe the current and projected prevalence of HIV/AIDS in their workforce and "relevant populations" (e.g., service providers, target consumers, etc.).[95] Under that heading, a company must also disclose its current and projected costs and losses caused by the disease.[96] Although the GRI's guidelines include an alternative "Basic-Level Indicators" reporting guide for "first time reporters in small or low-capacity organizations," even this bare-bones reporting document calls for prevalence and cost/loss documentation.[97] As discussed above in Part

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89. *GRI at a Glance*, Global Reporting Initiative, *at* http://www.globalreporting.org/test/brief.asp (last visited Sept. 19, 2004).

90. *SA is Pilot Site for HIV/AIDS Global Reporting Initiative*, CAPE ARGUS, May 1, 2003 [hereinafter *Pilot Site*].

91. *Listed Companies Must Comply*, *supra* note 5.

92. *Id.*

93. GLOBAL REPORTING INITIATIVE, REPORTING GUIDANCE ON HIV/AIDS: A GRI RESOURCE DOCUMENT 6 (2003), *available at* http://www.globalreporting.org/guidelines/HIV/HIVAIDSpilot.pdf (last visited Sept. 7, 2004).

94. *Id.* at 9.

95. *Id.* at 11.

96. *Id.*

97. *Id.* at 16.

II.B, the reporting of prevalence rates and financial costs of the disease evokes many concerns among affected businesses. Further, some fear that the ambitious nature of the GRI reporting indicators requires such costly and advanced processes that it might scare off small or medium-sized companies that have not implemented HIV/AIDS-related policies and prefer to operate "under the radar."[98]

Ultimately, the practical concerns about determining prevalence in the workplace won out over those insisting that such reporting was necessary. As of this writing, the JSE has decided against requiring companies to report specifically on prevalence rates and the financial costs of HIV/AIDS to a company. The softer line taken by the JSE, requiring only that a company report its own self-assessment of compliance with the King Code, may give way in the future, however, to a more stringent reporting requirement. The South African Institute of Chartered Accountants (SAICA) is currently working on an actuarial system that would allow companies to assess prevalence rates without physical testing.[99] This would also allow companies to forecast the financial costs of the disease with a greater degree of certainty.

C. *Is Disclosure Good for Business?*

The new listing requirements are undoubtedly going to cause some dissatisfaction among companies. First of all, the regulations may be preclusive for some smaller companies wanting to make it on to the Exchange.[100] Second, there are sure to be companies that do not feel that AIDS risk management is a significant concern in their industry.[101] These companies may fear being viewed as "bad" if they do not take the same measures as their colleagues on the Exchange.[102]

Linda de Beer, a SAICA technical director, developed the disclosure requirements that the JSE adopted.[103] De Beer understands that the regulations are a "tall order" for affected management, but stresses that these issues are too important to be ignored.[104] She also emphasizes that the extent of the disclosure will

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98. Baue & Sinclair, *supra* note 86.

99. Sanchia Temkin, *HIV/AIDS Poses Information Disclosure Challenges*, BUS. DAY (South Africa), Mar. 10, 2003, at 7.

100. *Pilot Site*, *supra* note 90.

101. Andy Smith et al., *HIV/AIDS Risk*, GIBS NEWS, Feb. 3, 2004, *available at* http://www.gibs.co.za/newsevents/news/fullstories/hiv.htm.

102. David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 80 (1999) (stating that many corporations may resist social reporting for fear of being labeled as "good" or "evil").

103. Temkin, *supra* note 99; *see also Pilot Site*, *supra* note 90.

104. Temkin, *supra* note 99.

vary from company to company, acknowledging that different companies have different levels of risk.[105] While the new listing requirements do not specifically require compulsory AIDS reporting (the current version requires only the identification of the key risks of AIDS to business sustainability), that is indeed what the JSE initially had in mind. As a result, some fear that soon all listed companies will be required to include the cost of AIDS on their financial statements.[106]

1. The Cost of Implementing HIV/AIDS Programs

Another debate surrounding the new listing requirement is whether it will ultimately hurt or help South African businesses with workforces that are dramatically affected by the AIDS crisis. The JSE listing requirements are a unique mix of both financial and social accountability.[107] The driving force behind these regulations is pressure from big investment firms concerned with the long-term financial forecasts of listed companies.[108] This concern is fueled by the rationale that "the health of a company's workforce is intertwined with the well-being of the company."[109] Also included in the guidelines, however, is the requirement of a detailed narrative of how a company is managing the AIDS crisis in its workplace, in terms of both prevention and treatment.[110] Although such disclosure is undoubtedly social in nature, these measures will surely have some form of financial impact (whether good or bad) on listed companies. Some companies have already come to the conclusion that disclosures that may appear to detract from the bottom line will be looked upon favorably by a so-called "ethical investor."[111] These forward-looking companies have already implemented prevention and treatment measures.

For example, in an effort to reduce the at-risk sexual behavior that occurs as a result of migrant labor and all-male hostels typically used by mining companies to house their workers, one mine in Tanzania has implemented a home ownership plan under which its

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105. *Id.*

106. *Firms Warned of High Cost of AIDS*, BUS. DAY, Oct. 6, 2003, *available at* http://www.journ-aids.org/reports/06102003.htm (last visited Nov. 17, 2004) [hereinafter *Warned*].

107. Temkin, *supra* note 99.

108. *See* Heaps & Whittaker, *supra* note 11.

