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Legislating Corporate Social Responsibility: Expanding Social Disclosure Through the Resource Extraction Disclosure Rule

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Note

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On July 21, 2010, in the wake of a global recession, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act[1] to promote the financial stability of the country. Dodd-Frank introduced the most sweeping (and contentious) reforms in the financial regulatory system since the Great Depression,[2] ending "too big to fail" and taxpayer bailouts.[3] But the statute included "other purposes" far removed from Wall Street reform, which have proved just as contentious.[4] One such provision includes increasing international transparency in the production of oil, natural gas, and minerals.[5] Section 1504 of the Act, also known as the Cardin-Lugar Amendment,[6] directed the Securities and Exchange

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1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

2. Press Release, The White House, Office of the Press Sec'y, 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 ("[M]y 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.").

3. 124 Stat. at 1376.

4. *Id.*

5. Dodd-Frank § 1504, 15 U.S.C. § 78m(q) (2012).

6. Press Release, Ben Cardin, U.S. Senator for Md., Cardin, Lugar,

Commission (SEC) to promulgate final rules requiring all companies listed on the U.S. stock exchanges and engaged in the commercial development of oil, natural gas, or minerals, to disclose payments (i.e., taxes, royalties, fees, etc.) made to foreign governments for the purpose of commercial resource development.[7] The law seeks to abate the "resource curse" that plagues so many resource-rich countries.[8] The mandated disclosure rules are intended to shine light on the disparity that exists between the extraction revenues received by a government and that government's expenditures on societal needs (e.g., clean water, food, heath, education), thereby empowering citizens with the information needed to hold leaders accountable. The rules are not the first of their kind, but are recognized as a necessary compliment to the existing volunteer-based Extractive Industries Transparency Initiative (EITI) introduced by United Kingdom (UK) Prime Minister Tony Blair in 2002 to promote state adoption of an international transparency standard.[9] And they are consistent with a growing international trend to increase the transparency of labor standards and environmental risk and, more generally, to promote corporate social responsibility in all sectors of business.[10]

Leahy Welcome SEC Approval of Transparency Rules (Aug. 22, 2012), *available at* http://www.cardin.senate.gov/newsroom/press/release/cardin-lugar-leahy-welcome-sec-approval-of-transparency-rules.

7. Dodd-Frank § 1504, 15 U.S.C. § 78m(q).

8. Press Release, Cardin, *supra* note 6; *see also* Luis A. Aguilar, Comm'r, SEC, Statement at SEC Open Meeting: Facilitating Transparency of Resource Revenue Payments to Protect Investors (Aug. 22, 2012), *available at* https://www.sec.gov/News/Speech/Detail/Speech/1365171490958#.Ux-BDIXFnXY ("Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike." (quoting 156 CONG. REC. S3816 (daily ed. May 17, 2010) (statement of Sen. Lugar))).

9. *See generally* EITI, http://eiti.org/ (last visited Apr. 22, 2014). The United States joined the EITI in 2011. Samuel Rubenfeld, *US Joins Extractive Industry Transparency Initiative amid Open Government Launch*, WALL ST. J. BLOGS (Sept. 20, 2011, 4:31 PM), http://blogs.wsj.com/corruption-currents/2011/09/20/us-joins-extractive-industry-transparency-initiative-amid-open-government-launch/. For information on the Open Government launch, see *Open Government Declaration*, OPEN GOV'T P'SHIP, http://www.opengovpartnership.org/about/open-government-declaration (last visited Apr. 22, 2014) (promoting transparency, citizen engagement, and access to enabling technology).

10. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 2, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter

The SEC adopted the final rules in a 2-1 vote on August 22, 2012,[11] against strong opposition from industry groups[12] and 493 days past the deadline imposed by law.[13] Less than one month later, the European Parliament followed suit, calling for the European Commission to establish rules that match, if not exceed, the requirements imposed by the U.S. rule.[14] Their reach will extend to many of the same firms, given the transnational nature of the extractive industry.

On October 10, 2012, the American Petroleum Institute (API) and U.S. Chamber of Commerce, along with two other organizations, filed a lawsuit against the SEC in the U.S. District Court for the District of Columbia.[15] The industry groups challenged the new rules under the First Amendment of the U.S.

Guiding Principles] (articulating a state's responsibility to protect and businesses' responsibility to respect human rights under existing international law); U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Apr. 22, 2014) (providing a voluntary initiative for businesses and other stakeholders to commit to promotion of universally accepted principles in the areas of human rights, labor, environment, and anti-corruption throughout their supply chain); *see also* MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 1 (Chip Pitts ed., 2009) ("[C]orporations are seeking to redefine themselves as socially responsible. . . . [C]ompanies everywhere are lining up to sign on to codes of conduct covering environmental, social and economic performance."); *About the HRCA,* HUM. RTS. COMPLIANCE ASSESSMENT, https://hrca2.humanrightsbusiness.org/Page-AboutTheHrca-1.aspx (last visited Apr. 22, 2014) (providing a comprehensive tool designed to identify human rights risk in company operations).

11. Press Release, SEC, SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers (Aug. 22, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484028#.U0Yhe1fBc0Y; Christopher M. Matthews, *SEC Narrowly Approves Reporting Rules on Resource Extraction, Conflict Minerals*, WALL ST. J. BLOGS (Aug. 22, 2012, 12:48 PM), http://blogs.wsj.com/corruption-currents/2012/08/22/sec-narrowly-approves-reporting-rules-for-energy-mining-firms/. Two members of the SEC recused themselves from the vote. Matthews, *supra*.

12. Letter from Harry M. Ng, Vice President, Gen. Counsel & Corp. Sec'y, API, to Elizabeth M. Murphy, Sec'y, SEC 3–5 (Jan. 19, 2012), *available at* http://sec.gov/comments/s7-42-10/s74210-121.pdf; *see also* GRANT D. ALDONAS, ANALYSIS OF SECTION 1504 OF THE WALL STREET REFORM AND CONSUMER PROTECTION ACT 21 (2011), *available at* http://www.api.org/~/media/Files/Policy/Congress/Analysis_Section_1504_paper.ashx (noting industry's claim that the proposed rules would require firms to violate existing contracts in countries that prohibit certain disclosures).

13. *See* Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(2)(A) (2012) (requiring the SEC to issue final rules no later than 270 days after the date of enactment of the Act or April 17, 2011).

14. *See* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

15. Complaint, Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (No. 12-1668), 2012 WL 4803691.

Constitution, the Securities Exchange Act of 1934[16] (Exchange Act), and the Administrative Procedure Act[17] (APA), claiming that the SEC "grossly misinterpreted its statutory mandate," forcing companies to publicly disclose more than Congress required, and failing to properly assess the costs of compliance—including the burden on competition—and the benefits to shareholders and citizens of resource-rich countries.[18] On July 2, 2013, the court vacated the rule and remanded to the SEC for further proceedings.[19] As of the time of this writing, the SEC has yet to reissue the rule.[20]

This Note discusses the importance of section 1504 in both the national and international context as a model for future social disclosure rules across diverse industries and as part of the growing international movement for transparency in the extraction industry, in particular. Part I explores the development of section 1504: its origins in the decade-long "Publish What You Pay" campaign for transparency and the existing, but inadequate, Extractive Industries Transparency Initiative. Part II carefully examines the congressional mandate and the SEC's exercise of discretion in rulemaking,[21] the SEC's cost-benefit analysis, and the review standard adopted by the D.C. Circuit in similar cases. Because the district court's decision to vacate and remand does not preclude the SEC from promulgating a substantially similar rule, this Note focuses on the arguments which support the rule as written.[22] Part II also analyzes

16. 15 U.S.C. §§ 78a–78pp.

