

Journal of Business & Technology Law

Volume 6 | Issue 2

Article 3

The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues

David M. Lynn

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jbtl>

 Part of the [Securities Law Commons](#)

Recommended Citation

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 (2011)

Available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol6/iss2/3>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

DAVID M. LYNN*

The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues

I. INTRODUCTION

THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION Act of 2010 (the "Dodd-Frank Act")¹ has been widely viewed as bringing about the most sweeping changes to the financial regulatory system since the Great Depression.² While the enormous legislative effort was clearly directed at reforms to financial services regulation,³ discrete provisions of the Dodd-Frank Act call for an unprecedented incursion into the public company reporting regime for the purpose of serving distinct public policy objectives, opening the door to the use of mandated public issuer disclosures as a means to directly or indirectly address specific policy interests that may not be at all material to the shareholders of those public companies. This article explores the three provisions of the Dodd-Frank Act that the U.S. Securities and Exchange Commission (the "SEC") has described as "Specialized Corporate

© 2011 David M. Lynn

* David M. Lynn is a partner of Morrison & Foerster LLP. Mr. Lynn served as Chief Counsel of the Division of Corporation Finance of the U.S. Securities and Exchange Commission. The views expressed in this article do not reflect the views of Mr. Lynn's colleagues at Morrison & Foerster LLP or of the firm generally.

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

2. Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167, 234 (2011) ("On July 21, 2010, President Obama signed the Dodd-Frank Act, the most sweeping financial reform bill since Congress adopted securities regulations in response to the stock market crash of 1929."). This comparison and description for The Dodd-Frank Act was first introduced in a speech by President Obama on July 21, 2009, stating, "So today, my administration is proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression." Barack Obama, The President of the United States of America, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform.

3. See The Dodd-Frank Act, 124 Stat. at 1376. The preamble to the Dodd-Frank Act indicates the purposes of the Act were "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." *Id.*

Disclosure,” which collectively include disclosure regarding mine safety,⁴ payments to governments by issuers engaged in resource extraction activities and the use by manufacturers of conflict minerals emanating from the Congo region of Africa,⁵ including how these provisions are intended to operate, how the SEC proposed to implement the provisions and the potential implications for public issuers, investors and policymakers.⁶

Title XV of the Dodd-Frank Act, aptly entitled “Miscellaneous Provisions,” contains what the SEC has described as the “specialized” disclosure provisions (hereinafter collectively referred to as the “Specialized Corporate Disclosure” provisions).⁷ Section 1502 of the Dodd-Frank Act requires persons to disclose annually whether any “conflict minerals” that are “necessary to the functionality or production” of a product of the person originated in the Democratic Republic of the Congo or an adjoining country and, if so, to provide a report describing, among other matters, the measures taken to exercise due diligence on the source and chain of custody of those minerals.⁸ This must include an independent private sector audit of the report that is certified by the person filing the report.⁹ Section 1503 of the Dodd-Frank Act requires any reporting issuer that is an operator of a coal or other mine, or has a subsidiary that is a mine operator, to disclose in each periodic report filed with the SEC information related to health and safety violations, including the number of certain violations, orders, and citations received from the Mine Safety and Health Administration (“MSHA”), among other matters contemplated in the statute.¹⁰ Issuers must also disclose in their Current Reports on Form 8-K the receipt from MSHA of any “imminent danger orders or notices indicating that a mine has a pat-

4. See *infra* Parts III.A–B.

5. See *infra* Parts IV.A–B.

6. See *infra* Parts V.A –B.

7. See The Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. at 2212 (“Title XV – Miscellaneous Provisions”); see also U.S. SEC. AND EXCH. COMM’N, SPECIALIZED CORPORATE DISCLOSURE, available at <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>.

8. *Specialized Corporate Disclosure*, U.S. SEC. AND EXCH. COMM’N, available at <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>; See also The Dodd-Frank Act, § 1502, 124 Stat. at 2213–18 (discussing conflict minerals).

9. See The Dodd-Frank Act, § 1502, 124 Stat. at 2213–14. Persons are not required to comply with the rules adopted under Section 1502 until their first full fiscal year after the date on which the SEC issues final rules. *Id.* Section 1502(b) of the Dodd-Frank amends the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to add a new paragraph to Section 13, captioned “Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of the Congo.” *Id.*; see also Securities Exchange Act of 1934, Pub. L. No. 111-257, § 13, 48 Stat. 881 (1934) (as amended Oct. 5, 2010) available at <http://www.sec.gov/about/laws/sea34.pdf>.

10. *Specialized Corporate Disclosure*, *supra* note 8; see also The Dodd-Frank Act, § 1503, 124 Stat. at 2218–20. (Section 1503 of the Dodd Frank Act entitled “Reporting Requirements Regarding Coal or Other Mine Safety.”).

tern or potential pattern of violating mandatory health or safety standards.”¹¹ Section 1504 of the Dodd-Frank requires reporting issuers engaged in the commercial development of oil, natural gas, or minerals to disclose, in an annual report, certain payments made to the United States or a foreign government.¹² The SEC must make a compilation of the electronically-provided information available online.¹³

The Dodd-Frank Act established a very aggressive timetable for rulemaking under the Specialized Corporate Disclosure provisions.¹⁴ The regulations required by Sections 1502 and 1504 must be adopted no later than 270 days after the Dodd-Frank Act’s date of enactment.¹⁵ While no rulemaking was required under Section 1503, the SEC proposed rules at the same time that it proposed the rules required by Sections 1502 and 1504 of the Dodd-Frank Act, and it is expected that the rules under Section 1503 would be adopted at the same time that rules are required to be adopted under Sections 1502 and 1504.¹⁶

11. *Specialized Corporate Disclosure*, *supra* note 8; *see also* The Dodd-Frank Act, § 1504, 124 Stat. at 2219–20. Pursuant to Section 1503(f) of the Dodd-Frank Act, the disclosure requirements took effect 30 days after enactment of the Dodd-Frank Act. *Id.* at 2220. Section 1503(d) (2) specified that the SEC is “authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of [Section 1503].” *Id.* at 2219. Section 1503 of the Dodd-Frank Act did not amend the Exchange Act or any other provision of the pre-existing federal securities laws. *Id.* at 2219–20.

12. *Specialized Corporate Disclosure*, *supra* note 8; The Dodd-Frank Act, 124 Stat. at 2220–22. Section 1504 of the Dodd-Frank Act is entitled “Disclosure of Payments by Resource Extraction Issuers.” *Id.* at 2220.

13. *Specialized Corporate Disclosure*, *supra* note 8 (“Information must be provided in an interactive data format [to permit the SEC to compile the information electronically and provide the information online]. *see also* The Dodd-Frank Act, § 1504(q)(3), 124 Stat. at 2221–22 (“To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).”).

14. *See* Kathleen L. Casey, Commissioner, U.S. Sec. & Exch. Comm’n, Speech by SEC Comm’n: The Regulatory Implementation and Implications of Dodd-Frank (Jan. 23, 2011) (transcript *available at* <http://222.sec.gov/news/speech/2011/spch012311klc.htm>) (describing the timetable for implementing the Dodd-Frank Act, Commissioner Casey stated, “The timetables that the Act sets forth are in many cases extremely aggressive. . . .”). The SEC also provides a timeline for the implementation of the Dodd-Frank Act. *Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act—Upcoming Activity*, U.S. SEC. AND EXCH. COMM’N, <http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml#0910> (stating that the SEC hopes to adopt rules for Sections 1502, 1503 and 1504 of the Dodd-Frank Act by August-December 2011).

15. *See* Conflict Minerals, 75 Fed. Reg. 80,948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (SEC proposed rules implementing Section 1502 of the Dodd Frank Act); *see also* Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978, 80,993 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (SEC proposed rules implementing Section 1504 of the Dodd-Frank Act).

16. *Specialized Corporate Disclosure*, *supra* note 8. *See also* Conflict Minerals, 75 Fed. Reg. 80,948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (SEC proposed rules implementing Section 1502 of the Dodd Frank Act); Mine Safety Disclosure, 75 Fed. Reg. 80374 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. 229, 239, 249) (SEC proposed rules implementing Section 1503 of the Dodd-Frank Act.); Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978, 80,993 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (SEC proposed rules implementing Section 1504 of the Dodd-Frank Act).