109. Macmillan, *supra* note 19, ¶ 4.

110. Schlesinger, *supra* note 41.

111. Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1267 (1999).

employees can buy homes closer to work.[112] Such a measure is not without financial cost to the company, but the social goodwill may outweigh the detrimental affect to the bottom line, at least in the minds of some investors. Perhaps most notably, several companies have begun offering free HAART to their workforce.[113] Mining giant Anglo American, for example, is currently offering HAART to all of its 30,000 infected employees.[114] The treatment plan will cost $3 million, but as Brian Brink, the head of Anglo's medical program, says, "with earnings of about $1.7 billion, it's not going to kill us—it will protect us."[115]

Gold Fields, another of South Africa's key mining companies, started reporting the cost of AIDS of its own volition in 2001.[116] After responding to an array of questions from wary investors and realizing that AIDS has become an "increasing high-profile item on investor agendas," the company implemented AIDS assessment and prevention reports well in advance of the just-passed regulation.[117] Included in the Gold Fields program are different formulas for counting the future cost of AIDS depending on the success or failure of its "life extension" campaigns.[118]

Recent data show that investing in prevention and treatment plans may ultimately be good for a company's portfolio.[119] A recent study evaluated the so-called "AIDS tax" that a group of six large sub-Saharan companies incurred as a result of AIDS among their respective workforces.[120] The "tax" ranged from 0.4 percent of the company's annual payout of salaries to 5.9 percent of the payout.[121] For half of the companies surveyed, prevention programs (such as providing condoms, education, voluntary testing, and treatment for other STDs that increase risk of HIV transmission) proved profitable.[122] Most striking, the study found that providing HAART at no cost to employees would produce positive returns for *all* companies involved.[123] It is worth noting that all of the companies involved in

112. Heaps & Whittaker, *supra* note 11 (discussing steps taken at Barrick Gold, one of Africa's most prominent mines).

113. *Id.*

114. *Id.*

115. *Id.*

116. Bailey, *supra* note 17.

117. *Id.*

118. *Id.*

119. *See generally* Rosen et al., *supra* note 34.

120. *Id.* at 84.

121. *Id.* at 86.

122. *Id.* at 87. It should be noted that the study authors believed the programs would have produced positive returns for all of the companies studied if all organizational costs of the epidemic had been counted. *Id.*

123. *Id.*

this study were large by sub-Saharan standards.[124] While the companies opted to remain anonymous for the study, it is likely that similar results would be reached using those companies large enough to be listed on the JSE.

Companies that have already implemented prevention and treatment plans like these will likely support the disclosure requirement, as the costs incurred are already reflected in their financial statements. In fact, about thirty percent of listed companies already voluntarily disclose their HIV/AIDS commitments.[125] In fact, one of the most compelling arguments for making the disclosures mandatory is the "peer pressure" that would be applied to those companies that are shirking their perceived social obligations. As JSE President Russell Loubser observes, some employers are still "closing their eyes to the issue . . . [and] haven't even started doing anything about HIV-AIDS."[126] Mike Murphy, a facilitator of the HIV/AIDS program of the GRI, noted that "[o]nce more companies start reporting, questions will be asked about companies which say nothing."[127] While this "peer pressure" can be a force for good, the Ethics Institute of South Africa stresses that it is important for companies to treat AIDS reporting seriously, and not merely as a piece of literature in their year-end statements.[128]

Those who are involved in preventive and treatment plans acknowledge that altruism is not the only motivator. [129] Companies are as conscious of the dollar value of such measures as they are of the goodwill they yield. Placer Dome, which has only one mine in South Africa, is also initiating a family housing plan and keeps its 5,500 South African miners in constant supply of condoms.[130] While acknowledging that there is a cost to inaction, a spokeswoman for the company implied that the financial gains of the program were not sufficient to outweigh the expenditures, saying "it's one mine out of seventeen for us, so part of the motivation is to protect our reputation."[131]

2. Gold Fields: An Example of AIDS Reporting at Work

Companies that were already engaging in some sort of prevention and reporting have found compliance with the regulation

124. *Id.* at 84.
125. Heaps & Whittaker, *supra* note 11.
126. Macmillan, *supra* note 19, ¶¶ 14-15.
127. Wessels, *supra* note 52.
128. Punt, *supra* note 49.
129. Heaps & Whittaker, *supra* note 11.
130. *Id.*
131. *Id.*

to be fairly simple. Mining giant Gold Fields is listed on both the JSE and NYSE.[132] In its 2003 annual report, the company detailed its approach toward the AIDS epidemic in compliance with the King Code and the new JSE regulation.[133] Gold Fields adopted an actuarial model in order to assess the prevalence of AIDS, finding about thirty percent of its workforce to be infected.[134] It then outlined its strategy for dealing with AIDS in accordance with the regulation's treatment and prevention disclosure requirements.

On the prevention front, Gold Fields has employed peer educators who teach the virtues of abstinence, monogamy, and protected sex.[135] Counseling and treatment for those infected with STDs are also available, as an active STD can often facilitate the transmission of AIDS.[136] Also integral in Gold Fields' strategy is a program called "Informed, Consented, Voluntary Counseling and Testing" (ICVCT).[137] Though current participation among its employees in ICVCT languishes around eight percent, the company is aiming to increase that figure to seventy percent by the end of 2004.[138]

On the treatment front, Gold Fields has established wellness clinics throughout its mines. The company has also committed to providing HAART to infected employees and to "a responsible and compassionate ill-health retirement programme" for employees who are no longer able to contribute to the workforce because of AIDS.

IV. THE SOCIALLY RESPONSIBLE INVESTMENT INDEX

The JSE took another step toward accountability among listed companies in the area of AIDS with the establishment of the Socially Responsible Investment index (SRI). The new index is a response to the increased demand by investors to be apprised of a company's socially relevant activity.[139] Specifically, the index consists of companies that have demonstrated social responsibility in the three pillars of what is called the "triple bottom line": environmental,

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132. GOLD FIELDS LIMITED, 2003 ANNUAL REPORT 1, *available at* http://www.goldfields.co.za/Investor/Annual_Reports/Fy_2003/gf_ar03/sd_03/perfomance/perfomance.htm#hiv (n.d.).