17. 5 U.S.C. §§ 551–559 (2012).

18. Complaint, *supra* note 15, at 2–7; *see also* Securities Exchange Act of 1934 § 3(f), 15 U.S.C. § 78c(f) (requiring the SEC to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,397–403.

19. *Am. Petroleum Inst.*, 953 F. Supp. 2d 5.

20. Stella Dawson, *SEC Omits Extractive Industry Rules from Its 2014 Priority List*, THOMPSON REUTERS FOUND. (Dec. 9, 2013, 12:51 PM), http://www.trust.org/item/20131209125125-6gr27/. In addition, the SEC omitted the rule from its 2014 priority list. *Id.*

21. *See* Securities Exchange Act of 1934 § 3(f), 15 U.S.C. § 78c(f) (requiring the SEC to "); *see also* Daniel M. Gallagher, Comm'r, SEC, Statement at SEC Open Meeting: Proposed Rules to Implement Section 1504 of the Dodd-Frank Act ("Disclosure of Payments by Resource Extraction Issuers") (Aug. 22, 2012), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1365171490864#.U1acJFfBc0Y (stating that such rulemaking is in conflict with the SEC mission and prohibited by Congress).

22. The court did not consider industry's First Amendment claim or many of its APA claims. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 11.

section 1504 in the context of the growing movement to legislate transparency for social needs. Part III discusses what needs to be done to achieve the objectives of section 1504 and what steps can be taken to expand transparency beyond the extraction industry.

This Note concludes that mandatory disclosure rules are necessary to promote and protect human rights and that the SEC acted in accordance with legislative intent and within its statutory authority in promulgating a rule now consistent with strong European Union (EU) rules and strengthened EITI reporting standards. While Congress may be required to further clarify the SEC's mandate under the Exchange Act, section 1504 should serve as a model for expanding social disclosure to meet the growing demand for corporate transparency. Importantly, this Note recognizes that disclosure rules are insufficient on their own. Nongovernmental organizations (NGOs) must be tasked with using the information disclosed to advocate for effective change.

I. THE NEED FOR STRONG "PUBLISH WHAT YOU PAY" LAWS AND CONGRESS'S MANDATE TO THE SEC

The call for transparency is not new. It was nearly forty years ago when the discovery of millions of dollars of questionable and illegal corporate payments and corrupt practices pushed the SEC to "insure [sic] that investors and shareholders receive material facts necessary to make informed investment decisions."[23] One year later, Congress enacted the Foreign Corrupt Practices Act of 1977,[24] prohibiting bribery of foreign officials and requiring accounting transparency. The United States led the charge internationally. In fact, it wasn't until 1997—twenty years later—that nations of the Organisation for Economic Co-operation and Development (OECD) joined in signing an Anti-Bribery Convention.[25] But the push for full transparen-

23. SEC, 94TH CONG., REP. TO THE S. COMM. ON BANKING, HOUSING & URBAN AFFAIRS ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, at c (Comm. Print 1976) [hereinafter SEC REP. TO CONG.], *available at* http://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

24. Pub. L. No. 95-213, §§ 101–04, 91 Stat. 1494, 1494–98 (codified as amended in scattered sections of 15 U.S.C.).

25. OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS (2011), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. Recommendations were adopted in 2009 to further combat

cy continued, particularly in the extraction industry where corruption has been prevalent. While the Foreign Corrupt Practices Act and OECD Anti-Bribery Convention have minimized corrupt business practices, these laws fall far short of eliminating the corrupt practices of foreign governments. Companies may be prohibited from making improper payments, or "bribes,"[26] to government officials, but nothing prevents a government from collecting similar payments in the form of licenses, permits, or other legal mechanisms—different means, same illegitimate ends.

A. The Global Campaign for Transparency

In 1999, the human rights watchdog Global Witness[27] called on oil companies operating in Angola to develop policies of full transparency, requesting that they publish all payments made, including payments for what it describes as "dubious social projects," and to clarify exact relationships with the government.[28] It brought to light the industry's contribution to the plundering of state assets during a decades-long civil war and its complicity in the government's failure to address human development needs.[29] Despite its position as Africa's second largest oil producer, the United Nations (UN) Human Development Index—which measures development by combining indicators of life expectancy, education, income—ranked Angola 160 out of 174 countries. Eighty-two percent of Angola's population was living in absolute poverty, fifty-nine percent without access to drinking water, and thirteen percent afflicted with severe mal-

bribery of foreign officials. *Id.* at 20. For more information about the OECD, see *About the OECD*, OECD, http://www.oecd.org/about (last visited Apr. 22, 2014).

26. *See* Foreign Corrupt Practices Act of 1977 § 103, 15 U.S.C. § 78dd-1.

27. Global Witness runs campaigns against natural resource-related conflict and corruption and related human rights and environmental violations. *Our Work*, GLOBAL WITNESS, http://www.globalwitness.org/ (last visited Apr. 22, 2014). In 2003, Global Witness was co-nominated for a Nobel Peace Prize for its work campaigning against conflict diamonds. *Conflict Diamonds*, GLOBAL WITNESS, http://www.globalwitness.org/campaigns/conflict/conflict-diamonds (last visited Apr. 22, 2014).

28. GLOBAL WITNESS, A CRUDE AWAKENING 1–3, 13 (1999), *available at* http://www.globalwitness.org/sites/default/files/pdfs/A%20Crude%20Awakening.pdf. "Dubious projects" include upgrading houses and overseas scholarships. *Id.* at 3, 13. Global Witness additionally highlights the need to publish all payments in a format that is easy for the Angolan population to understand. *Id.* at 13.

29. *Id.* at 21.

nutrition.[30] Yet it was estimated that the extraction industry was contributing $1.8–$3 billion annually to the Angola state income, and revenue was projected to grow substantially over the next decade.[31]

Angola was, and still is, an example of a country that is plagued by what is commonly referred to as the "resource curse"—the notion that countries rich in natural resources are often fraught with mismanagement of revenues, corruption, economic instability, and conflict.[32] Global Witness's 1999 exposé on Angola gained international attention from which the Publish What You Pay Coalition was born—a campaign for the disclosure of payments and expenditures in research-rich countries around the world.[33] Since its inception in 2002 as a small, primarily UK-based coalition, Publish What You Pay has grown to include membership organizations in over sixty countries.[34]

Acting on the Publish What You Pay campaign, UK Prime Minister Tony Blair announced the launch of the EITI at the 2002 Sustainable Development Summit in Johannesburg.[35] The international political initiative encouraged governments of resource-rich countries, extractive companies, NGOs, and other interested parties to develop a framework to promote disclosure of payments and revenues.[36] In its simplest form, the EITI requires reporting, verification, and reconciliation of payments

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30. *Id.* at 1, 4.

31. *Id.* at 6; *see also Angola: IMF Should Insist on Audit*, HUMAN RTS. WATCH (July 11, 2012), http://www.hrw.org/news/2012/07/11/angola-imf-should-insist-audit (calling for an explanation of how Angola spent more than $41.8 billion in unaccounted for oil revenues from 2007 to 2011); HUMAN RIGHTS WATCH, TRANSPARENCY AND ACCOUNTABILITY IN ANGOLA: AN UPDATE 11 (2010), *available at* http://www.hrw.org/sites/default/files/reports/angola0410webwcover_1.pdf ("The 2010 [U.S. Senate's Permanent Subcommittee on Investigations] report underscored how oil revenue has fueled corruption and mismanagement in Angola . . . .").