As discussed in this article, the new Specialized Corporate Disclosure provisions of the Dodd-Frank Act were borne out of discrete public policy concerns, rather than concerns that shareholders or potential investors in public issuers were being misled or kept in the dark about the level of involvement of public issuers in the use of conflict minerals, mine safety issues, or the payments to governments made by companies in extractive resource industries.¹⁷ As a result, these Specialized Corporate Disclosure provisions represent a historic shift away from the SEC's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.¹⁸ The requirements for Specialized Corporate Disclosure are not based on the fundamental question of whether the information would be considered to be "material" by investors in making voting or investment decisions.¹⁹ Rather, the requirements are based on a determination through the legislative process that the importance of the underlying public policy warrants the use of the public disclosure regime as a means for more broadly disseminating information that is of interest to certain members of the public, although not necessarily of interest to any investor.²⁰

It remains to be seen whether the Specialized Corporate Disclosure requirements represent a new trend toward special-interest driven, non-material disclosure requirements for public issuers.²¹ In the meantime, public issuers across a wide varie-

17. See *infra* Parts II, III & IV.

18. U.S. SEC. & EXCH. COMM'N, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2010), available at <http://www.sec.gov/about/secpar/secpar2010.pdf>

19. The proposed releases implementing Sections 1502, 1503 and 1504 do not apply a "materiality" threshold. See *generally* Conflict Minerals, 75 Fed. Reg. 80,948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249); Mine Safety Disclosure, 75 Fed. Reg. 80,374 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. 229, 239, 249); Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978, 80,993 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249). Information is "material" for the purposes of the federal securities laws if there is a substantial likelihood that a reasonable shareholder would consider the information important in making a voting or investment decision. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 439, 449 (1976); see *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (adopting the standard of materiality from the *TSC Industries* case).

20. See The Dodd-Frank Act, 124 Stat. at 2213 ("It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).").

21. The SEC, shareholders and other interested parties have in the past sought to utilize the public disclosure process as a means for communicating information relating to particular interest that does not necessarily constitute material information for a public company's shareholders. This trend has been noted by other practicing attorneys. See, e.g., Owen Bonheimer et. al., *New Corporate Social Responsibility Mandate Related to Conflict Materials in the New Financial Reform Bill Could Affect Many Companies* (2010), available at <http://www.steptoe.com/publications-7050.html>. (commenting on the same conflict minerals provision of the Dodd-Frank Act and stating, "the Brownback Amendment may have helped usher in a new era of corporate social responsibility mandates that will require companies to audit their supply chains as vigorously as they are required to audit their financials.").

ty of industries will likely incur significant compliance costs in the development of the newly-required information, with potentially only marginal benefits to investors.

II. CONFLICT MINERALS DISCLOSURE

Section 1502 of the Dodd-Frank Act seeks to address (at least in part), through disclosure in SEC filings made by public companies that are subject to the requirements, the highly sensitive political controversy raised by ongoing armed conflict in the Democratic Republic of the Congo (formerly Zaire) and the adjoining region in Africa.²² Section 1502 was adopted to promote transparency and consumer awareness regarding the use of certain minerals mined in the Congo and adjoining region²³ that, in some cases, benefit the armed groups engaged in conflict in that region.²⁴ It would appear that ultimately the objective may be to discourage the use of these minerals by manufacturing companies, principally by exposing the use of conflict minerals through the public disclosure process.²⁵ It has not been suggested in any of the legislative history of Section 1502 of the Dodd-Frank Act (or any preceding legislative initiatives) that the conflict minerals disclosure provision is being adopted in accordance with the mission of the SEC to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.²⁶

Notwithstanding the lack of any significant connection to the federal securities laws and to any established notions of materiality with regard to the required disclosures, nothing in this article should be construed as downplaying the severity of the humanitarian crisis in the Congo region. The long-running conflict has re-

22. The Dodd-Frank Act, § 1502, 124 Stat. at 2213–18; *see also* Final Report of the Group of Experts on the Democratic Republic of the Congo in Accordance with Paragraph 6 of Security Council Resolution (hereinafter “Final Report”) 1896 (2009), transmitted by letter of the Chair of the Security Council Committee concerning the Democratic Republic of the Congo, U.N. Doc. S/2010/596/61506 (Nov. 29, 2010) (discussing the armed conflict and conflict mineral issues in the Democratic Republic of the Congo and surrounding territories).

23. The Democratic Republic of the Congo, in west-central Africa, is bordered by the Republic of Congo, the Central African Republic, the Sudan, Uganda, Rwanda, Burundi, Tanzania, Zambia and Angola. The requirements of Section 1502 apply to this entire region, not solely the Democratic Republic of the Congo. *See* Conflict Minerals, 75 Fed. Reg. 80,948, 80,971 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (“The proposed rules would require clear disclosure about the source and chain of custody of an issuer’s necessary conflict minerals, which may result in increased transparency about the origin of those minerals.”).

24. *See generally* Final Report, *supra* note 22, at 47 (discussing the numerous financial benefits the groups involved in the armed conflict receive from the mining of mineral and other natural resources).

25. *See* The Dodd-Frank Act, 124 Stat. at 2215 (noting that the objective of Section 1502 of the Dodd-Frank Act is to discourage the use of conflict minerals by increasing disclosure requirements while also monitoring and stopping the commercial activities that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo).

26. *See id.* § 1502, 124 Stat. at 2213.

sulted in an extraordinary number of deaths and the significant displacement of the population.²⁷ Against the backdrop of worldwide concern about the crisis in the Congo region, Section 1502 of the Dodd-Frank Act focuses on one of the commercial aspects of the crisis, in particular the extent to which specific minerals that are mined in the region find their way into the sourcing and supply chain, and ultimately into a wide range of products manufactured by public companies that are required to file reports with the SEC.²⁸

Section 1502 of the Dodd-Frank Act thus requires specified persons to disclose annually whether any “conflict minerals” that are “necessary to the functionality or production” of a product of the person originated in the Democratic Republic of the Congo or an adjoining country and, if so, to provide a report describing, among other things, the measures taken to exercise due diligence on the source and chain of custody of those minerals, which must include an independent private sector audit of the report that is certified by the person filing the report.²⁹ In December 2010, the SEC proposed rules to implement the conflict minerals requirements.³⁰

A. *Disclosure Concerning Conflict Minerals and Their Use*

The term “conflict minerals” refers to “columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives [,]” and “any other mineral or its derivatives determined by the Secretary of State [of the United States] to be financing [armed] conflict in the Democratic Republic of the Congo or an adjoining country.”³¹ These minerals are ubiquitous in many products manufactured across a number of industries, notably including the jewelry and electronics industries, and manufacturers who regularly utilize tin, gold, or tungsten in the manufacturing process.³² As the SEC noted in the Conflict Minerals Proposing Release,

27. See Final Report, *supra* note 22, at 38. Part V.B. of this report, entitled, “Individuals operating in the Democratic Republic of the Congo and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction, and forced displacement” makes note of the substantial violence and displacement in the region. *Id.* at 38–41. The report discusses the numerous financial benefits the groups involved in the armed conflict receive from the mining of mineral and other natural resources. *Id.* at 47.

28. See generally The Dodd-Frank Act, § 1502, 124 Stat. at 2213.

29. *Id.* at 2213–14.

30. Conflict Minerals, 75 Fed. Reg. 80,948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (“The proposed rules would require clear disclosure about the source and chain of custody of an issuer’s necessary conflict minerals, which may result in increased transparency about the origin of those minerals.”). The comment period was extended to March 2, 2011. See Conflict Minerals, 75 Fed. Reg. 6,110 (proposed Feb. 3, 2011) (proposed rule comment period extension) (to be codified at 17 C.F.R. 229 and 249).

31. The Dodd-Frank Act, 124 Stat. at 2218.

32. Conflict Minerals, 75 Fed. Reg. 80,948, 80,950 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. 229 and 249) (describing the uses of the various minerals discussed).

*“cassiterite is the metal ore . . . commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits. . . . Columbite-tantalite is the metal ore from which tantalum is extracted; tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components.”*³³

Gold is of course used for making jewelry, and is also used in a wide range of electronic, communications, and aerospace equipment.³⁴ Lastly, wolframite is used to produce tungsten, which is used for “metal wires, electrodes, and contacts in lighting, electronic, electrical, heating, and welding applications.”³⁵ Given the wide range of uses for these conflict minerals, the SEC expects that the conflict minerals disclosure requirements will apply to many different companies across a wide array of industries.³⁶

In accordance with Section 1502, the conflict minerals disclosure provision only applies to a “person described,” defined as one for whom conflict minerals are “necessary to the functionality or production of a product manufactured by such person.”³⁷ Under the SEC’s proposed rules, an issuer meeting this definition would be required to disclose, based on a reasonable country of origin inquiry, in the body of its annual report, whether its conflict minerals originated in the Democratic Republic of the Congo countries.³⁸ Further, the SEC’s proposed rules would specify that if an issuer concludes that its conflict minerals did not originate in the Democratic Republic of the Congo countries, then the issuer would be required to “disclose this determination and the reasonable country of origin inquiry process” that was used in making that determination in the body of its annual report.³⁹ In addition, such an issuer would be required to: “(1) provide on its Internet website [the] determination that its conflict minerals did not originate in the [Democratic Republic of the Congo] countries; (2) disclose that this information is available on the [issuer’s] website and the Internet address of that site in the body of its annual report; and” (3) maintain records demonstrating that its conflict minerals did not originate in the Democratic Republic of the Congo countries.⁴⁰

33. *Id.* (describing the industrial uses of Columbite-tantalite).

34. *Id.* (describing the industrial uses of gold).

35. *Id.* (describing the industrial uses of wolframite).

36. *Id.*

37. *Id.*

38. *Id.* at 80,948.

39. *Id.* at 80,949.