133. GFL SUSTAINABLE DEVELOPMENT REPORT, *supra* note 73, at 22-25.

134. *Id.* at 23.

135. *Id.* at 24.

136. *Id.* at 22.

137. *Id.; see also Case Study Executive Summary*, World Economic Forum, *at* http://www.weforum.org/site/homepublic.nsf/Content/GHI_Case_Studies_Details (n.d.).

138. GFL SUSTAINABLE DEVELOPMENT REPORT, *supra* note 73, at 25.

139. JSE SRI Index: Background and Selection Criteria, 2, Oct. 6, 2003 *available at* http://www.jse.co.za/sri/docs/Background (last visited Sept. 9, 2004).

economic, and social sustainability.[140] HIV/AIDS falls under the pillar of social sustainability, and the JSE stresses the need to emphasize how a company is "managing the impact of the HIV/AIDS pandemic on [its] activities."[141] In order to be included on the index, a company must first complete an application detailing its policies and programs relating to the specific criteria related to each pillar, along with reasonable targets for the future and a plan for reaching them.[142] In the area of AIDS management, a company must identify the "policies and strategies in place to identify and manage the impact of HIV/AIDS on the company's activities" and must "document[] initiatives or programmes to address the impact of HIV/AIDS."[143] A company's social sustainability reporting must also demonstrate that its policy includes a commitment to allowing shareholders to be involved in social issues "when relevant" and disclosing to the public key shareholder issues.[144] The questionnaire specifically asks the company to answer the following questions relevant to its management of AIDS:

- Does the company have dedicated capacity for managing the AIDS risk to the organization as well as preparedness and contingency planning in light of anticipated HIV/AIDS impacts?
- Provide an estimated cost associated with the impact of HIV/AIDS on the company's workforce as both a percentage of annual remuneration costs and as a percentage of annual turnover. (Please consider replacement costs of staff training and retraining, cost of non-production due to absence related illness, time off to attend funerals, time off to look after sick family members).
- Describe what steps are being taken to communicate the HIV/AIDS policy and strategy to the workforce and other stakeholders (non-governmental organizations, government, labour, aid and funding organizations, and shareholders).
- State whether the organization has determined its prevalence rate (number or proportion of infected people at any given moment) and incidence rate (refers to the rate of increase or decrease in the prevalence).
- What steps have been taken to minimise the impacts of these prevalence rates on the organization, such as the provision of Anti Retro-Viral Therapy, Voluntary Counseling and Testing programmes and other medication and wellness programs.
- Is the provisioning through medical aid benefits or through state healthcare provisioning? If no such steps are being taken, please explain.
- Specify what benefits and support HIV/AIDS employees or the families of deceased employees could expect (such as income during

140. *Id.*
141. *Id.*
142. *Id.* at 15.
143. *Id.* at 15-16.
144. *Id.* at 15.

temporary absence, disability benefits, ongoing medical aid or health care, family support (such as, education and housing, funeral costs, death benefits).[145]

Upon completion, the answers to these questions and others under each pillar are reviewed and scored. Application to the SRI is optional, and only those applicants who achieve a high enough score will be listed on the index.[146] The new SRI index was launched in May 2004 and, of the seventy-four companies that applied, fifty-one scored high enough to secure a place on the index.[147] Although the index is still in its infancy, initial results are encouraging. Some prominent businesses have elected to participate in the index; Anglo American, Gold Fields, SABMiller, and Woolworths Holdings are among the key participants.[148] The "peer pressure" effect of having such noteworthy businesses on the SRI is an anticipated, and desired, response. The JSE hopes that by initiating the index, and by measuring shareholder enthusiasm for investing in companies listed on the index, other companies will be encouraged to apply. In hopes of scoring high enough for inclusion, these companies will likely develop AIDS programs and may even begin some form of prevalence reporting.[149]

Still, there is a legitimate concern that smaller companies will not be able to handle the financial burden that comes with complying with the "three pillars." Corli le Roux, assistant legal counsel for the JSE, says in response that "[a] black mark will not be brought against companies that do not comply with all the requirements to make the index. But the debate needs to start happening and companies need to address issues that will impact on long-term sustainability."[150] While the Exchange itself will not impose any tangible sanctions on firms that do not engage in disclosure, it remains to be seen whether investors will respond negatively to firms that do not engage in the type of sustainability reporting envisioned by JSE. Further, the fifty-one currently listed companies include seventeen members of the MidCap Index and three SmallCap members.[151] The inclusion of these smaller players on the index demonstrates that the requirements may not be cost-prohibitive.

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145. Johannesburg Securities Exchange, JSE SRI Index Questionnaire §§ 6.2.1-6.2.7 *available at* http://www.jse.co.za (last visited Sept. 23, 2004).

146. Press Release, Johannesburg Securities Exchange, Launch of JSE Socially Responsible Investment Index (May 19, 2004) *available at* www.jse.co.za (last visited Sept. 23, 2004).

147. *Id.*

148. *Id.*

149. *See* JSE, *supra,* note 139.

150. Wessels, *supra* note 52.

151. *See id.*

The new SRI index is another way in which the JSE is encouraging corporate accountability in the area of AIDS response. It is too early to tell how investors will respond to the index, but the enthusiastic participation of a wide cross-section of South African businesses is an encouraging sign that others will likely follow suit. It is important that the new index will provide companies with a clear indication of investors' concern with their response to the disease. If investors respond favorably to the SRI, companies will be more likely to address AIDS in their workplaces simply because it is good for *business*, not because it is an unwelcome and burdensome obligation.

V. SOCIAL REPORTING DEBATE

There are currently no regulations in the United States that require companies to make disclosures of a purely social nature to their shareholders. Some scholars have, however, maintained that social reporting requirements can and should be implemented by the SEC. One of these scholars, Professor Cynthia Williams, argues that social data meets the "materiality" requirement mandated by the SEC. Professor David Hess agrees and provides a detailed plan for how such a reporting requirement might be implemented in the United States.