32. *See* Paul Stevens, *Resource Curse*, ENCYCLOPEDIA EARTH (Aug. 22, 2008, 4:51 PM), http://www.eoearth.org/view/article/155721/.

33. *History*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about/history (last visited Apr. 22, 2014). The scope of the Publish What You Pay campaign has evolved to include transparency in government expenditures ("publish what you spend") and licensing procedures ("publish what you don't pay/should pay"). *Id.*

34. *Id.*

35. *Id.*

36. EITI, STATEMENT OF PRINCIPLES AND AGREED ACTIONS (2003), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf.

made by extraction companies and received by governments.[37] The EITI seeks to strengthen accountability and good governance, empowering citizens with information and stimulating foreign investment by demonstrating commitment to transparency.[38]

In 2013, thirty-seven countries were implementing EITI, twenty-five of which were meeting all of the requirements of the EITI standard, including Africa's largest oil producer, Nigeria.[39] Nigeria launched its initiative in 2004, becoming the first African country to follow the EITI standard.[40] In 2009, the government of Nigeria released its second audit, reporting an over $800 million government shortfall in taxes, royalties, and signing bonuses that companies reported paying.[41] Nigeria has long been considered one of the most corrupt countries in the world. Transparency International ranked it 37th most corrupt in 2012.[42] But implementation of the EITI "cracked open" the extraction industry and exposed the intricate details of corruption.[43] While disclosure alone will not create change, the information has allowed both international and state attention to focus more effectively on ensuring that society benefits from resource wealth.

B. THE GLOBAL CAMPAIGN FOR TRANSPARENCY TAKES ROOT IN THE UNITED STATES

By 2005, the Publish What You Pay campaign in the United States was working with members of Congress to strengthen transparency initiatives, laying the foundation for what would become the Cardin-Lugar Amendment in 2010.[44] The disclosure rules were first introduced in 2008 by Representative Barney

37. *What Is the EITI?*, EITI, http://eiti.org/eiti (last visited Apr. 22, 2014).

38. *Benefits from Implementing EITI*, EITI, http://eiti.org/eiti/benefits (last visited Apr. 22, 2014).

39. *EITI Countries*, EITI, http://eiti.org/countries (last visited Apr. 22, 2014).

40. EITI, NIGERIA EITI: MAKING TRANSPARENCY COUNT, UNCOVERING BILLIONS 1 (2012) [hereinafter NIGERIA EITI], *available at* http://eiti.org/files/Case%20Study%20-%20EITI%20in%20Nigeria.pdf.

41. *Id.* at 2. This amount exceeded the individual budgets for the Ministries of Education, Health, and Power. *Id.*

42. *Corruption by Country / Territory: Nigeria*, TRANSPARENCY INT'L, http://www.transparency.org/country#NGA_DataResearch (last visited Apr. 22, 2014).

43. NIGERIA EITI, *supra* note 40, at 3.

44. *Our Activities U.S.*, PUBLISH WHAT YOU PAY U.S., http://www.pwypusa.org/our-activities/us (last visited Apr. 22, 2014).

Frank and Senator Charles Schumer as the Extractive Industries Transparency Disclosure Act.[45] While the Act was not passed, it was reintroduced by Senator Schumer along with Senators Ben Cardin and Richard Lugar as the Energy Security Through Transparency Act of 2009.[46] The sponsors claimed that disclosure would lead to better governance which would, in turn, result in strengthened U.S. energy security and national security.[47] When the Dodd-Frank Act opened for debate, Senators Cardin and Lugar introduced the Energy Security Through Transparency Act as an amendment, which was adopted as section 1504 and became law in July 2010.[48] In 2011, President Obama demonstrated further commitment to transparency by announcing that the United States would also implement the EITI, becoming only the second OECD nation to join.[49]

Section 1504 of Dodd-Frank added section 13(q) to the Exchange Act, directing the SEC to issue final rules requiring resource extraction companies[50] to include in their annual report any payment—including taxes, royalties, fees, bonuses, and other "not de minimis" benefits commonly recognized in commercial resource development—made to a foreign government by the issuer, subsidiary, or entity under their control.[51] Additionally, the statute requires that companies disclose payments according to type and total amount for each "project" and each government and that they submit all information in an interactive data format, which includes electronic tags to mark specified information.[52] Finally, the SEC, "[t]o the extent practicable, . . . [was to] make available online, to the public, a compilation of the information required to be submitted under the rules."[53] The SEC received and considered over 150 unique comment letters and over 149,000 form letters.[54] It extended

45. H.R. 6066, S. 3389, 110th Cong. (2008); *Our Activities U.S.*, *supra* note 44.

46. S. 1700, 111th Cong. (2009); *Our Activities U.S.*, *supra* note 44.

47. S. 1700 § 2.

48. *Our Activities U.S.*, *supra* note 44.

49. *President Obama: The U.S. Will Implement the EITI*, EITI (Sept. 20, 2011, 8:15 PM), http://eiti.org/news-events/president-obama-us-will-implement-eiti. Norway was the first OECD nation to join the EITI. *Id.*

50. "[R]esource extraction issuer" refers to a company that "engages in the commercial development of oil, natural gas, or minerals." Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(1)(D)(ii) (2012).

51. *Id.* § 78m(q)(1)(C).

52. *Id.* § 78m(q)(2).

53. *Id.* § 78m(q)(3).

54. *Comments on Proposed Rule: Disclosure of Payments by Resource Ex-*

the comment period at the request of commentators and delayed issuing the final rule until 493 days after the deadline imposed by statute.[55]

In its 232-page final rule, issued on August 22, 2012, the SEC dealt a surprising blow to industry groups opposed to the rule. The SEC defined "not de minimis" as any payment or series of related payments that equals or exceeds $100,000, as opposed to a $1 million threshold urged by some in industry or a definition based on materiality as suggested by others.[56] Despite strong pressure to define "project," the SEC left the term undefined, noting generally that the contract should serve as the basis for definition[57] and rejecting definitions proposed by industry as inconsistent with Congress's intent for transparency.[58] The SEC refused to grant exemptions for commercially sensitive information or for those operating in countries which prohibit disclosure.[59] And the SEC was not persuaded by commenters that Congress intended companies to submit payment disclosures confidentially to the SEC and for the public to only have access to the aggregate data.[60] While the statute does not define "compilation" as it relates to public availability of information, the SEC concluded that all payment disclosures required by the rule will be made available online.[61]

The SEC estimated the total initial cost of compliance for all companies at approximately $1 billion and ongoing costs between $200 million and $400 million annually.[62] While Congress intended the rules to improve accountability and governance in resource-rich countries, the SEC noted that such social

traction Issuers, SEC, http://www.sec.gov/comments/s7-42-10/s74210.shtml (last visited Apr. 22, 2014). All form letters and the large majority of unique letters were in support of the rules, requesting that the SEC follow the language of section 1504 and not give in to industry pressure for exemptions. *Id.*

55. *See supra* note 13 and accompanying text.

56. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,381–83 & n.234 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249). This threshold exceeded that urged by some commentators. *Id.* at 56,381–82.

57. *Id.* at 56,406.

58. *Id.* (rejecting industry pressure to define "project" at the country level, as reporting unit, in relation to a particular geological basin or mineral district, or by reference to materiality standard consistent with federal securities laws).

59. *Id.* at 56,368.

60. *Id.* at 56,391.

61. *Id.* at 56,390–94.