40. *Id.*

By contrast, under the SEC's proposed rules,

*“if an issuer concludes that its conflict minerals did originate in the Democratic Republic of the Congo countries, or the issuer is unable to conclude that its conflict minerals did not originate in the Democratic Republic of the Congo countries, then the issuer would similarly disclose [this] conclusion in its annual report.”*⁴¹

It is worth noting that the SEC's proposed rules also require that a more comprehensive Conflict Minerals Report (discussed below) is furnished as an exhibit to the annual report, posted the Conflict Minerals Report on its Internet website, and that the issuer disclose that the Conflict Minerals Report is posted on the issuer's Internet website, and that the issuer provide the Internet address of that website.⁴²

The SEC's proposed rules would require an issuer that has concluded that its conflict minerals did originate in the Democratic Republic of the Congo countries (or an issuer that is unable to conclude that its conflict minerals did not originate in the Democratic Republic of the Congo countries) to provide, in a Conflict Minerals Report, a description of the measures that the issuer has taken to exercise due diligence on the source and chain of custody of its conflict minerals.⁴³

*“This would have to include a certified, independent, private sector audit of the Conflict Minerals Report that identifies the auditor and is furnished as part of the Conflict Minerals Report. Further, the issuer would be required to include in the Conflict Minerals Report a description of its products manufactured or contracted to be manufactured containing conflict minerals that are not ‘DRC conflict free,’ the facilities used to process those conflict minerals, those conflict minerals’ country of origin, and the efforts to determine the mine or location of origin with the greatest possible specificity.”*⁴⁴

With respect to all of the determinations made in the Conflict Minerals Report, the issuer would have to exercise due diligence in making those determinations.⁴⁵

41. *Id.*

42. *Id.* at 80,949–50.

43. *Id.*

44. Conflict Minerals, 75 Fed. Reg. at 80,949–50.

45. *Id.* at 80,950.

B. The Challenges Faced in Implementing the Conflict Minerals Disclosure Requirements

As is the case with much of the Dodd-Frank Act rulemaking that the SEC presently grapples with, the language of Section 1502 is prescriptive and does not provide the SEC with much leeway for adopting workable implementing rules.⁴⁶ For instance, Section 1502 does not provide for a *de minimis* standard regarding the amount of conflict minerals that an issuer must use in order to be subject to the above-referenced reporting requirements.⁴⁷ As a result, issuers using a very small amount of conflict minerals must nonetheless go through the disclosure exercise if that small amount “is necessary to the functionality or production of a product manufactured” (or contracted to be manufactured).⁴⁸ In its proposed rules, the SEC has not proposed any *de minimis* standard, citing the absence of such flexibility in Section 1502 itself.⁴⁹ Moreover, in its proposed rules, the SEC has chosen to not specifically define some of the key terms that are used in Section 1502, such as “necessary to the functionality or production of a product manufactured by such person” or what is contemplated by the terms “manufacture” or “contracted to be manufactured.”⁵⁰

The breadth of the due diligence and reporting requirements contemplated by Section 1502 and the SEC’s implementing rules will likely lead to very significant compliance costs for issuers in a wide variety of circumstances.⁵¹ While it is possible that more fully developed information and due diligence processes will be created regarding the raw materials supply chain and the sourcing of conflict minerals, issuers will still be compelled by the rules to determine whether they are in fact engaged

46. See The Dodd-Frank Act § 1502, 124 Stat. at 2213–18 (laying out detailed disclosure requirements).

47. See *id.*; see also Conflict Minerals, 75 Fed. Reg. at 80,963 (“Materiality Threshold”) (proposed Dec. 15, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

48. See The Dodd-Frank Act § 1502, 124 Stat. at 2214 (noting a person is required to file reports with the SEC if conflict minerals are necessary to the functionality or production of a product manufactured by such person, without mention of quantity); see also Conflict Minerals, 75 Fed. Reg. at 80,963.

49. *Id.* at 80,963. The SEC sought comment as to whether a *de minimis* threshold amount of conflict materials should be incorporated into its rules and, if so, what amount. The SEC also asked whether such a threshold would be consistent with Conflict Minerals Provision of Dodd-Frank. *Id.* These comments were due to the SEC by March 2, 2011. Conflict Minerals, 76 Fed. Reg. at 6,110 (proposed January 28, 2011) (to be codified at 17 C.F.R. pt. 229, 249).

50. See *id.* at 80,950–52.

51. See Jessica Holzer, *Corporate News: SEC Proposes ‘Conflict Mineral’ Report*, WALL ST. J., Dec. 16, 2010, at B9; see also Jessica Holzer, *Retailers Fight to Escape ‘Conflict Minerals’ Law*, WALL ST. J., Dec. 2, 2010, at B1 (discussing the substantial burden compliance with the new conflict minerals disclosure requirements places on a broad array of U.S. companies).

in the manufacturing of products and the extent to which conflict minerals will potentially be necessary to functionality or production of the issuer's products.⁵²

All of this effort and expense will not be undertaken for the purposes of providing the company's shareholders and prospective investors with information that is relevant to their voting or investment decisions.⁵³ It could potentially be argued that the use of conflict minerals is qualitatively material from the standpoint of a reasonable investor because of the potential impact on the sales and marketing of the company's products once the use of conflict minerals is disclosed;⁵⁴ however, this seems to be a circular argument given that, for the most part, the issuer would not have been required to perform due diligence on the supply chain and provide any disclosure regarding the use of conflict minerals absent Section 1502 of the Dodd-Frank Act.⁵⁵

C. The Power of Disclosure & the Misguided Attempt to Have the SEC Address Public Policy through Disclosure

The notion that public disclosure of the conduct of manufacturers in the sourcing of raw materials from mines in areas subject to conflict in the Democratic Republic of the Congo and adjoining countries will alter that conduct appears to be a fundamental tenet of Section 1502.⁵⁶ In many ways, the provision is reflective of a notion arising from time to time in the legislative and regulatory arena that, when lacking any direct ability to regulate or control the activities of public issuers, indirect regulation through the "shame" of public disclosure has the potential to accomplish the same objectives.⁵⁷

52. See *supra* notes 49–53 and accompanying text.

53. See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1253 (1999) (noting the SEC considers information to be either "socially significant" or "economically significant[,] but not both).

54. See *id.* at 1282–87 (arguing that social disclosure information may be material to economic decisions because it impacts how the company is marketed).

55. See Holzer, *supra* note 54, at B9; see also Holzer, *supra* note 54, at B1 (explaining that conflict minerals provisions of Dodd-Frank introduce many new disclosure requirements).

56. See The Dodd-Frank Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (describing extreme violence and emergency humanitarian situation in the region, various issuer disclosure and reporting requirements, and requirement that Secretary of State develop a strategy to address the linkages between human rights abuses, armed groups, mining of conflict materials, and commercial products).

57. See Mark Stephan, *Environmental Information Disclosure Programs: They Work, but Why?*, 83 SOC. SCI. Q. 190, 193–94 (2002) (discussing the link between information disclosure and political and corporate behavior); see also Holzer, *supra* note 54, at B9 ("The African-mineral rule aims to pressure companies to reject 'conflict minerals' who may be 'shunned by consumers'"); Holzer, *supra* note 54, at B1 (stating that the new law under Dodd-Frank "aims to pressure companies to spurn so-called conflict minerals" and "companies that fail to verify their mineral sources can still sell their products in the States, but could face public embarrassment").

The United States economy remains decidedly “free market,” with notably few restrictions or direct regulation of business activities.⁵⁸ There are, of course, exceptions, such as the regulation of the safety of products and services, the regulation of business conduct for national security purposes, the regulation of financial activities for the protection of consumers, investors and the overall financial system, the prevention of fraud, and similar circumstances where the burden of regulation on commercial activities has been deemed necessary for some overriding public policy purpose.⁵⁹ As a result of this approach, there remains no regulatory structure in the United States governing the *conduct* of business generally, including the conduct of business by larger companies that have accessed the public capital markets or that have a sufficient number of investors so that regulation of their disclosure by the SEC is mandated by statute.⁶⁰ This leaves the SEC in the sometimes unenviable position of serving as the only regulatory body that “touches” large businesses across all industries.⁶¹ Regardless of the business carried on by the public issuer, the result is that the SEC’s regulatory oversight becomes a likely mechanism for attempting to achieve policy objectives through the public disclosure process.⁶²

The SEC has not been, and likely never will be, a business conduct regulator (except of course with respect to the regulated financial institutions and persons that the SEC regulates in its market oversight role, such as broker-dealers and ex-

58. See Alan Cowell & Edmund L. Andrews, *European Converts to Laissez Faire See the Rush to Intervene as Heresy*, N.Y. TIMES, Oct. 25, 2001, at C1.

59. See, e.g., Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified as amended in scattered sections of 15 U.S.C.); see also Ann Graham, *The Consumer Financial Protection Agency: Love It or Hate It*, U.S. FINANCIAL REGULATION NEEDS IT, 55 VILL. L. REV. 603, 605–07 (2010) (describing the Consumer Financial Protection Agency and analyzing recent financial reform and consumer protection legislation); Stephen Sothmann, *Let He Who is Without Sin Cast the First Stone: Foreign Direct Investment and National Security Regulation in China*, 19 IND. INT’L & COMP. L. REV. 203, 223–25 (2009) (discussing instance of regulation of foreign business investment for national security purposes).