A. *What Is "Materiality"?*

1. SEC Disclosure Rules and the Need for Reform

In the United States, reporting of non-financial data by publicly traded companies is a topic that has been widely debated. The SEC is empowered, under the Securities Exchange Act of 1934[152] (hereinafter, 1934 Act), to require that companies disclose all information "necessary or appropriate in the public interest or for the protection of investors" in their proxy statements.[153] Publicly traded companies in the United States are required by the SEC to make continued disclosures throughout the year through their periodic quarterly and annual reports, in their proxy statements, and when a major corporate event occurs.[154] Regulation S-K[155] details what a company must disclose in terms of five categories.[156] Some of the criteria listed for specific disclosure provide the company with clear

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152. Securities and Exchange Act of 1934 § 14(a), 15 U.S.C. § 78(n) (2004).
153. 15 U.S.C. § 78(n).
154. 15 U.S.C. 7819(b)(1), 781(g)(1), 78m, 78o(d) (2004).
155. 17 C.F.R. 229.10-229.702 (2004).
156. 17 C.F.R. 229.10-229.702

guidelines for when a particular item must be reported.[157] For instance, Item 103 specifically dictates that, in an environmental proceeding against a governmental entity, any litigation involving the possibility of a $100,000 fine must be disclosed.[158] Where the regulations do not detail the precise threshold for disclosure, items need only be disclosed if they are "material."[159]

The U.S. Supreme Court has interpreted "materiality" to mean that the information creates a "substantial likelihood that a reasonable investor would deem the information significant in the total mix of information."[160] This "total mix" test has been further endorsed by the SEC itself in its Staff Accounting Bulletin (SAB) No. 99 on "Materiality."[161] This SAB was issued to debunk a rumor promulgated by corporate auditors' "rules of thumb" that no duty to report attached (i.e., an item was not considered "material") unless it resulted in more than a five percent misstatement of financial accounts.[162] In dispelling such a strict numerical threshold, the SEC stated:

> In the context of a misstatement [or omission] of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[163]

While case law and bulletins like these may open up the possibility of reporting social data if deemed relevant in the "total mix" of information, there is still a need for clarification as to what this definition means. Some groups have been steadily working on proposals that would clarify a corporation's disclosure obligations under the SEC.

The Corporate Sunshine Working Group (CSWG) is composed of public interest organizations and investors.[164] This group since 1998 has been advocating more extensive disclosure of non-financial data

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157. *See* Williams, *supra* note 111 at 1208.
158. *Id.* (discussing 17 C.F.R. 229.103).
159. *See* 17 C.F.R. 229.10-229.702.
160. T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).
161. SEC, SAB No. 99—Materiality, *available at* http://www.sec.gov/interps/account/sab99.htm (last visited Oct. 4, 2004).
162. *Id.*
163. *Id.*
164. Michelle Chan-Fishel, *After Enron: How Accounting and SEC Reform can Promote Corporate Accountability While Restoring Public Confidence*, 32 ENVTL. L. REP. 10965, 10968 (2002).

and has issued a proposal outlining suggested disclosure rules.[165] The CSWG's proposal suggests some new guidelines along with some modifications to the reporting instructions, or materiality standards, of existing ones.[166] The proposal suggests disclosure of several "Good Actor Indicators," among them, "company-adopted human rights, including standards and codes including brief description of internal and external monitoring mechanisms."[167] Other interesting additions include disclosure of corporate contributions to political organizations, number and value of complaints filed at and violations found by the Equal Employment Opportunity Commission, and a list of countries where the company has facilities or operations.[168] This type of specific disclosure would be an improvement on the vague "materiality" standard currently employed by the SEC. As is demonstrated in Part V.B. of this Note, similar specific disclosure requirements with respect to HIV/AIDS policies may also be worthy of consideration, as they may be of substantial interest to investors in certain, particularly foreign, companies.

2. The Williams Approach to Social Disclosure

Cynthia Williams, assistant professor at the University of Illinois College of Law, argues that "the SEC's public interest disclosure power is separate from and broader than its investor protection disclosure power."[169] Although the SEC has not exercised its ability to require companies to report on social data relating to the public interest, she argues that such reporting can and should be required by the SEC in proxy disclosure statements.[170] She relies on the history of the legislation itself in support of her argument that a major congressional aim in enacting the 1934 Act was to encourage and induce public accountability among corporate management.[171] Finally, she concludes that despite the SEC's refusal to require broad social disclosure in the past, such disclosure should today be required, as this information would now be deemed "material" by many investors.[172]

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165. *Id.*

166. CSWG Proposed Expanded SEC Nonfinancial Disclosure Requirements, *reprinted in* Michelle Chan-Fishel, *After Enron: How Accounting and SEC Reform can Promote Corporate Accountability While Restoring Public Confidence*, 32 ENVTL. L. REP. 10965, 10968 (2002).

167. *Id.*

168. *Id.*

169. Williams, *supra* note 111, at 1204.

170. *Id.* at 1204-06.

171. *Id.* at 1205.

172. *Id.* at 1206.