62. *Id.* at 56,398.

benefits could not be readily quantified with any precision.[63] Additionally, the SEC made clear that such objectives would not necessarily generate direct economic benefits to investors or issuers, but may "materially and substantially improve investment decision making."[64]

C. INDUSTRY RESPONDS

On October 10, 2012, the API, the U.S. Chamber of Commerce, the Independent Petroleum Association of America, and the National Foreign Trade Council filed a lawsuit against the SEC in the U.S. District Court for the District of Columbia.[65] The industry groups alleged that section 1504 and the SEC rule requiring disclosure violate the First Amendment of the U.S. Constitution by forcing U.S. companies to unnecessarily engage in speech that discloses sensitive and confidential information.[66] Additionally, they alleged that the SEC violated the APA and Exchange Act by acting arbitrarily and capriciously in (1) declining to allow confidential reporting;[67] (2) failing to define "project" as a geologic basin or province;[68] (3) denying an exemption in cases where foreign law prohibits disclosure;[69] (4) disregarding the Exchange Act which prohibits "impos[ing] . . . burden[s] on competition not necessary or appropriate";[70] (5) conducting insufficient evaluation of costs and benefits;[71] and (6) failing to solicit additional comments after releasing a flawed cost-benefit analysis in the final rule.[72] In sum, the industry groups argued that the SEC "grossly misinterpreted its statutory mandate,"[73] forcing companies to publicly disclose more than Congress required, and acted outside its statutory authority in issuing rules which imposed high costs—not only

63. *Id.*

64. *Id.*; *see also* Letter from 58 Members of Congress to Mary L. Schapiro, Chairman, SEC (June 22, 2012), *available at* http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/documents/2012-06-22_SEC_ChairmanSchapiro_ProtectPowerless.pdf (noting that the rule "will also provide material information for investors to reduce their risk and increase the choices of ethical investment").

65. Complaint, *supra* note 15.

66. *Id.* at 28.

67. *Id.* at 30–31.

68. *Id.* at 31–32.

69. *Id.* at 32–33.

70. *Id.* at 34 (quoting 15 U.S.C. 78w(a)(2) (2012)); *see id.* at 34–35.

71. *Id.* at 35–36.

72. *Id.* at 36–37.

73. *Id.* at 3.

in reporting, but in business lost to competitors outside the SEC's reach[74]—and with no quantified benefits.[75]

Senators Cardin and Lugar refuted the industry groups' claim of gross misinterpretation by the SEC.[76] Following the court filing, Senator Lugar stated, "[t]he benefits will not be realized if investments serve to entrench authoritarianism, corruption and instability."[77] Senator Cardin noted that "[i]ncreased transparency will not put companies that comply at a competitive disadvantage but will reduce the risks for U.S. investors" and referred to the rule as "carefully crafted," "reasonable," and "very manageable."[78]

D. MANDATORY DISCLOSURE RULES GAIN SUPPORT OUTSIDE THE UNITED STATES

Just one month after the SEC announced the final rule, the EU began garnering support for its own disclosure rule—one that extends beyond the extraction industry to logging, banking, construction, and telecommunications.[79] Before the court

74. State-owned issuers hold the majority of the world's oil reserves and produce the majority of the world's supply. Branden Carl Berns, Note, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not To?*, 2011 COLUM. BUS. L. REV. 758, 765.

75. Complaint, *supra* note 15; *see* Securities Exchange Act of 1934 § 3(f), 15 U.S.C. § 78c(f) (requiring the SEC to consider whether the rule "will promote efficiency, competition, and capital formation").

76. Jim Snyder, *Senators Contradict Oil Industry's Challenge of SEC Rules*, BLOOMBERG NEWS (Oct. 11, 2012, 2:18 PM), http://www.bloomberg.com/news/2012-10-11/senators-contradict-oil-industry-s-challenge-of-sec-rules.html.

77. *Id.*

78. Press Release, Ben Cardin, U.S. Senator for Md., Cardin, Lugar Respond to Big Oil Challenge to Transparency Regulations (Oct. 11, 2012), *available at* http://www.cardin.senate.gov/newsroom/press/release/cardin-lugar-respond-to-big-oil-challenge-to-transparency-regulations.

79. Rep. of the European Parliament Comm. on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2004/109/EC on the Harmonization of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Commission Directive 2007/14/EC, at 7, Doc. A7-0292/2012 (Sept. 27, 2012) [hereinafter EU Disclosure Proposal], *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+REPORT+A7-2012-0292+0+DOC+PDF+V0//EN; James O. Green et al., *EU Parliamentary Committee Backs Tough Disclosure Rules for Extractive Companies*, LEGAL INSIGHT (K&L Gates, Pittsburgh, Pa.), Oct. 3, 2012, *available at* http://m.klgates.com/files/Publication/aa7765f1-7efa-494d-a7b1-0065a2da6108/Presentation/PublicationAttachment/bf155e6c-de25-4c56-9c48-05b02346202f/EU_Committee_backs_Tough_Disclosure_Rules_for_

rendered its decision, the EU Parliament voted in favor of new EU Transparency and Accounting Directives which require resource extraction companies with securities traded on a regulated market to disclose payments to national governments on a project-by-project level with no exemption for companies operating in countries which bar disclosure.[80] Combined, the U.S. and EU disclosure rules will cover over ninety percent of the extraction industry, while the EITI will continue to cover large state-owned companies in the countries implementing the EITI.[81] In addition, efforts to increase transparency have begun in Australia, Hong Kong, and Canada.[82] At the G8 meeting in June 2013, Canadian Prime Minister Stephen Harper announced Canada's commitment to mandate disclosure in the extraction industry.[83] Prior to that, the two largest Canadian

Extractive_Companies.pdf; Press Release, European Parliament Comm. on Legal Affairs, Oil, Gas and Diamond Companies Could Be Forced to Fully Disclose Payments to Governments (Sept. 18, 2012), *available at* http://www.europarl.europa.eu/news/en/news-room/content/20120917IPR51496/html/Extractive-companies-could-be-forced-to-fully-disclose-payments. The proposal requires project-level reporting of all payments—including multiple related payments—equal to or greater than €80,000 euros ($105,100), which is on par with the U.S. rules. *UK Back Tough Oil, Gas Anti-Corruption Law*, REUTERS (Oct. 11, 2012, 1:49 PM), http://www.reuters.com/article/2012/10/11/britain-industry-mining-idUSL1E8LBC7P20121011.

80. *See* Minutes of the Sitting of 12 June 2013, 2013 O.J. (C 253 E) 142, 154, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2013:253E:FULL&from=EN (voting on Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market, P7_TA(2013)0262 (2013), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/acp/dv/p7_ta-prov%282013%290262_/p7_ta-prov%282013%290262_en.pdf).

81. Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978, 80,980 n.39 (proposed Dec. 23, 2010) (originally to be codified at 17 C.F.R. pts. 229, 249) (stating that the rule applies to "90 percent of the major internationally operating oil companies and 8 out of the 10 largest mining companies in the world" and that twenty out of the top fifty oil and gas companies by proven reserves do not operate internationally and do not compete with international companies); EITI, EITI RULES, 2011 EDITION 21 (Sam Bartlett & Kjerstin Andreasen eds., 2011) [hereinafter EITI RULES], *available at* http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf (stating that the rule applies to all companies—both public and private).

82. *See* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,403 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249); Nick Cunningham, *From the Lawyer: SEC Actions Dodd-Frank Disclosure Requirements for 'Resource Extraction Issuers'*, BREAKING ENERGY (Sept. 11, 2012, 12:00 PM), http://breakingenergy.com/2012/09/11/from-the-lawyers-sec-actions-dodd-frank-disclosure-requirements/.