60. See James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859 (2006) (discussing the lack of comprehensive corporate management regulation compared to that of the banking industry); Charles R.P. Pouncy, *The Rationale Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263, 310–11 (2002) (noting that there is no overriding regulatory system for the conduct of business actors).

61. See Fanto, *supra* note 63, at 861 (discussing the difficulties inherent in the SEC’s monitoring of large businesses across a diverse group of industries).

62. See generally Williams, *supra* note 56 (demonstrating that the SEC has statutory authority to enact disclosure requirements that promote the public interest or protect investors); see also Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757 (2007) (examining the SEC’s policy of using public disclosure requirements to shame CEOs into taking less pay); Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 786–87 (2007) (proposing that shame can function as a powerful international force for achieving policy change).

changes).⁶³ Rather, with respect to public issuers, the regulatory beat is principally limited to ensuring that material information is disclosed to shareholders and prospective investors, so that they can make informed voting and investment decisions over time.⁶⁴ It has been no secret, however, that the disclosure process, and the market's utilization of SEC-mandated disclosures, can have collateral effects on the actual conduct of a public issuer's business.⁶⁵ Thus, considerations about the reaction from the market and/or the reaction from the general public to disclosures can work to significantly influence the business decisions that an issuer's board of directors and management will make.⁶⁶ It is in this gray area that policymakers hope the mandated conflict mineral disclosures will operate to impact corporate behavior.

Therefore, the means by which Section 1502 could successfully address the geopolitical concern of the "[e]xploitation and trade of [c]onflict [m]inerals [o]riginating in the Democratic Republic of the Congo"⁶⁷ is not directly through the additional due diligence and disclosure requirements contemplated by the statute and the implementing rules.⁶⁸ It appears unlikely (although not entirely out of the question) that the requirements of Section 1502 will compel any sort of shareholder or investor backlash against public issuers that disclose the use of conflict minerals emanating from the Democratic Republic of the Congo and adjoining countries.⁶⁹ Rather, in all likelihood, the principal consequence of the new disclosures will be to focus public attention on those issuers in the consumer electronics, jewelry, and other affected industries that source any conflict minerals from the Democratic Re-

63. The Exchange Act requires brokers and dealers to register with the SEC. 15 U.S.C. § 78o(a) (2006). Once registered with the SEC, brokers and dealers are subject to SEC authority over certain aspects of their business, including the supervision of personnel, financial responsibility, and the maintenance of corporate books and records. 15 U.S.C. § 78o(b) (2006). The Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(4)(A) (2006). The Act defines "dealer" as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise" but excluded a bank or any person insofar as he "buys or sells securities for [his] own account, either individually or in [some] fiduciary capacity, but not as a part of a regular business." 15 U.S.C. § 78c(5)(A), (B) (2006). Securities firms typically operate as both brokers and dealers and are, therefore, referred to as "broker-dealers."

64. See Williams, *supra* note 56, at 1237, 1251–53; David Johnston, *10-K's: A Good Read for the Curious Investor*, N.Y. TIMES, Jan. 20, 2002, at 3:12; see also Michael C. Schouten, *The Mechanisms of Voting Efficiency* 14 (Ctr. for Bus. Res., Working Paper No. 411, 2010) (noting that informed shareholder voting and investment decisions require access to material information and ability to process that information).

65. See, e.g., Williams, *supra* note 56, at 1285–86 (discussing the impact of global social and environmental practices on consumer practices and corporate profitability, including famous examples of Nike and Walmart).

66. See *supra* notes 60, 65 and 68.

67. Conflict Minerals, Exchange Act Release No. 34-63547, 75 Fed. Reg. 246, 80,949 (proposed Dec. 15, 2010) (to be codified at 17 C.F.R. pt. 229, 249).

68. See *supra* notes 60, 65 and 68.

69. See Williams, *supra* note 56, at 1285–86.

public of the Congo and the adjoining countries.⁷⁰ Such public attention would no doubt be facilitated through the efforts of those organizations that have been seeking to draw public attention to the use of conflict minerals to finance the conflict in those areas, including the brutal nature of the conflict and the humanitarian crisis that has resulted.⁷¹ As a result, it seems the sheer shame of being a direct or indirect participant in the conflict and its financing is the ultimate disclosure objective, an objective far afield from the traditional role of the SEC and the public disclosure system.⁷²

An important question remains as to where the line might ultimately be drawn regarding the use of the public disclosure system contemplated by the federal securities laws for the purposes of addressing social, public policy, and geo-political concerns.⁷³ While acknowledging the seriousness and severity of the crisis on the African continent represented by the conflict in the Congo region, there are many analogous circumstances in the United States and around the world where the role of public issuers in the normal course of commerce could be singled out for the purposes of creating a public spectacle of those issuers.⁷⁴ Any such future attempts to utilize the public disclosure process for achieving ends other than to protect investors, to maintain fair, orderly, and efficient markets, and to facilitate capital formation could risk overburdening both issuers and investors with costly disclosure requirements for information that is not material to any investment or voting decision.⁷⁵

III. MINE SAFETY DISCLOSURE

Section 1503 of the Dodd-Frank Act established new disclosure requirements for issuers that are operators, or that have a subsidiary that is an operator, of a coal or

70. See, e.g., *Democratic Republic of Congo Human Rights*, AMNESTY INT'L USA, <http://www.amnestyusa.org/all-countries/congo-dem-rep-of/page.do?id=1011136> (last visited Mar. 13, 2011) (describing the organization's efforts to bring attention to the humanitarian crisis in the Democratic Republic of Congo and to address the problem by reducing trade in conflict minerals).

71. *Id.*

72. See *supra* notes 60 and 65; see also Ian Talley, *SEC Is Asked to Rethink CO2 Guidance*, WALL ST. J., Mar. 24, 2010 (discussing SEC's response to pressure from activist groups and investors regarding climate-change rules and corporate disclosure requirements); Kara Scannell, *SEC Discord Count Stymie Schapiro's Efforts*, WALL ST. J., Feb. 6, 2010, at B1 (noting political accusations that the SEC focused on the agenda of the social and environmental policy lobby).

73. See *supra* note 65.

74. See, e.g., John M. Broder & Michael Luo, *Well-Known Problems of Drilling Agency Still Avoided Fixes*, N.Y. TIMES, May 31, 2010, at A13 (discussing previous corruption in an agency that regulates offshore drilling).

75. See *supra* Part II.B.

other mine.⁷⁶ Under Section 1503, issuers operating coal or other mines must include disclosures regarding health and safety violations in periodic reports, and must file a Current Report on Form 8-K to disclose receipt of certain notices or orders of mine safety violations, or a pattern of such violations.⁷⁷ The disclosures required regarding coal or other mine safety were effective 30 days following enactment of the Dodd-Frank Act.⁷⁸ In December 2010, the SEC proposed rules regarding these provisions.⁷⁹

The disclosure requirements in Section 1503 refer to, and are based on, the health and safety requirements applicable to mines under the Federal Mine Safety and Health Act of 1977 (“Mine Act”),⁸⁰ which is administered by the MSHA.⁸¹ For the purposes of Section 1503, a “mine” is generally deemed to include “area[s] of land from which minerals are extracted in non-liquid form, or if in liquid form, are extracted with workers underground.”⁸²

Mine safety has been of area of significant public concern, as highlighted in recent years by major mine accidents.⁸³ In the spring of 2010, during the deliberation of the legislative initiatives that ultimately resulted in the Dodd-Frank Act, mine safety was a topic of close public attention following the explosion of the Upper Big Branch mine in West Virginia in April, in which all of the miners were killed.⁸⁴ In the wake of this disaster, Section 1503 significantly expanded the level of detailed information about mine safety issues that must be publicly disclosed by public issuers.⁸⁵

76. The Dodd-Frank Act, Pub. L. No. 111-203 § 1503, 123 Stat. 1376, 2218 (2010).

77. *Id.* at 2218–19.

78. *Id.* at 2200.

79. Mine Safety Disclosure, Securities Act Release No. 9,164, Exchange Act Release No. 63,548, 75 Fed. Reg. 245, 80,374 (proposed Dec. 22, 2010). The SEC extended the comment period on the proposed rules to March 2, 2011. Mine Safety Disclosure, 76 Fed. Reg. 23, 6,110 (proposed February 3, 2010) (to be codified at 17 C.F.R. pt. 229, 239, 249).

80. 30 U.S.C. § 801 *et seq.* (2006).

81. Mine Safety Disclosure, 75 Fed. Reg. 245, 80,374–75 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pt. 229, 239, 249).

82. *See id.* at 80,376 n. 28.

83. *See, e.g.,* Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES, Apr. 10, 2010, at A1 (detailing fatal explosions in Appalachian mines).