"Materiality" is a relative term whose definition will change over time. Recent events suggest that investors may be increasingly concerned with disclosures that relate more to corporate integrity and accountability than the mere numbers. Since the publication of Professor Williams' articles, corporate accountability has become a prevalent issue in the public conscience. With the collapse of Enron and other corporate mismanagement scandals involving companies like Tyco and Worldcom, the demand for corporate transparency is at an all-time high.[173] In light of these corporate calamities, the discussion of the need for social and ethical (rather than purely financial) accountability is as relevant as ever.[174]

This shift in priorities can be seen in investment trends. People invested $97 billion in so-called "socially responsible" mutual funds in 1997, thus demonstrating that investors are concerned with social as well as financial responsibility.[175] Therefore, Williams' argument that social disclosure would be considered "material"[176] to the average investor is more persuasive than ever in the current economic and social climate. Arthur Levitt, former chairperson of the SEC, would likely agree with Williams' assertion. As he stated, "if a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere. If investors are not confident with the level of disclosure, capital will flow elsewhere. If a country opts for lax accounting and reporting standards, capital will flow elsewhere."[177] In the context of South Africa, reporting standards under which companies may hide from investors the impact of the AIDS virus on their businesses would arguably be considered "lax."

A recent critique of Williams' argument points out that rarely are shareholders motivated either purely by ethics or purely by the bottom line.[178] This dichotomy is not necessary, however, to support Williams' basic assertion because social disclosures usually have some impact (whether material or not) on finances. Indeed, "[h]ippie or yuppie, the shareholder needs to know if a firm is a toxic polluter so that she can divest herself of the moral guilt or the Superfund liability-in-waiting, whichever concerns her."[179]

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173. Colleen DeBaise, *Corporate Governance Law is the Rage*, WALL ST. J., Sept. 1, 2004, at B7; *see also* Bob Greifeld, *The View from Nasdaq*, WALL ST. J., July 30, 2004, at A10.

174. *Id.*

175. Williams, *supra* note 111, at 1267.

176. For SEC purposes, materiality is defined as anything "substantially likely to be considered significant by a reasonable investor." *Id.* at 1268.

177. KING REPORT, *supra* note 6, § 16 (quoting Arthur Levitt).

178. Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1439 (2002) [hereinafter *Nonfinancial Disclosure*].

179. *Id.* at 1436.

The Social Investment Forum tracks trends in socially responsible investing.[180] It follows investors who engage in "screening," the process of "including, excluding, or evaluating publicly traded securities from investment portfolios or mutual funds based on social and/or environmental criteria."[181] Such investors seek out "operations that respect human rights around the world" and, conversely, "avoid . . . companies whose products and business practices are harmful."[182] The report calculated investments of $2.14 trillion in socially screened portfolios in 2003, up seven percent from 2001.[183] These social investors seek out companies that have met certain criteria of "Corporate Social Responsibility."[184] From 1995 to 2003, socially responsible investment assets grew by 240 percent, compared to 174 percent growth for investments overall during the same time period.[185] It is evident that social reporting has become increasingly important to U.S. investors in recent years. The SEC should thus reform its disclosure rules to allow shareholders to make their investment decisions with the body of knowledge that they deem "material" by today's more socially responsible standards.

B. *Implementing a Disclosure Requirement: Hess' Plan of Action*

David Hess argues for social reporting requirements in the United States.[186] His plan of action for implementing such regulations follows fairly closely the steps that have already been taken in South Africa. He suggests a first stage involving non-mandatory legislation that would "encourage companies to experiment with social reporting and work with accounting institutions to gain the practical experience necessary to develop the needed standards."[187] The JSE's new listing requirements follow this model.[188] A listed company is given ample discretion to choose what it wants to disclose under the circumstances.[189] Accordingly, Hess stresses the need to allow flexibility in the reporting requirements and to acknowledge that each social report may vary widely

180. *Report on Socially Responsible Investment Trends in the United States*, Social Investment Forum, Dec. 2003, *available at*, http://www.socialinvest.org/areas/research/trends/sri_trends_report_2003.pdf (last visited Oct. 4, 2004).
181. *Id.* at 9.
182. *Id.*
183. *Id.* at 4.
184. *Id.* at 9.
185. *Id.* at 4.
186. Hess, *supra* note 102, at 41.
187. *Id.* at 65.
188. *See* KING REPORT, *supra* note 6, § 5.1.4.
189. *Id.*; *see also* Temkin, *supra* note 99.

depending on the nature of the company filing the report.[190] Finally, Hess proposes that after this "experimental" period, companies of a certain size should be required to participate in social reporting.[191] He advocates following the SEC's size threshold for its registration and reporting requirements—that any corporation with 500 or more shareholders and more than $5 million in assets must comply.[192] The JSE's listing requirements are already similar to Hess' proposal in that listed companies must meet certain size requirements.[193] Hess' argument is useful, however, in considering what steps South Africa could take toward making the reporting requirement a legal one, imposed by the Financial Services Board, a governmental entity, rather than merely a requirement imposed by individual stock exchanges like the JSE.

VI. ARGUMENT

A. *Social Reporting Is Material to U.S. Investors*

The realization that there are social disclosures that will affect shareholders' investment decisions should resonate with the SEC and U.S. corporations. Admittedly, HIV/AIDS is not now so pervasive in U.S. society as to warrant prevalence reporting requirements on all publicly traded domestic companies. But there are parallel concerns in U.S. society that, while perhaps not as polemic as AIDS, could arouse the same kind of investor scrutiny and selectivity if reported routinely. For example, corporate funding of political campaigns, gun control laws, abortion, and compliance with environmental regulations are all potential areas of material interest for either the socially conscious or the fiscally responsible investor. In answer to the query of why corporations should be required to be concerned with their social performance in areas such as these, Professor David Hess responds: "The simple answer . . . is that society, and in particular the marketplace, expects and demands it. A recent survey found that ninety-five percent of Americans disagreed with the view that the only responsibility of business is to increase profits."[194]

As an example, one author notes that Occupational Safety and Health Administration (OSHA) data relating to worker fatalities, absenteeism and accidents provide a good indication of a company's

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190. Hess, *supra* note 102, at 66.
191. *Id.*
192. *Id.* at 66-67.
193. *See Guidelines to Listing on the JSE, at* http://www.jse.co.za/informational/guideline/guidelines_05072004.doc (last visted Sept. 26, 2004).
194. Hess, *supra* note 102 at 43.

risk management strategies.[195] But, since companies are not required to report this data to shareholders, they are effectively immune to shareholder reprimand and will likely perpetuate unsafe working conditions.[196] Losses in productivity and liabilities incurred as a result hurt both the workers affected and the shareholders' investments.[197] Where deplorable working conditions have been disclosed to shareholders through the media, as happened with the so-called Nike "sweatshops," companies have been pressured into changing their business practices.[198] It follows, then, that despite the absence of a legal requirement to disclose social data like these, shareholders do indeed find them "material" and will modify their investment strategies accordingly. Examples like this show that even when a corporation is in technical compliance with the law, its shareholders may find its compliance (or lack thereof) with other social norms equally important.