83. *Harper Announces New Transparency Rules for Energy, Mining*, CBC NEWS (June 12, 2013, 7:33 AM), http://www.cbc.ca/news/politics/harper-announces-new-transparency-rules-for-energy-mining-1.1305236.

mining industry associations announced collaboration with Publish What You Pay–Canada to create a new framework for disclosure of payments to foreign governments by Canadian oil and mining companies, which currently operate in over 100 countries.[84] The Canadian mining industry is not alone in its support for transparency rules. Norwegian oil and gas producer Statoil openly rejected the lawsuit brought by the API, stating that reporting is not an impediment to doing business.[85]

E. DISCLOSURE RULES EXPAND BEYOND THE EXTRACTION INDUSTRY

Mandating disclosure of extraction industry payments to foreign governments is just one part of the growing movement for legislating transparency and corporate social responsibility, more generally. In addition to addressing the resource curse, Congress, through Dodd-Frank section 1502, sought to crack down on the use of "conflict minerals" used to finance violence in the Democratic Republic of Congo and other areas in central Africa.[86] Section 1502 required the SEC to promulgate rules mandating that companies disclose whether their products contain defined materials, including tantalum, tin, gold, or tungsten, from the Democratic Republic of Congo or an adjoining country and what measures companies have taken to exercise due diligence through their supply chain.[87] In January 2012, the California Transparency in Supply Chains Act took effect,

84. Andrew Bauer, *RWI, Canadian Mining Industry Working to Improve Transparency*, REVENUE WATCH INST. (Sept. 6, 2012, 10:34), http://www.revenuewatch.org/news/blog/rwi-canadian-mining-industry-working-improve-transparency. For more details on the collaboration, see Memorandum of Understanding Between Mining Assoc. of Can.; Prospectors and Developers Assoc. of Can.; Publish What You Pay–Canada; The Revenue Watch Inst.; (July 11, 2012), *available at* http://www.revenuewatch.org/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf.

85. Press Release, Revenue Watch Inst., Statoil Withholds Support from Lawsuit Against Transparency; Dutch Government Pledges Support for EU Transparency, Resisting Pressure from Shell (Feb. 8, 2013), *available at* http://www.revenuewatch.org/news/press_releases/statoil-withholds-support-lawsuit-against-transparency-dutch-government-pledges-.

86. Media Note, U.S. Dep't of State, Final Rules for Dodd-Frank Sections 1502 and 1504 (Aug. 23, 2012), *available at* http://www.state.gov/r/pa/prs/ps/2012/08/196882.htm.

87. Dodd-Frank § 1502, 15 U.S.C. § 78m(p) (2012). This rule was also met with a legal challenge. *See* Christopher M. Matthews, *Business Groups Fully Brief "Conflict Minerals" Legal Challenge*, WALL ST. J. BLOGS (Jan. 17, 2013, 4:28 PM), http://blogs.wsj.com/corruption-currents/2013/01/17/business-groups-fully-brief-conflict-minerals-legal-challenge/.

requiring retailers and manufacturers doing business in California to disclose their efforts to eradicate human trafficking and slavery from their supply chains.[88] Additionally, the U.S. State Department is currently considering strategies for implementing the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011, in effort to articulate the obligations of states and business entities under international law.[89]

The Guiding Principles seem to be playing a particularly important role in increasing corporate transparency. In addition to developing sector-specific guidance for implementation of the Guiding Principles,[90] in February 2014, the European Commission announced that certain large companies would be required to "disclose information on policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, [and] anti-corruption and bribery issues."[91]

The United States has not yet taken this step, but there is a clear trend toward increased government oversight and a public demand for transparency.[92] There may be disagreement

88. California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43 (2014) and CAL. REV. & TAX CODE § 19547.5 (2014)) (relating to human trafficking). In 2011, a bill modeled after the California law was introduced in Congress, but effectively died in committee. *See* Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. (2011).

89. *See Guiding Principles*, *supra* note 10.

90. *See, e.g.*, EUROPEAN COMM'N, OIL AND GAS SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013), http://www.ec.europa.eu/enterprise/policies/sustainablebusiness/files/csr-sme/csr-oag-hr-business_en.pdf.

91. Press Release, European Comm'n, Disclosure of Non-Financial Information by Certain Large Companies: European Parliament and Council Reach Agreement on Commission Proposal to Improve Transparency (Feb. 26, 2014), *available at* http://www.europa.eu/rapid/press-release_STATEMENT-14-29_en.htm?locale=en. The directive will apply to "[l]arge public-interest entities (mainly listed companies and financial institutions) with more than 500 employees." *Id.*

92. The demand for public transparency may also be observed in the growing trend toward sustainable and responsible investing (SRI). Since 1995, the growth in total dollars under professional management outpaced the overall market, and the longest-running SRI index has performed competitively with the S&P 500. *Performance & SRI*, F. FOR SUSTAINABLE & RESPONSIBLE INVESTMENT, http://www.ussif.org/performance (last visited Apr. 22, 2014). Organizations such as the International Corporate Accountability Roundtable and projects such as Shift—which helps governments and businesses implement the Guiding Principles—also play a prominent role in driving the momentum for increased corporate social responsibility. *See* INT'L CORP. AC-

over whether the SEC is the appropriate body to regulate social disclosure in general,[93] but regulating disclosure of financial information is well within the SEC's purview and there is a strong argument that the SEC has the statutory authority to mandate disclosure for public interest, so long as it is not the sole purpose of the disclosure.[94]

Failure to move forward with disclosure mandates in the extraction industry—the industry at the heart of corruption in much of the developing world—would be an enormous step back in the campaign for transparency. If we cannot demand transparency from this industry, from whom can we demand it? This landmark legislation marks a critical milestone for U.S. corporate transparency. The law must be defended and its implementation must serve as a model for new regulatory measures aimed at expanding social disclosure.

II. DEFENDING THE RULE: THE NEED, THE MANDATE, SEC ACTION, WHY INDUSTRY CHALLENGES FALL SHORT, AND HOW IT FITS WITHIN A BROADENING INTERNATIONAL EFFORT

Congress intended the disclosure rule to address a social problem and was fully aware of the EITI—its value as well as its shortcomings—when it enacted section 1504. It clearly sought a rule that would expand the scope of the EITI and, importantly, mandate what the EITI has been unable to.[95] Moreo-

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COUNTABILITY ROUNDTABLE, http://www.accountabilityroundtable.org/ (last visited Apr. 22, 2014); SHIFT, http://www.shiftproject.org/ (last visited Apr. 22, 2014). In addition to the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 101–04, 91 Stat. 1494, 1494–98 (codified as amended in scattered sections of 15 U.S.C.), the Sarbanes-Oxley Act of 2002 is an example of increased U.S. government oversight to address corrupt business practices. *See* Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.) (addressing major corporate accounting scandals including Enron and Global Crossing).

93. *See* Interview with Richard W. Painter, S. Walter Richey Professor of Corporate Law, Univ. of Minn. Law Sch. (Oct. 28, 2013) (noting that the U.S. Environmental Protection Agency, U.S. Department of Labor, U.S. Department of State, or others are likely in a better position to regulate disclosure for purely social ends, including environmental pollution and labor issues, which involve substantially more than disclosure of financial transactions).

94. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1235–46 (1999). Williams notes that this is a "proxy" power "limited by the social goals underlying the [securities] acts." *Id.* at 1271–72.

95. *Compare* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,368 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts.

ver, it appeared to provide very little discretion to the SEC or opportunity for the SEC to frustrate its intent.[96] Nonetheless, the court found there was room for interpretation and thus the SEC must now reconsider whether or not its interpretation was appropriate.[97]

This section discusses the weaknesses of the EITI, the congressional mandate to the SEC, the SEC's obligations under the Exchange Act, judicial review under the APA, and the need for a model for social disclosure expansion.