84. *See id.*

85. The Dodd-Frank Act expands the Federal Mine Safety and Health Act of 1977’s reporting provisions. *Compare* Dodd-Frank, Pub. L. No. 111-203, § 1503, 123 Stat. 1376 (2010) *with* 30 U.S.C. § 811 *et seq.* (2006).

A. *Dodd-Frank's Expanded Disclosure Requirements Concerning Mine Safety*

Section 1503 seeks to accomplish the disclosure objective via real-time reporting of mine safety violations through required disclosures made on the SEC's Current Report on Form 8-K, as well as periodic disclosures of data about mine safety violations to be included in the Quarterly Report on Form 10-Q and the Annual Report on Form 10-K.⁸⁶ In contrast to the circumstances of public issuers that will be subject to the Section 1502 with regard to the use of certain "conflict minerals" in the manufacture of products, public issuers that operate mines are already subject to extensive regulation of the safety of their mine operations, as discussed above.⁸⁷ Therefore, the rationale for a significantly enhanced disclosure regime for mine safety violations (with many of such violations likely not to be deemed to be material to prospective investors or shareholders) is less clear.⁸⁸ Undoubtedly, there is a "shame" factor at work in compelling these disclosures, seeking to ultimately highlight, through the descriptive current reports and the periodic data, those mine operators with incidences of mine safety violations higher than those of their competitors.⁸⁹

The current reporting requirements of Section 1503 require each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to report on Form 8-K the receipt of certain notices from MSHA, including: "(i) an imminent danger order under section 107(a) of the [Mine Act]; (ii) written notice from [MSHA]. . . of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of the [Mine Act];" or (iii) written notice from MSHA of the potential to have a pattern of such violations.⁹⁰

The periodic reporting requirements of Section 1503 have applied to any quarterly report on Form 10-Q or annual report on Form 10-K filed on or after August 20, 2010.⁹¹ Such reports must include the following for each coal or other mine operated by the issuer or its subsidiaries during the period covered:

86. The Dodd-Frank Act, §1503, 124 Stat. at 2218–19.

87. See *supra* notes 81–82 and accompanying text.

88. See Ian Urbina & Bernie Becker, *As Rescue Efforts Continue for Miners, Officials Press for Answers*, N.Y. TIMES, Apr. 8, 2010, at A18 (noting that Congress had just recently overhauled the mining safety regulations in 2006). But see Sheryl Stolberg, *Reviewing Mine Safety, Obama Faults Company and the Government*, N.Y. TIMES, Apr. 16, 2010, at A15 (discussing how after the Upper Big Branch mine incident, President Obama referred to federal mining laws as "riddled with loopholes" that "allow unsafe conditions to continue").

89. See Stephan, *supra* note 60, at 194.

90. The Dodd-Frank Act, § 1503, 124 Stat. at 2218–19.

91. *Id.*

“(i) the total number of violations of mandatory health or safety standards that could significantly and substantially contribute to a mine safety or health hazard under Section 104 of the Mine Safety Act for which the mine operator received a citation from the MSHA; (ii) the total number of orders issued under Section 104(b) of the Mine Safety Act; (iii) the total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under Section 104(d) of the Mine Safety Act; (iv) the total number of flagrant violations under Section 110(b)(2) of the Mine Safety Act; (v) the total number of imminent danger orders issued under Section 107(a) of the Mine Safety Act; (vi) the total dollar value of proposed assessments from the MSHA under the Mine Safety Act; and (vii) the total number of mining-related fatalities.”⁹²

In addition an issuer’s periodic reports must include a list of coal or other mines operated by the issuer (or a subsidiary of the issuer) that receive written notice from the MSHA of either a pattern, or the potential to have a pattern, of violations of mandatory health or safety standards that are of such a nature as could have significantly and substantially contributed to mine health or safety hazards under Section 104(e) of the Mine Safety Act.⁹³ Further, an issuer must disclose “[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.”⁹⁴

Most of the information called for by these disclosure requirements is already publicly disclosed by MSHA and, as a result, is readily available to issuers, who receive the notices, orders and citations directly from MSHA and can also access relevant information through MSHA’s data retrieval system.⁹⁵ Further, the disclosure for periodic reports requiring disclosure of mining-related fatalities is already subject to MSHA regulations.⁹⁶

The SEC’s proposed rules under Section 1503 largely implement the statutory requirements that were already in effect following enactment of the Dodd-Frank

92. *Id.*

93. *Id.*

94. *Id.* at 2219.

95. “MSHA maintains a data retrieval system on its website that allows users to examine data on inspections, violations, and accidents, as well as information about dust samplings, at specific mines throughout the United States.” Mine Safety Disclosure, 75 Fed. Reg. 80,374, 80,375 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pt. 229, 239, 249). The data retrieval system is available at <http://www.msha.gov/drs/drshomt.htm>. *Id.* at 80,378 n.50.

96. See 30 C.F.R. § 50.10 (2010) (requiring operators to immediately notify MSHA when there is a fatality at the mine); *id.* § 50.20 (2010) (requiring operators to prepare and submit a MSHA Report Form when there is an accident or injury at the mine).

Act.⁹⁷ The proposed rules seek to implement and specify the scope and the application of the Section 1503 disclosure requirements, as well as require some additional disclosure to provide context for certain items required by the Section 1503.⁹⁸ The proposed rules would apply to both U.S. companies and to foreign private issuers, requiring disclosure in each Form 10-K, Form 10-Q, Form 20-F and Form 40-F filed with the SEC, as applicable.⁹⁹ In addition to the disclosures required by Section 1503, the proposed rules require that issuers describe the categories of violations, orders and citations they are reporting, so that the information provided in the reports can be understood without referencing the Mine Act and MSHA rules.¹⁰⁰

With respect to the current reporting obligations under Section 1503, the proposed rules would require that an issuer's Form 8-K filing specify the type of order or notice, the date of the order or notice, and the name and location of the mine involved.¹⁰¹ The SEC has proposed to add new Item 1.04 to Form 8-K, "which would require filing of Form 8-K within four business days of the receipt by an issuer (or a subsidiary of the issuer) of" the notices or orders discussed above.¹⁰² Under the SEC's proposed rules, a late filing of the Form 8-K would not affect an issuer's eligibility to use a Form S-3 short-form registration statement.¹⁰³ Foreign private issuers would not be required to file current reports under the SEC's proposed rules.¹⁰⁴

B. The Challenges of Providing Mine Safety Disclosure

In contrast to the significant undertaking required to comply with Section 1502 with regard to disclosure of the use of conflict minerals, the mine safety disclosure requirements contemplated by Section 1503 largely build upon reporting systems that are already in place under the Mine Act and through MSHA.¹⁰⁵ Thus, Section 1503 was targeted at bringing mine safety issues to the public reporting system as a means of essentially raising the profile of the violations that occur and highlighting

97. Mine Safety Disclosure, 75 Fed. Reg. 80,374, 80,375 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pt. 229, 239, 249).

98. *Id.*

99. *Id.* at 80,375–76.

100. *Id.* at 80,378, 80,380–81.

101. *Id.* at 80,380.

102. *Id.* at 80,381.

103. *Id.* at 80,375, 80,382.

104. *Id.* at 80,381.

105. See 30 C.F.R. §§ 50.10 & 50.20 (2010).

the incidences (through both current reporting and statistical data) of mine safety violations to facilitate comparisons across public issuers that operate mines.¹⁰⁶

The judgments made as to the information required for issuers to disclose regarding mine safety issues do not appear to have been based on assessments of materiality of that information. For example, some of the mine safety violations individually reported on Form 8-K following enactment of Section 1503 do not appear to be material in any way to understanding the issuer's mining operations or the risk profile of those mining operations. As a result, issuers have felt compelled to explain in the context of these disclosures that problems were corrected or that there was no adverse impact on the operations as a result of the order or notice.¹⁰⁷

The mine safety disclosure requirements under Section 1503 and as proposed to be implemented by the SEC's rules, potentially create another danger in the context of using the public disclosure system for the purposes of achieving objectives outside of the SEC's core mission. The frequency with which issuers must report notices and orders on Form 8-K, and the duplicative nature of the disclosure provided in the periodic reports regarding the mine safety violations,¹⁰⁸ risk the problem of over-emphasis of these matters in the public reporting for affected issuers. The nature of the MSHA regulatory process and the types of events which trigger Form 8-K disclosure result in the need for frequent filings by issuers, requiring prospective investors and shareholders of those issuers to wade through a significant volume of filings in order to locate information that may in fact be material to an investment

106. See S. 3886, 111th Cong. (2010) (enacted as The Dodd-Frank Act, Pub. L. No. 111-203, 123 Stat. 1376 (2010)) (stating that the purpose of the statute was "[t]o require publicly traded coal companies to include certain safety records in their reports to the Commission"); Press Release, Senator John D. "Jay" Rockefeller IV, Rockefeller Requires Mining Companies to Disclose Safety Records (May 7, 2010), available at <http://rockefeller.senate.gov/press/record.cfm?id=324768&> (discussing Senator Rockefeller's reasons for introducing the amendment that would require mining companies to disclose safety records).