A recent *Wall Street Journal* article noted that events such as the nuclear accident at Three Mile Island, South Africa's apartheid regime, and the support of terrorism by foreign oil companies have all influenced investor decisions.[199] While the SEC first ignored the contention that the social ventures of a company would be of any material interest to an investor, a divestment campaign against these "bad actors" proved successful.[200] As a result, companies supporting terrorism and regimes abusive to human rights saw drops in their stock values.[201] In response, the SEC appears to have changed its tune—at least in the area of U.S. foreign policy. Its chairman noted in 2001 that "[o]ur aim is to make available to investors additional information about situations in which the material proceeds of an offering could—however indirectly—benefit countries, governments,

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195. Chan-Fishel, *supra* note 164, at 10966.
196. *Id.*
197. *Id.*
198. Hess, *supra* note 102, at 44-45.
199. Roger W. Robinson, Jr., *Are You Investing in Rogue States?*, WALL ST. J., July 6, 2001, at A8.

> The nuclear accident at Three Mile Island, for example, elevated the importance of environmental risk factors in the markets. Other 'socially responsible' investment guidelines have caused many state public pension funds to eschew stocks issued by tobacco, gun and alcohol concerns. The divestment campaign directs against South African apartheid is, to many, a model for the current market activism aimed at the genocide-, slavery-, and terrorist-sponsoring Sudanese government—and the foreign oil companies like Talisman whose investments are providing the Khartoum regime with economic life-support.

Id.

200. *Id.*
201. *Id.*

or entities that, as a matter of U.S. foreign policy, are off-limits to U.S. companies."[202] The Director of the SEC's Division of Corporate Finance also conceded that "[a] reasonable investor would likely consider it significant that a foreign company raising capital in the U.S. markets has business relationships with countries, governments or entities with which any U.S. company would be prohibited from dealing because of U.S. economic sanctions."[203]

In the wake of Enron's collapse and similar corporate scandals, disclosure in general is a hot topic in the United States. Michelle Chan-Fishel,[204] coordinator of the Green Investments program at Friends of the Earth-U.S., notes that

> [t]he Enron case . . . demonstrates that investors needed fair and full disclosure of both financial *as well as nonfinancial* data. Indeed, inadequate reporting of nonfinancial information such as . . . the amount and recipients of political campaign contributions (not currently required by the SEC), were at the core of many problems highlighted by the Enron case.[205]

Some U.S. companies are already making this kind of disclosure work for them. Hess notes that The Body Shop International and Ben and Jerry's Homemade, Inc. are two companies that have included categories like these in annual reports.[206] One of the great benefits of the social reports is an increase in transparency and accountability to shareholders.[207]

B. *South Africa as a Case Study for Materiality*

Because of the magnitude of the AIDS crisis in South Africa and the public demand for corporations to do their fair share to help, U.S. investors should watch closely to see whether the moral pressure on these companies is sufficient to compel preventive and treatment-oriented expenditures. Shareholder response to such disclosure is an indication of how "material" investors do perceive these social data to be both financially and morally relevant. Pressure on reluctant companies is likely to be successful only if the company believes it is in jeopardy of losing shareholder support. As it stands, the JSE regulations only require companies to *report* their response to the

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202. *Id.* (quoting letter from SEC Chairman, Laura Unger, to Congress (internal quotes omitted)).

203. *Nonfinancial Disclosure*, *supra* note 178, at 1434 (quoting Memorandum from David B.H. Martin, Director, Division of Corporation Finance, SEC, to Laura Unger, Acting Chair, SEC (May 8, 2001).

204. Chan-Fishel, *supra* note 164, at 10965 FN*.

205. *Id.* at 10965 (emphasis added; parenthesis in original).

206. *Id.* at 72-79.

207. *Id.* at 83.

AIDS epidemic in their workplace, rather than actually requiring any particular responsive *action*.[208] If such disclosure has a significant effect on investments, the social data will evidently be "substantially likely to be considered significant by a reasonable investor," or "material."[209] Thus, by the SEC's definition of materiality, this type of social data can and should be disclosed to investors.[210] Furthermore, in South Africa, the discovery that such reporting has a significant effect on shareholder investing will likely either encourage or discourage (depending on the investors' reactions) companies to do more in the way of preventing and treating the disease. Such proactive measures may one day be important enough to also be included as requirements for listing.

Although only eight African companies are listed on the New York Stock Exchange (NYSE), seven of those are South African companies.[211] Furthermore, three of the companies are gold mines and the fourth is primarily concerned with investments in the mining industry.[212] Because the mines depend primarily on a workforce derived from a particularly high-risk segment of the population, the AIDS epidemic is particularly relevant for U.S. investors in these listed companies.[213] More than twenty-three percent of workers in the mining, metals processing, and agribusiness industries suffer from the disease.[214] The cost of labor in these industries has risen dramatically because of an increase in absenteeism and employee turnover as a result of the disease.[215] As an example of this cost at its worst, companies in Zambia and the Congo have resorted to training and hiring two employees for every one needed, in anticipation that one will die.[216] This threatens to stifle the trend of globalization, as the once-alluring prospect of cheaper labor in developing countries is dwindling.[217]

Outside of the workforce itself, the well-being of South African companies is also threatened by the reduced demand for goods and services that has resulted from the disease.[218] Families that once had

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208. KING REPORT, *supra* note 6, § 5.1.4.