A. EITI FALLS SHORT

While industry has argued that the EITI meets congressional goals for transparency, the initiative has two critical shortcomings. First, as a voluntary program, the EITI operates only in countries that have accepted its requirements[98] and are meeting its standard.[99] Second, the EITI's flexible reporting methodology results in inconsistent levels of disclosure.[100] At the low end, EITI disclosure falls severely short of the disclo-

240, 249) (requiring an annual report of disclosures within a year of implementation), *with* EITI RULES, *supra* note 81, at 19 (stating that countries have eighteen months to publish an EITI report and two and a half years to submit a final validation report which may or may not include disaggregated payments).

96. *See* Brief for Representatives Edward J. Markey et al. as Amici Curiae Supporting Respondents at 4, Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2013 WL 179895, at *4 [hereinafter Brief Supporting Respondents] ("Here, the Commission was following such an explicit, detailed congressional mandate; section 1504 laid out the precise contours that the Resource Extraction Rule must have, and the Commission followed those dictates to the letter.").

97. *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 13 (D.D.C. 2013) (finding that the Commission erred in finding that Congress "has directly spoken to the precise question at issue," and that under *Chevron*'s second prong, deference to the agency is "only appropriate when the agency has exercised its own judgment").

98. As of November 2013, thirty-seven countries were implementing EITI, yet Shell operated in over eighty countries and Total operated in over 130. *See A Leading Global Energy Company*, TOTAL, http://total.com/en/about-total/thumbnail (last visited Apr. 22, 2014); *EITI Countries*, *supra* note 39; *Shell at a Glance*, SHELL GLOBAL, http://www.shell.com/global/aboutshell/at-a-glance.html (last visited Apr. 22, 2014).

99. *How Countries Can Implement the EITI Standard*, EITI, http://eiti.org/eiti/implementation (last visited Apr. 22, 2014) (outlining the process for becoming an EITI candidate and reaching EITI compliant status).

100. EITI RULES, *supra* note 81, at 12 ("The guidance is limited given that the EITI is a robust, but flexible standard, and national stakeholders are to adapt it to local needs and context.").

sure rules adopted by Congress.[101] At its best, it serves to compliment the U.S. rule by minimizing the negative impact on competition and providing a platform for extending transparency standards toward initiatives that effect the positive change the EITI seeks—better governance and promotion of human rights.[102]

1. Voluntary Nature and Flexible Reporting Undermine the EITI's Objectives

Because it is voluntary, it is not surprising that countries such as Angola, which are at the heart of the EITI movement, have failed to join.[103] Although membership is growing, there are currently only forty-one member states, twenty-five of which are meeting all requirements of the EITI standard, and four of which have had their status suspended.[104]

The EITI governing board—comprised of representatives from government, industry, and civil society—sets the minimum standards for implementation, which are published in the EITI Rules.[105] Unlike the U.S. disclosure rules, EITI standards are meant to provide flexibility to member countries—they establish a mechanism for transparency, but it is up to the mem-

101. *Id.* at 11 (noting that requirements are minimal and states are encouraged to expand).

102. The final challenge will be translating disclosure to a positive change in the lives of the many untouched by the resource wealth of their country. With new data made available through U.S. and EU disclosure rules, perhaps the EITI can focus more on verification and expand its scope to include direct impact on the conditions it seeks to change. *See* Jean Claude Katende, *The New Challenge for EITI: Becoming a Tool for Improving the Living Conditions of Poor Populations*, PUBLISH WHAT YOU PAY (Dec. 4, 2012), http://www.publishwhatyoupay.org/resources/new-challenge-eiti-becoming-tool-improving-living-conditions-poor-populations (calling for a new mechanism of evaluation that considers the changes, such as the impact on the lives of poor populations, brought about by the implementation of the EITI).

103. HUMAN RIGHTS WATCH, *supra* note 31, at 22 (noting that the Angola government has repeatedly rejected the EITI and there is no external pressure to join); *EITI Countries*, *supra* note 39. The Human Rights Watch report also notes that World Bank officials had informed Human Rights Watch that Angola already exceeded EITI's requirements. HUMAN RIGHTS WATCH, *supra* note 31, at 22.

104. *From Transparency to Accountability*, WORLD BANK (Dec. 19, 2013), http://www.worldbank.org/en/news/feature/2013/12/19/from-transparency-to-accountability. Countries that are not EITI compliant have not yet undergone the validation process, or have, but failed to meet the EITI criteria. Countries have eighteen months to publish an EITI report and two and a half years to submit a final validation report. EITI RULES, *supra* note 81, at 19.

105. EITI RULES, *supra* note 81, at 9.

ber countries to implement that mechanism in a manner that best meets their needs.[106] These decisions are not made by state governments, but by multi-stakeholder groups comprised of industry, government, and NGOs within each country.[107] There are some obligations that are non-negotiable. Under the EITI, governments must publish "all material oil, gas and mining payments to government" and "all material revenues received by governments from oil, gas and mining companies."[108] The EITI criteria leave it to member multi-stakeholder groups, however, to determine the threshold for "materiality."[109] Additionally, the EITI criteria currently place no requirement on how information is reported or published.[110] While a growing number of EITI reports include information that is disaggregated by company and/or revenue stream, some states continue to publish composite data only, sometimes years after the payments have been made.[111] Furthermore, unlike the SEC rule, which requires project-level reporting, EITI still largely employs public reporting at the country-level,[112] which is far less valuable. Because projects vary significantly in scope, geologic location, and risk, project-level reporting provides the transparency needed for citizens to hold their local or provincial governments accountable. This is particularly important in countries where revenues are distributed to the locales in which the

106. *See supra* note 100 and accompanying text.

107. EITI RULES, *supra* note 81, at 13, 15.

108. *Id.* at 21. According to the EITI Rules, certain revenue streams should be included: the host government's production entitlement, national state-owned company production entitlement, profits taxes, royalties, dividends, bonuses, license fees, and rental fees. *Id.*

109. *Id.* (stating that the multi-stakeholder group must agree on the definition and the reporting templates).

110. *See id.* (stating that the multi-stakeholder group is responsible for developing reporting templates to define which revenue streams are to be included and the time periods covered by the reporting); *see also* ANWAR RAVAT & ANDRE UFER, TOWARD STRENGTHENED EITI REPORTING: SUMMARY REPORT AND RECOMMENDATIONS 4–7, 20–21 (2010) (noting EITI implementation issues include detailed reporting versus aggregate reporting and delay and difficulty in obtaining data to the degree that there is little value in producing EITI reports).

111. Diarmid O'Sullivan, *The EITI Needs to Become More Ambitious and More Realistic*, EITI (Sept. 27, 2012, 3:28 PM), http://eiti.org/blog/eiti-needs-become-more-ambitious-and-more-realistic#.

112. *But see* Clare Short, *Building on Achievement: A Proposal to Improve the EITI, by Making the EITI Reports Better, Implementation Simpler, and the EITI a Stronger Platform for Wider Reforms* 7–8 (EITI, Board Paper No. 21-2-A, 2012) (noting the emerging consensus that reporting standards should come in line with U.S. rules of company-by-company reporting).

operations are located. Additionally, project-level reporting provides the level of detail investors need to evaluate risk, which is critical in regions marred by instability.