107. See, e.g., Massey Energy Co., Current Report (Form 8-K) (Nov. 26, 2010) ("The Company is currently evaluating the situation and will take steps to correct any unfavorable conditions and ensure the safety of its miners. No injuries resulted from the condition described in the order").

108. The SEC states in the Mine Safety Disclosure Release:

[w]e believe the plain language of Section 1503 of the Act requires such orders and notices to be reported both in issuers' Forms 8-K and their periodic reports. For example, if an issuer receives from MSHA one of the orders or notices specified above during the second quarter of the year, the issuer would file a Form 8-K reporting the receipt of the order or notice within four business days of receipt, include information about such order or notice in accordance with new Regulation S-K Item 106 in its Form 10-Q for the second quarter and include information regarding this violation in the annual cumulative total for the fiscal year in its Form 10-K for that fiscal year.

Mine Safety Disclosure, 75 Fed. Reg. 80,374, 80,381 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pt. 228-30, 239, 240, 249).

decision.¹⁰⁹ In this regard, the SEC has in the past reserved the Current on Form 8-K for the reporting of triggering events that are deemed “unquestionably or presumptively material.”¹¹⁰ It is questionable whether the triggering events for the proposed new Item 1.04 of Form 8-K would rise to this level of materiality, and the new requirement thus runs the risk of creating unnecessary “noise” in the public reporting for issuers operating mines.¹¹¹

IV. PAYMENTS TO GOVERNMENTS BY CERTAIN RESOURCE EXTRACTION ISSUERS

Section 1504 of the Dodd-Frank Act imposes requirements on certain resource extraction issuers to disclose, in their annual reports filed with the SEC, information regarding payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to either the U.S. Federal Government or to a foreign government for the purpose of the commercial development of oil, natural gas or minerals.¹¹² Section 1504 was enacted against a backdrop of international efforts seeking to encourage greater transparency and accountability in countries dependent on the revenues from oil, gas and mining.¹¹³

A. *Disclosure Concerning Payments to Governments by Certain Resource Extraction Issuers*

Section 1504 defines “commercial development of oil, natural gas, or minerals” to include the “exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the [SEC].”¹¹⁴ The payments covered by the disclosure requirements under Section 1504 include “taxes, royalties, fees (including li-

109. See *id.* (“[W]e are proposing that the current report under new Item 1.04 be required to be filed no later than four business days after the triggering event. . . . [T]he triggering events . . . do not require management to make rapid materiality judgments. . . .”).

110. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 69 Fed. Reg. 15,594 (proposed March 16, 2004) (to be codified at 17 C.F.R. pt. 228–30, 239, 240, 249) (adopting additional disclosure items for Form 8-K).

111. See *supra* note 93.

112. The Dodd-Frank Act, Pub. L. 111-203, § 1504(q)(2)(A), 124 Stat. 1376, 2220–21 (2010). Section 1504 is similar to the disclosure requirements in the proposed Energy Security Through Transparency Act (the “Transparency Act”), which was introduced in Congress in September 2009. S. 1700, 111th Cong. (2009). The Transparency Act sought to address a number of concerns including promoting good governance in extractive industries, promoting energy security, improving the transparency of revenue payments to governments, and increasing the public information available to shareholders of public issuers. *Id.*

113. See, e.g., Group of Eight [G8], *Muskoka Declaration Recovery and New Beginnings*, at 5 (June 25–26, 2010) available at http://www.whitehouse.gov/sites/default/files/g8_muskoka_declaration.pdf (urging countries in the extractive sector to enhance governance and accountability).

114. The Dodd-Frank Act, § 1504(q)(1)(A), 123 Stat. at 2220.

cense fees), production entitlements, bonuses, and other material benefits, that the [SEC] . . . determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.”¹¹⁵ In making this assessment, Section 1504 indicates that the SEC must consider, to the extent practicable, the guidelines set out by the Extractive Industries Transparency Initiative (“EITI”).¹¹⁶ EITI is an international organization with the stated purpose of promoting transparency and improved governance in the oil, gas and mining industries.¹¹⁷ The required disclosures under Section 1504 include “the type and total amount of such payments made for each project . . . relating to the commercial development of oil, natural gas, or minerals[and] the type and total amount of such payments made to each government.”¹¹⁸ Section 1504 provides that a payment that is of a *de minimis* amount will not require disclosure.¹¹⁹ The disclosures required under Section 1504 must be made in the issuer’s annual report, and must be submitted to the SEC in an interactive data format.¹²⁰

More specifically, Section 1504 requires that the interactive data submitted to the SEC to identify, for any payments made by a resource extraction issuer:

*(i) the total amounts of the payments, by category; (ii) the currency used to make the payments; (iii) the financial period in which the payments were made; (iv) the business segment of the . . . issuer that made the payments; (v) the government that received the payments, and the country in which the government is located; (vi) the project of the . . . issuer to which the payments relate; and (vii) [any] other information [that the SEC considers] necessary or appropriate in the public interest or for the protection of investors.*¹²¹

The disclosure requirements under Section 1504 of the Dodd-Frank Act will take effect beginning with the annual report for the first fiscal year ending on or after the first anniversary of the date on which the SEC issues final rules implementing Sec-

115. The Dodd-Frank Act § 1504(q)(1)(C), 124 Stat. at 2220.

116. *Id.* § 1504(q)(1)(C).

117. Extractive Industries Transparency Initiative, *EITI Fact Sheet*, <http://eiti.org> (last visited Mar. 7, 2011).

118. The Dodd-Frank Act, § 1504(q)(2)(A), 124 Stat. at 2221.

119. *Id.* at 2220.

120. *Id.* at 2221.

121. *Id.*

tion 1504.¹²² In December 2010, the SEC proposed rules regarding these provisions.¹²³

Section 1504 provides that the SEC's rules should, to the extent practicable, support the federal government's commitment to "international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."¹²⁴ In this regard, Section 1504 directs the SEC, to the extent practicable, to make publicly available online a compilation of the information required to be submitted pursuant to the disclosure requirements contemplated by Section 1504.¹²⁵

Under the SEC's proposed rule and form amendments, an issuer would be required to provide the information mandated by Section 1504 about resource extraction payments in an exhibit filed in HTML or ASCII format, which would allow prospective investors and shareholders to read the disclosure about payment information without the aid of additional computer programs or software.¹²⁶ In addition, a resource extraction issuer would be required to file a second exhibit with the information about resource extraction payments electronically tagged in XBRL format, which would be readable through a viewer.¹²⁷ The SEC's proposed rule and form amendments would also require a resource extraction issuer to "provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report."¹²⁸ The Section 1504 payment disclosure requirements would apply to U.S. and foreign resource extraction issuers as contemplated by the SEC's proposed rules.¹²⁹ A new Item 105 to Regulation S-K proposed by the SEC would "require a resource extraction issuer to provide information relating to any payment made by it, a subsidiary, or an entity under its control to a foreign government or the U.S. Federal Government during the fiscal year covered by the annual report for the purpose of the commercial development of oil, natural gas, or minerals."¹³⁰

122. *Id.* § 1504(q)(2)(F).

123. Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 63,549, 75 Fed. Reg. 80,978, 80,978 (proposed Dec. 23, 2010). On January 28, 2011, the SEC extended the comment period on the proposed rules to March 2, 2011. Disclosure of Payments by Resource Extraction Issuers, Exchange Act No. 63,795, 76 Fed. Reg. 6,111 (Feb. 3, 2011).

124. The Dodd-Frank Act § 1504(q)(2)(E), 124 Stat. at 2221.

125. *Id.* § 1504(q)(3)(A).

126. Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 63,549, 75 Fed. Reg. 80,978, 80,990 (proposed Dec. 23, 2010).

127. *Id.*

128. *Id.*

129. *Id.* at 80,980.

130. *Id.* at 80,994.

B. The Challenges of Providing Government Payments Disclosure

Section 1504 touches upon a sensitive area of disclosure for issuers engaged in the commercial development of oil, natural gas or minerals, as payments made to the U.S. government and to foreign governments can raise a variety of issues from a business, competitive and geo-political standpoint.¹³¹ While initiatives have been underway to date to increase transparency in this area, Section 1504 represents the mandated use of the existing public disclosure system as a means of addressing the issue.¹³² As with Section 1502, the disclosure under Section 1504 seems largely targeted at eliciting information that has implications for public policy around the world.

Of all of the Specialized Corporate Disclosure provisions, Section 1504 perhaps is a better “fit” with SEC reporting. The payment information could be more easily determined to be material to an investor or shareholder, and the statute (as well as the SEC’s proposed rules) provide for a *de minimis* exception to the disclosure requirement so as to avoid the unnecessary disclosure of information that is not material.¹³³ Section 1504 provides the SEC with the latitude to require additional disclosure of any other information that the SEC considers necessary or appropriate in the public interest or for the protection of investors, which is a standard that is more reflective of the typical consideration made by the SEC in adopting rules under the federal securities laws.¹³⁴

The SEC has sought to in some ways to lessen the burden of the Section 1504 disclosure requirements in its proposed rules, by requiring the payment and related information as exhibits to the annual report that, for the purposes of the securities laws, will be considered to be “furnished” rather than “filed.”¹³⁵ As a result, the exhibits to be filed by resource extraction issuers would not be subject to Section 18 liability under the Exchange Act.¹³⁶ However, failure to furnish the information would subject the resource extraction issuer to liability under Sections 13(a) and 15(d) of the Exchange Act.¹³⁷

131. *Id.* at 80,997.