209. Williams, *supra* note 111.

210. *Id.*

211. *See Listed Companies Sorted by Geography*, New York Stock Exchange, *available at* www.nyse.com [hereinafter *Listed Companies*].

212. *See id.* AngloGold Limited, Gold Fields Limited, and Harmony Gold Mining are all mining companies. *See id.* Limited is a closed-end investment company that invests fifty percent of its capital in South African gold mines. *See id.*

213. Rosen et al., *supra* note 34, at 82.

214. *Id.* at 85.

215. *Id.* at 82.

216. *Id.*

217. *Id.*

218. *Id.*

discretionary income are now forced to save their money to pay for medical treatments and make up for the lost wages of a sick breadwinner.[219] The costs associated with an infected workforce and decreased demand are not unique to South Africa.[220] Because the costs of the disease are not immediate (most HIV-infected workers will not become a financial burden until five to ten years after infection), countries in which AIDS is rapidly spreading have not yet evaluated how AIDS affects the cost of doing business.[221] The costs of doing business in South Africa have escalated dramatically and can no longer be ignored. The JSE has determined that AIDS prevalence and treatment are now matters that should be considered relevant to the average investor. While investors may today be warned against the financial risks inherent in South African investments, similar companies in other AIDS-ravaged countries are seeming to follow suit.[222]

South Africa, with its combination of sophisticated publicly listed companies and an extremely high AIDS prevalence rate among the general population, provides the perfect case study for assessing investor demand for AIDS-related disclosure. But while South Africa may be the first country to provide such a poignant example, it will not be the only country to encounter such results. AIDS is not only an African disease. As of the end of 2003, between ten and twenty percent of the world's AIDS cases were found in Asia, and India had the greatest number of infected individuals at around 4 million cases.[223] As the recent rapid increase in infection rates in India and Russia indicates, the rising costs of AIDS will soon be a matter of the utmost importance for investors in markets worldwide. The World Health Organization (WHO) now estimates that forty million people worldwide are infected with HIV.[224] China reported a sixty-four percent increase in infections during the first six months of 2001. It is now estimated that one million Chinese are infected with AIDS and that only about ten percent of individuals know they are infected.[225] If drastic measures are not taken to curtail the negative effects of

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219. *Id.*
220. *Id.* at 84.
221. *Id.* at 87.
222. *Id.*
223. Mieko Nishimizu, *AIDS and the Development Paradigm in India*, BUS. LINE, India, Oct. 7, 2002, *available at* http://lnweb18.worldbank.org/SAR/sa.nsf/Countries/India. Mieko Nishimuzu is Vice President of the South Asian Region of the World Bank. *Id.*
224. *Facts About HIV/AIDS–South-East Asia Region*, World Health Organization, *available at* http://w3.whosea.org/hivaids/fact1.htm (last visited Feb. 28, 2004).
225. Reuters, *Few in China Aware They May Have AIDS*, MSNBC.COM, Mar. 2, 2004, *available at* http://www.msnbc.msn.com/id/4428619.

both of these factors, it is estimated that the number of infected Chinese could rise to ten million by 2010.[226] Infection rates are growing the fastest in Eastern Europe, where 1.5 million people are now HIV-positive (up from only 30,000 in 1995).[227] It is estimated that one in every 100 adults living in Russia, Estonia, and the Ukraine are infected with AIDS.[228]

The bottom line is that AIDS reporting should be of the utmost concern for the socially conscious as well as the fiscally responsible investor in international corporations. All of the three countries in which AIDS is growing most rapidly (China, India, and Russia) have companies listed on the NYSE.[229] Not only is a company's response to AIDS in its workforce a measure of its ethical responsibility, it is simply good business.[230] The U.S.'s stock exchanges should take their lead from the JSE in considering an expansion of disclosure requirements as a prerequisite for listing. In light of the enormous costs associated with AIDS, the exchanges should recognize the importance that investors in foreign corporations may place on a company's response to the disease. The disease has costs that go well beyond the physical well-being of an infected individual and, indeed, reach into the portfolio of an investor.[231]

C. *The SEC Has Authority to Introduce Social Reporting Requirements*

1. The SEC Has Authority to Require Social Disclosure on Issues That Will Have a Material Financial Impact on the Health of a Company

AIDS is a particularly unique issue for investors because data that are known today can have an enormous effect on the future health of the company.[232] The financial implications of the disease are not, however, realized until five to ten years later.[233] This fate can be substantially altered depending on the company's response to the

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226. *Id.*

227. Press Release,WHO/UNAIDS/UNICEF, AIDS Threat Growing Throughout Europe: UN, World Bank and Global Fund Call on European Ministries to Scale Up HIV Prevention and Treatment Programmes (Feb. 23, 2004), *available at* http://www.who.int/mediacentre/news/releases/2004/pr14/en/print/html.

228. Associated Press, *HIV Rates Soaring in Eastern Europe,* Feb. 17, 2003, *available at* http://www.msnbc.msn.com/id/4286514 (last visited Mar. 21, 2004).

229. *See Listed Companies, supra,* note 211.

230. Rosen et al., *supra* note 34, at 87.

231. Schlesinger, *supra* note 41.

232. *See* Rosen et al., *supra* note 34, at 85.