132. The Dodd-Frank Act, Pub. L. 111-203, § 1504, 123 Stat. 1376, 2220–20 (2010); see Press Release, Extractive Industries Transparency Initiative, Six More Countries Compliant with Transparency and Accountability Standard (Mar. 2, 2011), available at <http://eiti.org/news-events/press-release-six-more-countries-compliant-transparency-and-accountability-standard> (discussing transparency initiative in oil, gas, and mining sectors).

133. See The Dodd-Frank Act, § 1504(q)(1)(C), 124 Stat. at 2220.

134. See *id.* § 1504(q)(2)(D).

135. Disclosure of Payments by Resource Extraction Issuers, Exchange Act No. 63,549, 75 Fed. Reg. 80,978, 80,992 (proposed Dec. 23, 2010).

136. *Id.*

137. *Id.*

The utilization of interactive data for the submission of the information required by Section 1504 represents a relatively recent trend toward providing SEC-required information (such as the information included in financial statements) in a format that users can easily compile and manipulate.¹³⁸ The availability of this data in an interactive format will not only facilitate the analysis of the information by prospective investors and shareholders of resource extraction issuers, but also permit interested groups and governments to compile the data in such a way that will provide further transparency and insight into the subject payments and related information.

The provisions of Section 1504 and the SEC's proposed rules also seek to avoid the potential problems discussed above with regard to Section 1503, in that no current reporting of payments of resource extraction issuers will be required,¹³⁹ limiting the release of the information to an annual event and through an exhibit filing, where the risk of over-emphasis of the information is reduced.

V. ANALOGOUS USES OF THE SEC DISCLOSURE SYSTEM FOR POLICY INTERESTS

The Specialized Corporate Disclosure provisions of the Dodd-Frank Act do not represent the first time that the SEC's public disclosure system has been utilized for serving policy interests that may extend beyond the specific concerns of prospective investors and shareholders under the federal securities laws.¹⁴⁰ For example, the SEC has, in the recent past, engaged in significant efforts toward eliciting disclosure about matters affecting global security risks, and the shareholder proposal process

138. Interactive data allows users to pinpoint facts and figures and immediately pull out this information to organize and compare with other data. See, e.g., What is Interactive Data and Who's Using It?, <http://www.sec.gov/spotlight/xbri/what-is-idata.shtml> (last visited Mar. 15, 2010). The SEC first began exploring the use of interactive data in 2003 and "continues to investigate ways to further integrate interactive data into its disclosure system." *Id.*

139. Instead, reports of payments made by the resource extraction issuer shall be made on an annual basis. See The Dodd-Frank Act, § 1504(q)(2)(A), 124 Stat. at 2220.

140. See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance (Dec. 16, 2009), available at <http://www.sec.gov/news/press/2009/2009-268.htm> (describing new rules to improve corporate disclosure of employee risk-taking, qualifications of directors, consideration of diversity, board structure and leadership); Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to Adopt Changes to Disclosure Requirements Concerning Executive Compensation and Related Matters (July 26, 2006), available at <http://www.sec.gov/news/press/2006/2006-123.htm> (discussing rules requiring disclosure of executive compensation for shareholders and boards to help determine pay of employees); Press Release, U.S. Sec. & Exch. Comm'n, Disclosure Documents Indicate All Broker-Dealers and Non-Bank Transfer Agents Ready for Year 2000 (Nov. 19, 1999), available at <http://edgar.sec.gov/news/press/pressarchive/1999/99-155.txt> (illustrating SEC's use of Y2K compliance and disclosure to ensure broker-dealer community ready for new millennium).

has been utilized for many years to compel disclosure regarding a wide array of policy considerations.¹⁴¹

A. The SEC's Office of Global Security Risk

At the direction of Congress, the SEC established the Office of Global Security Risk within the Division of Corporation Finance.¹⁴² The Office of Global Security Risk was established to work with the staff in the Division of Corporation Finance that reviews reports filed by public issuers to determine if those issuers must include disclosure of material information regarding global security risk-related issues.¹⁴³

The SEC's rules do not include specific mandated line items requiring a discussion of global security risks, however, the Office of Global Security Risk seeks to require issuers to include information about global security risks when material to the issuer, based upon broader requirements such as under management's discussion and analysis of results of operations and financial condition,¹⁴⁴ the business description,¹⁴⁵ and risk factors.¹⁴⁶

In 2004, the SEC was directed to establish the Office of Global Security Risk within the Division of Corporation Finance,¹⁴⁷ with the duties of the new office to include: (i) establishing a process by which the SEC identifies all companies listed on U.S. stock exchanges that operate in State Department-designated "terrorist-sponsoring states" (e.g., Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria);¹⁴⁸

141. One such disclosure initiative with regard to global security risks was a software tool on the SEC website that allowed investors to obtain information directly from company disclosure documents about their business interests in countries designated as "State Sponsors of Terrorism" by the U.S. Secretary of State. Press Release, U.S. Sec. & Exch. Comm'n., SEC Adds Software Tool for Investors Seeking Information on Companies' Activities in Countries Known to Sponsor Terrorism (June 25, 2007), available at <http://www.sec.gov/news/press/2007/2007-121.htm>; see *infra* notes 158–61 and accompanying text.

142. *Office of Global Security Risk*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/divisions/corpfina/globalscrisk.htm>.

143. See *id.* In a May 2001 letter from S.E.C. Chairman Laura Under to Congressman Frank Wolf, it was noted that "[t]he fact that a foreign company is doing material business with a country, government, or entity on [the U.S. Treasury Department's Office of Foreign Assets Control] sanctions list is, in the SEC staff's view, substantially likely to be significant to a reasonable investor's decision about whether to invest in that company." Congressman Frank P. Wolf, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 579, *6 (May 8, 2001).

144. 17 C.F.R. § 229.303 (2010).

145. *Id.* § 229.101.

146. *Id.* § 229.305.

147. H.R. REP. NO. 108-221, at 151 (2003) (accompanying the Consolidated Appropriations Act of 2004, in which Congress directed the SEC to establish the Office of Global Security Risk within the Division of Corporation Finance); see EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 2.06[2][i] (9th ed. 2009).

148. H.R. REP. NO. 108-221, at 151 (2003). The U.S. Secretary of State has since removed Iraq, Libya, and North Korea from the roster of state sponsors of terrorism. See *Iraq, Libya and North Korea Officially Removed*

(ii) ensuring that such companies disclose these activities to investors;¹⁴⁹ (iii) implementing enhanced disclosure requirements based on the “asymmetric nature of the risk to corporate share value and reputation” stemming from business interests in these countries;¹⁵⁰ (iv) coordinating with other federal government agencies to share relevant information;¹⁵¹ and (v) initiating a global dialogue to ensure U.S.-traded foreign corporations properly disclose their activities in “terrorist-sponsoring states” to U.S. investors.¹⁵² The SEC was also directed to provide quarterly reports on the activities of the Office of Global Security Risk.¹⁵³

At the time of this Congressional direction to establish the Office of Global Security Risk, critics claimed that the directive would impose a political or foreign policy agenda on the SEC that was not consistent with the agency’s traditional role in overseeing disclosure of material information by public issuers.¹⁵⁴ However, unlike the Specialized Corporate Disclosure provisions of the Dodd-Frank Act that are not ostensibly based on traditional notions of materiality discussed above, the staff of the SEC has sought to implement its global security risk directive in a manner consistent with the concept of materiality.¹⁵⁵ In this regard, the description of the Office of Global Security Risk provided by the SEC states:

*[t]he Commission’s disclosure-based regulatory approach has served the investing public and this agency well over the years, and the standard for disclosure—that of materiality—has long been the foundation of the Commission’s work. We are committed to maintaining the materiality standard as the basis for our disclosure-based approach.*¹⁵⁶

Moreover, unlike the prescriptive requirements of the Specialized Corporate Disclosure provisions of the Dodd-Frank Act, the SEC has not adopted any specific

From Terrorist Roster, UMCi NEWS, May 19, 2009. At the time of publication, the U.S. Dept. of State has designated Cuba, Iran, Sudan and Syria as “State Sponsors of Terrorism.” *State Sponsors of Terrorism*, U.S. DEPT. OF STATE, <http://www.state.gov/s/ct/c14151.htm> (last visited Mar. 11, 2011).

149. H.R. REP. NO. 108-221, at 151.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. See, e.g., Letter from Marc Lackritz, President, Sec. Indus. Ass’n, to William Donaldson, Chairman, U.S. Sec. & Exch. Comm’n (Jan. 20, 2004), available at <http://www.sifma.org/issues/item.aspx?id=831> (expressing concern that the creation of the Office “could be a first step towards politicizing the U.S. capital markets” and presented “troubling issues” with the SEC’s traditional role of disclosure and materiality).

155. *Office of Global Security Risk*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/divisions/corpfin/globalsecrisk.html>.

156. *Id.*

rules calling for disclosure of global security risk considerations by public issuers.¹⁵⁷ Rather, the SEC's staff has sought to require the disclosure where necessary through the process of reviewing and commenting on the filings made with the SEC by public issuers.¹⁵⁸

B. The Shareholder Proposal Process

Rule 14a-8, a proxy rule adopted by the SEC, requires that public issuer include shareholder proposals in their proxy materials.¹⁵⁹ The rule, first adopted in 1942, originally was intended to allow shareholders participating in an annual meeting by proxy to vote on matters to be proposed from the floor of the meeting.¹⁶⁰ Under Rule 14a-8, a company must include a shareholder proposal in its proxy materials unless it violates one of the rule's procedural requirements or one of thirteen substantive restrictions.¹⁶¹ Rule 14a-8 imposes several procedural requirements on shareholders who rely on the rule.¹⁶² A shareholder may only submit one proposal per meeting must own at least \$2,000 or 1% of securities entitled to vote on its proposal and must limit its proposal to 500 words.¹⁶³ A shareholder must submit the proposal at least 120 days before the date of the company's proxy statement for the previous year's annual meeting (or a reasonable time before the company begins to print and mail its proxy materials if the company did not have an annual meeting

157. See Mechanisms to Access Disclosures Relating to Business Activities in or with Countries Designated as State Sponsors of Terrorism, Concept Release Nos. 8,860, 56,803, 72 Fed. Reg. 65,862, 65,863 (Nov. 23, 2007) ("The federal securities laws do not impose a specific disclosure requirement for business activities in or with a country based on its designation as a State Sponsor of Terrorism.").

158. Amy Deen Westbrook, *What's in your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151, 1180-85 (2010) (explaining that although current federal securities law and regulations do not impose a specific disclosure requirement that addresses business in or with state sponsors of terrorism, "[c]ertain general instructions in Regulations S-K suggest . . . that such information must be disclosed").

159. See 17 C.F.R. § 240.14a-8 (2010) (addressing when a company must include a shareholder's proposal in its proxy statement and when a proposal may be excluded).

160. See generally Securities Act Release No. 2887, Exchange Act Release No. 3,347, Investment Company Act Release No. 417, 1942 SEC LEXIS 44 (Dec. 18, 1942) (requiring that issuers include in their proxy materials shareholder proposals that are opposed by management, provided that issuers have been given adequate notice of such proposals).

161. 17 C.F.R. §240.14a-8(i)(1)-(13) (2010) (enumerating the 13 bases for exclusion of proposal); see SEC Staff Legal Bulletin No. 14A, 2002 SEC No-Act LEXIS 638 (July 12, 2002) ("The rule [14a-8] generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion.").

162. Procedural requirements include demonstrating eligibility to submit a proposal, guidelines for submission, maximum length of proposal and deadline for submission. See generally 17 C.F.R. §240.14a-8(b)-(e) (2010).

163. See *id.* §240.14a-8(b)-(d).

during the previous year, or if the date of the annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting).¹⁶⁴

A company that intends to rely on the rule to exclude a proposal must submit its no-action request 80 days in advance of the date that it proposes to file its definitive proxy materials.¹⁶⁵ Under paragraph (i) of Rule 14a-8, a company may exclude a shareholder proposal from its proxy materials if the proposal falls into one of thirteen substantive bases for exclusion.¹⁶⁶ Among other substantive restrictions, companies may exclude proposals that violate the law, relate to ordinary business, conflict with or duplicate other proposals to be considered at the same meeting, or are moot.¹⁶⁷ To exclude a proposal based on any of these enumerated bases for exclusions, a company must first notify the SEC, which often is done through a no-action letter process whereby the SEC's staff considers the merits of the issuer's arguments for exclusion of the shareholder proposal.¹⁶⁸

Issuers often rely on Rule 14a-8(i)(7) to exclude a shareholder proposal based on the position that the proposal relates to the issuer's ordinary business operations.¹⁶⁹ The SEC Staff has allowed, however, proposals to be included in proxy materials when the subject matter of the proposal relates to a significant policy issue that

164. *Id.* § 240.14a-8(e)(2).

165. *Id.* § 240.14a-8(j)

166. Generally a company may exclude a proposal that

(1) is not a proper subject for action by shareholders under applicable state law; (2) would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject; (3) is contrary to any of the proxy rules, including Rule 14a-9; (4) relates to a personal claim or grievance, is designed to result in a benefit to the shareholder, or furthers a personal interest; (5) relates to operations that account for less than five percent of the company's total assets, net earnings and gross sales for its most recent fiscal year and is not otherwise significantly related to the company's business; (6) the company would lack the power or authority to implement; (7) relates to the company's ordinary business operations; (8) relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election; (9) directly conflicts with one of the company's proposals to be submitted to shareholders at the same meeting; (10) has already been substantially implemented by the company; (11) substantially duplicates another proposal previously submitted to the company by another shareholder that will be included in the company's proxy materials for the same meeting; (12) deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding five calendar years and the proposal did not garner specified levels of shareholder support; and (13) relates to specific amounts of cash or stock dividends.

17 C.F.R. §240.14a-8(i) (2010).

167. *Id.*

168. *See id.* § 240.14a-8(f)-(g) (requiring that companies intended to exclude proposal must file submission with SEC and establishing that burden is on company to demonstrate entitlement to exclude proposal).

169. *Id.* § 240.14a-8(i)(7).

“transcends” ordinary business.¹⁷⁰ As a result of the this position, the SEC Staff has, through the no-action letter process, determined that certain proposals could not be excluded under Rule 14a-8(i)(7) when the relate to a wide range of policy issues, thereby permitting the proposal and supporting statement to be included in an issuer’s definitive proxy statement and be subject to a shareholder vote.¹⁷¹ These proposals have related to, among other things, environmental issues, human rights, political contributions, health care, sustainability, animal rights and anti-discrimination.¹⁷² The types of policy-oriented proposals could be included in the proxy statement regardless of whether the policy or information regarding the policy is material to the issuer’s shareholders, and, in most cases, do not receive substantial support from shareholders voting on the proposals.¹⁷³ In many ways, the exception from the ordinary business exclusion of Rule 14a-8 has created a platform for the disclosure of social and political policy issues (and the positions of the interest groups advancing such proposals) that would otherwise be outside of the public reporting regime for most public issuers.

VI. CONCLUSION

The Specialized Corporate Disclosure requirements of the Dodd-Frank Act are a breed apart from the traditional disclosure requirements that the SEC administers under the US federal securities laws.¹⁷⁴ The Specialized Corporate Disclosure provi-

170. See, e.g., Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40,018, Investment Company Act Release No. 23,200, 1998 SEC LEXIS 1001, *20–21 (May 21, 1998) (stating that proposals which relate to ordinary business matters but focus on “sufficiently significant social policy issues . . . would not be considered to be excludable, because the proposals would transcend the day-to-day business matters . . .”).

171. See CF Staff Legal Bulletin No. 14E, 2009 WL 4363205 (Oct. 27, 2009) (“Over the past decade, [the SEC has] received numerous no-action requests from companies seeking to exclude proposals relating to environmental, financial or health risks . . . [but] [t]o the extent that a proposal and supporting statement have focused on a company minimizing or eliminating operations that may adversely affect the environment or the public’s health, we have not permitted companies to exclude these proposals under Rule 14a-8(i)(7).”)

172. See, e.g., Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365, 382–83 (2006) (surveying the use of the shareholder proposal mechanism to address issues of corporate social responsibility like racial discrimination and pollution, more recently human-rights proposals and a study of economic impact of HIV/AIDS, tuberculosis and malaria); Thomas A. DeCapo, *Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule*, 1988 U. Ill. L. Rev. 119, 148–49 (illustrating that the shareholder proxy proposal rule is a “viable means for challenging objectionable animal treatment”).

173. See, e.g., DeCapo, *supra* note 175, at 146 (noting that determining who might benefit, or have an interest in, a particular policy is difficult unless the company gives shareholders the opportunity to voice their opinions on the issue vis-à-vis Rule 14a-8 shareholder proxy proposal mechanism); see also Stephen Gandel, *Nuns vs. Bankers: The Shareholder Proxy Wars*, TIME, Apr. 21, 2010, <http://www.time.com/time/business/article/0,8599,1981861,00.html> (noting that most proposals that do not receive management’s approval are voted down by shareholders).

174. See *supra* Parts II—IV.

sions continue a developing trend to utilize the SEC's public reporting regime as a means for advancing specific policy interests, notwithstanding whether the mandated information is material to prospective investors and shareholders of public issuers.¹⁷⁵ Before utilizing this approach in the future, Congress and the Administration should carefully evaluate how the Specialized Corporate Disclosure provisions have been implemented and whether they have achieved their intended effect without being unduly burdensome on public issuers and their investors.

175. See *supra* Part V.