233. *Id.* at 84.

epidemic.[234] A company that opts to adopt treatment and preventive programs will have a better future outlook even though its portfolios in the short run may suffer from the overhead of such programs.[235] The long-term investor will likely consider such measures material to his or her investment strategy.[236] As Professor Alan Whiteside, Director of Health Economics and HIV/AIDS Research at Natal University notes, "[w]e are working on two curves, the HIV curve and the AIDS curve. The HIV curve is growing, the AIDS curve is still to come."[237] Because the effect of HIV/AIDS on a company's workforce, along with the company's response to the disease, is a material consideration for many investors in certain hard-hit areas, the SEC has the authority to require disclosure of this information in such a company's annual report.

2. The SEC Has Authority to Require Social Disclosures Even if There Is No Material Financial Impact on a Company

The financial implications of the AIDS epidemic should satisfy the SEC's current "bottom line" standard of materiality. Because the disease will substantially affect a company's wage bill, it will affect investors' financial interests. This is not the only reason why the reporting requirement should be imposed, however. As the SEC found in its response to those investors who did not want to be affiliated with so-called "bad actors," investors care about more than simply their financial outlook.[238]

Steps have been taken to promote disclosure with an aim toward "ensuring transparency of material information so as to enable individual and institutional investors to make more informed decisions."[239] These enhanced disclosure requirements should also include those matters that may not only affect an investor's financial returns, but are also material to his moral conscience. Many investors are wary of being morally linked to a company engaged in practices with which they do not agree.[240] It may be of material interest to an investor that a company that employs up to thirty percent AIDS-infected workers is actively engaged in the treatment and prevention of the epidemic. Just as the SEC acknowledged its ability to notify investors of a company's "bad actions" in relation to

234. Schlesinger, *supra* note 41.
235. *See* Rosen et al., *supra* note 34, at 86-87.
236. *See id.* at 82.
237. Schlesinger, *supra* note 41.
238. Robinson, *supra* note 199 (detailing statements made in a recent letter from acting SEC chairman, Laura Unger, to Congress).
239. *Id.*
240. *See id.*

endeavors that conflict with U.S. foreign policy, it also has the ability to notify investors of a company's practices that are substantially likely to conflict with his or her personal ethos.[241]

3. How to Implement a Social Disclosure Requirement

The most seamless way to introduce social reporting requirements would be to follow a voluntary formula, like that proposed by Hess. As time and experience demonstrate which social issues are the most material to investors, these issues should then be elevated to "mandatory" status. In South Africa, financial reporting is currently optional for listed companies, but the JSE initially wanted to make such reporting compulsory. Some predict that mandatory financial disclosure is not far away for South African businesses.[242] Similarly, the SEC could make social disclosure optional until it can ascertain the bearing that such disclosure has on investment decisions.

Hess proposes dividing social reports into the following categories: customers, employees, environment, franchisees, shareholders, and suppliers.[243] Within these categories, employers would report on issues such as wages, childcare, charitable contributions, compliance with EPA standards, lawsuits filed, company investments, etc.[244] Hess sees disclosure as the key means of getting information to the market.[245] As a consequence, he believes that legislation requiring social reporting is simply a continuation of the theme of disclosure in federal securities law of late.[246] "[A] social report would not mandate that certain predetermined outcomes be reached, but would instead require a corporation to reflect on how its practices impact society and to open up dialogues with the relevant stakeholders."[247] His plan is flexible in that it provides companies with an incentive to make reforms in order to avoid exposure of lax policies, without mandating any one particular methodology.

AIDS prevention and treatment programs have potentially significant long-term relevance for a company's overall health and future stability.[248] Such an issue will be a likely candidate for the mandatory disclosure requirement, especially in foreign corporations in countries like South Africa, where infection rates are significantly

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241. *See id.*
242. *Warned*, *supra* note 106.
243. *Id.* at 69-70.
244. *Id.*
245. *Id.* at 71.
246. *Id.* at 78.
247. *Id.* at 46.
248. *See generally* Rosen et al., *supra* note 34.

higher than in the rest of the world. The time for enacting such a requirement is now. As noted above, the true costs of the AIDS epidemic on a company will not be apparent until the disease has reached its critical stage among a workforce.[249] Long-term investors should be interested in what a company is doing about AIDS now, especially if the company is located in a country with high infection rates. Of primary concern would be a company that uses mostly unskilled labor, the population hardest hit by the epidemic in most countries.

Whereas Hess argues for a company's elevation to "mandatory disclosure" status to be determined by the size of a corporation and the number of its investors,[250] it makes sense in the area of AIDS prevention and treatment for disclosure to be predicated on the prevalence of AIDS in the country and among the demographic represented in the company's workforce. These factors should adequately account for the interests of both socially minded and fiscally responsible investors (of which most people are neither uniquely one nor the other). These numbers are not always easy to quantify, but they are becoming more and more readily available as actuarial techniques improve and voluntary testing becomes cheaper and easier to administer.[251] South Africa, as a leader in the area of encouraging AIDS disclosure, provides a good benchmark.

VII. CONCLUSION

In sum, the SEC should follow the lead of the Johannesburg Stock Exchange in determining that companies' policies and procedures in AIDS reporting, treatment, and prevention are of material importance both financially and socially to U.S. investors in foreign corporations located in countries where the AIDS epidemic is prevalent. Because the AIDS epidemic is growing at alarming rates in countries where publicly traded companies derive a large portion of their workforces, U.S. investors should be interested and concerned over what these companies are doing about the disease. Not only is such disclosure good for a company's social good-will value, but studies show that it is also good for a company's bottom line.

> Just as it took a large number of deaths . . . including those of . . . Rock Hudson and Arthur Ashe . . . to focus attention on the problem in the United States, large death tolls may be necessary to shock people into noticing the epidemic in countries outside of Africa. But by then, it will

249. *Id.*
250. Hess, *supra* note 102, at 66.
251. Rosen et al., *supra* note 34, at 82-84.

be too late for companies and investors—not to mention employees, families and communities.[252]

*Martha L. Salomon**

252. *See* Rosen et al., *supra* note 34, at 87.

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