While the SEC did not define "project," it provided very specific guidance on what the term could and could not include.[113] Industry objected to this, arguing that the SEC's granular notion of project is costly and unnecessary.[114] But their objection is belied by the fact that some large companies committed to corporate social responsibility already voluntarily publish revenue for certain projects, including Newmont and Statoil, two of the world's leading extraction companies.[115] Additionally, several countries have developed project-level reporting templates through the EITI with some success, including Indonesia, Zambia, Mali, Burkina Faso, and Timor-Leste.[116]

2. While Insufficient on Its Own, the EITI Adds Value to the U.S. Disclosure Rule

One area of strength which the EITI has and the U.S. rule does not, and cannot, is the ability to create a level playing field.[117] Although EITI rules vary by country, their application is consistent within each country: they apply to all issuers alike, whether publicly-traded or state-owned, and thus are less likely to provide a competitive advantage or disadvantage. The SEC did not disregard the potentially large impact compliance will have on competition, but this was overshadowed by the fundamental failure of the EITI to require implementation.[118] This is what sets the U.S. rule apart from the EITI and why the

113. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,385–86 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

114. Complaint, *supra* note 15, at 6.

115. REVENUE WATCH INST., PROJECT-BY-PROJECT REPORTING THROUGH THE EITI 2 (2012), *available at* http://eiti.org/files/SWG/RWI_SWG_Paper_Project_level_reporting_April_2012.pdf. Transparency International gave Statoil its highest score in corporate transparency. *See* TRANSPARENCY INT'L, TRANSPARENCY IN CORPORATE REPORTING: ASSESSING THE WORLD'S LARGEST COMPANIES 2 (2012), *available at* http://issuu.com/transparencyinternational/docs/2012_transparencyincorporatereporting_en.

116. REVENUE WATCH INST., *supra* note 115.

117. EITI RULES, *supra* note 81, at 23 ("The EITI Criteria require that all companies—public (state-owned) and private, foreign and domestic—report payments . . . .").

118. Senators referred to the important strides the EITI has made in promoting transparency, but noted that "too many countries and too many companies remain outside this voluntary system." 156 CONG. REC. S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin).

U.S. rule is important to the EITI and its ability to meet its objectives. At the same time, the EITI may complement the U.S. disclosure requirements by bringing companies outside the purview of the SEC under the regulated scrutiny of the EITI.

Of course, some companies operating in non-EITI states will remain out of reach. In addition to the U.S. disclosure rule and proposed EU rules, support for transparency can be found in Hong Kong, Australia, and Canada.[119] But none of these initiatives will extend to the large state-owned companies in Russia and China. For this, expansion of the EITI may be necessary. Instead of opposing these initiatives, industry could use its power within the EITI governing board and the state-level multi-stakeholder groups to push uniform disclosure requirements. Companies and investors hold six spots on the EITI board of directors—equal to other major stakeholders.[120] Currently, these positions are held by Chevron, Statoil, Royal Dutch Shell, Rio Tinto, Standard Life Investments, and Freeport-McMoRan, Copper & Gold.[121] All industry members, including alternates, fall under the purview of the SEC and new U.S. disclosure rules. Industry has a voice at the negotiating table. With U.S. rules in place, industry will have a strong interest in ensuring that everyone is playing by the same rules. Industry could have the most powerful voice in driving that charge.[122] The question remains whether they will use it to obstruct or to create a uniform standard that can bring about transparency and better governance throughout the resource-rich world.

B. CONGRESS MANDATES SPECIFIED ACTION

Congress fully recognized the purpose and the shortcomings of the EITI. The plain language of the statute and the legislative history show that Congress intended the SEC to promulgate resource extraction disclosure rules with the same primary purpose—to empower citizens of resource-rich coun-

119. *See* Cunningham, *supra* note 82.

120. EITI, MEMBERS OF THE EITI INTERNATIONAL BOARD 2011–2013, at 2 (2012), *available at* http://eiti.org/files/22_10_2012_%20EITI%20Board%202011-2013_0.pdf. Implementing countries hold five seats, supporting countries hold three, and civil society groups hold five. *Id.* at 1–2.

121. *Id.* at 2. Board alternates include ExxonMobil, BP, Pemex, International Council on Mining and Metals, De Beers, and Allianz GI Europe. *Id.*

122. *But see Extracting Oil, Burying Data*, ECONOMIST, Feb. 25, 2012, at 73 ("Some suspect that the firms on the initiative's board sing its praises only because they can ensure it stays toothless.").

tries to hold their governments accountable for the management and appropriation of revenues generated.[123] In his testimony on the Senate floor, Senator Cardin stated that this amendment would "pierce the veil of secrecy that fosters so much corruption and instability in resource-rich countries."[124] Senator Lugar added that "[d]espite $1/2 trillion in revenues since the 1960s, poverty has increased, corruption is rife, and violence roils the oil-rich Niger Delta."[125]

But the call for transparency was not made solely with an altruistic intent to support the impoverished communities abroad, nor could it be under the Exchange Act.[126] Both Senators recognized that the promotion of good governance would have an additional positive impact on the United States—improving the conditions in which the extraction industry works and opening up new markets that are otherwise too risky or unstable.[127] Transparency, they said, would empower investors with a better view of their holdings, improve the investment climate overall, increase the reliability of commodity supplies, and promote energy security.[128] These assertions were supported by calling attention to the instability in the Niger Delta that has already resulted in lost jobs and profits for American companies operating in the region.[129]

Congress knew what it was doing. Despite the district court's finding that Congress had not clearly spoken, the level of detail and specificity with which the legislation was drafted

123. 156 CONG. REC. S3816 (statement of Sen. Richard Lugar) ("Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad. . . . More importantly, it would help empower citizens to hold their governments to account . . . .").

124. *Id.* at S3815.

125. *Id.* at S3816.

126. *See supra* note 94.

127. *See* 156 CONG. REC. S3815–16.

128. *See id.*

> Companies in the extractive sector face unique tax and reputational risks in the form of country-specific taxes and regulations. Exposure to these risks is heightened by the substantial capital employed in the extractive industries, and the often opaque and unaccountable management of natural resource revenues by foreign governments, which in turn creates unstable and high-cost operating environments for multinational companies. The effects of these risks are material to investors.

Id. at S3816 (noting the findings of the amendment).

129. *Id.* at S3815. Senator Cardin referenced a 2009 loss of production reaching nearly one million barrels less than it was able to produce because of instability in the region. *Id.*

suggests an intent to leave little room for the SEC to render disclosure ineffective.

The statute requires disclosure of any "payment" made by a "resource extraction issuer" to a "foreign government" (or the Federal Government) for "commercial development" of oil, natural gas, or minerals, including the type and total amount of payments made for each "project" and to each government.[130] In defining many of these terms, Congress clearly articulated the level of transparency it deemed necessary to meet its objectives and granted very little flexibility to the SEC.[131]

1. No Discretion for "Commercial Development" or "Resource Extraction Issuer"

Congress defined "commercial development" to include "exploration, extraction, processing, export, and other significant actions . . . as determined by the [SEC]."[132] While numerous commentators suggested defining "commercial development" in a manner consistent with the EITI which would include upstream activities (exploration and extraction) only, the SEC had only been granted discretionary authority to add to the list, not remove activities Congress had enumerated.[133] Proponents of the expansive definition recognize the importance of disclosing payments made throughout the operation,[134] particularly for transportation, given the long history of human rights abuses and destabilization surrounding pipeline transport of fuel.[135]

130. Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(2)(A) (2012).

131. *See* Brief Supporting Respondents, *supra* note 96, at 11–12 (characterizing Representative Waters's opening statement in the House Financial Services Committee as speaking "only of the many things section 1504 'requires,' providing additional evidence that Congress dictated the Resource Extraction Rule's ultimate scope").

132. Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(1)(A).

133. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,373 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

134. *See* PUBLISH WHAT YOU PAY, THE EITI STRATEGY WORKING GROUP: A SUMMARY OF PUBLISH WHAT YOU PAY VIEWS 1 (2011), *available at* http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/EITI%20Strategy%20Working%20Group%20-%20PWYP%20summary%20of%20views.pdf (noting that the current scope of the EITI is too narrow).

135. In 2002, a Burmese villager brought a suit against Unocal for human rights violations under the Alien Tort Claims Act (ATCA). Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). Although the ATCA claim was settled, EarthRights International reported continued abuse in 2009. MATTHEW F. SMITH, NEW REPORTS LINK TOTAL AND CHEVRON TO FORCED LABOR AND KILLINGS IN BURMA,

In addition to ensuring that all aspects of "commercial development" were within the disclosure mandate, Congress gave no discretion to the SEC with respect to which companies the mandate would apply. Congress defined "resource extraction issuer" simply as an issuer that engages in the specified commercial development that is also required to file an annual report with the SEC.[136] Under this definition, no one is left out.

2. Limited Discretion for "Payment" and "Project"

Congress granted limited discretion to the SEC in defining the level of reportable payment, and perhaps in defining "project." While Congress defined payments to include taxes, royalties, fees, production entitlements, and bonuses, it also included "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," *not de minimis*.[137] This gave the SEC discretion in adding to the list, which it did not do, and defining the minimum reportable amount—that which is not significant or "not de minimis."[138] It was important to proponents of the rule that the SEC set a low minimum value to capture as much of the revenue stream as possible, rather than ascribe a "materiality" factor or a value relevant to a company's balance sheet.[139]

DESPITE FLAWED IMPACT ASSESSMENTS (2009), *available at* http://www.earthrights.org/sites/default/files/documents/press-release-total-impact-getting-it-wrong.pdf; *see also* Marwaan Macan-Markar, *BURMA: Pressure Mounts on Energy Giant Chevron to Disclose Revenue*, INTER PRESS SERVICE, Apr. 29, 2010, http://www.ipsnews.net/2010/04/burma-pressure-mounts-on-energy-giant-chevron-to-disclose-revenue/. Human rights violations surrounding the Burmese pipeline were also noted in a comment to the SEC, stating that disclosure may enable communities to advocate that payments be used to compensate victims. *See* Letter from Human Rights Foundation of Monland to Meredith Cross, Dir., Division of Corp. Fin., SEC 2 (July 15, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-99.pdf.

136. Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(1)(D).

137. *Id.* § 78m(q)(1)(C).

138. The Internal Revenue Service defines "de minimis fringe" as "so small as to make accounting for it unreasonable or administratively impracticable." 26 U.S.C. § 132(e)(1) (2012).

139. *See* Letter from Payal Sampat & Scott Cardiff, Int'l Program Coordinators, Earthworks, to Elizabeth M. Murphy, Sec'y, SEC (Mar. 2, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-58.pdf (recommending reporting of payments above $1000); Letter from Publish What You Pay U.S. Coalition to Elizabeth M. Murphy, Sec'y, SEC 4 n.8 (Dec. 19, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-116.pdf ("[A] reporting standard based on materiality to the recipient government is qualitatively different from one based on the materiality of a project or a payment to the re-

Although defining "not de minimis" was a clear point of contention, industry's argument focused more on the SEC's failure to define "project" when granted discretionary authority to do so—or more accurately, to define "project" in a manner agreeable to industry when granted the discretion to do so.[140] Project-level reporting may be the most important element in the disclosure rule because it has the potential to bring transparency to the community level.[141] Congress left "project" undefined. In the end, the SEC also left "project" undefined, stating that it believed the term was generally understood by industry and that the contract should serve as the basis for its definition.[142] Given the complexity of the multifaceted industry, covering exploration to export, this was probably a wise decision, if not a necessary one. But it doesn't mean that the SEC left "project" open to broad interpretation. The SEC unambiguously rejected recommendations by industry commentators, which included defining "project" at the country level, as a reporting unit, in relation to a particular geological basin or mineral district, or by reference to the materiality standard consistent with federal securities laws.[143] By requiring disclosure at both the "project" and "country" level, Congress clearly did not intend for the terms to be used interchangeably. And considering that the primary purpose of disclosure is to empower citizens to hold their governments accountable for mismanagement of revenues, Congress must have intended the term "project" to represent a more defined activity within a country, recognizing that citizens will be best equipped to hold their governments accountable when the partitioning is such that it allows specificity at the local or provincial level.

Industry's opposition to project-level reporting is further undermined by the EITI requirements for project-by-project reporting in some countries and by companies that voluntarily publish such information.[144] Even the *Financial Times* editorialized that there was "no justification" for watering down project-level reporting, noting that "most payments to states are calculated on a project basis anyway, so publishing such detail

porting issuer . . . .").

140. *See supra* note 114 and accompanying text.

141. *See* Letter from Human Rights Foundation of Monland, *supra* note 135.

142. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,382 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

143. *Id.*

144. *See supra* notes 110–11 and accompanying text.

is no great burden."[145] While industry claims that the rule is over-burdensome, the real crux of their argument has nothing to do with the amount of effort or expense involved in compiling reports, but with the public nature of reporting that the SEC has mandated.

3. Required Public Disclosure with No Express Exemptions

In an effort that would effectively eliminate all possible hope for citizens of resource-rich nations, and particularly those living under the most corrupt regimes, industry challenged the SEC's failure to exercise discretion with regard to public disclosure and failure to provide an exemption for operations in countries with secrecy laws.[146] In regard to public disclosure, the statute states that "to the extent practicable," the SEC shall make available online a "compilation" of the information submitted by industry.[147] Industry argued that "compilation" could refer to the aggregate data of all issuers on a per country basis.[148] But the SEC rejected this as inconsistent with the plain language of the statute and the transparency goals articulated by Congress.[149] The statute requires that companies include payment disclosures in their annual reports.[150] Under the existing Exchange Act, annual reports must be filed publicly,[151] and there is no indication that Congress wanted to make the new disclosure reports, or any portion thereof, confidential. While the industry groups challenging the rule argued that the SEC "grossly misinterpreted its statutory mandate,"[152] there is no evidence that Congress had even considered the option of confidential reporting. Instead, Congress focused on developing a mechanism for compiling information into an easily searchable and reviewable format, evidenced by the requirement for electronic tags to identify payments according to type, amount,

145. Editorial, *Transparency Rules: Oil Companies Are Wrong to Resist Publication of Payments*, FINANCIAL TIMES, Feb. 26, 2012, http://www.ft.com/intl/cms/s/0/4ebf8410-5f16-11e1-9df6-00144feabdc0.html#axzz1nZRWgsKK.

146. Complaint, *supra* note 15, at 11–12 (alleging violation of the APA and Exchange Act).

147. Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(3)(A) (2012).

148. Complaint, *supra* note 15, at 16–17.

149. *See* Brief of Respondent SEC at 17–19, Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2013 WL 30051, at *17–19.

150. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,391 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

151. *See* Brief of Respondent SEC, *supra* note 149, at 18.

152. Complaint, *supra* note 15, at 3–4.

currency, business sector, receiving government, and project.[153]

While it is possible that some level of confidential reporting could still further the purpose of empowering citizens, it is difficult to see how confidentiality and aggregated data could support investor interests in disclosure or improve the investment climate. An investor can only assess the risks of a company's expenditures and practices, project cash flows, and acquisition costs and management effectiveness if it has company-specific information.[154] Furthermore, the rule does not regulate in any way the types or amount of payments companies can make to foreign governments; it only requires that all payments are reported. Of course, as noted, all payments are subject to the rules of the Foreign Corrupt Practices Act.[155] Unless Congress intended section 1504 to serve simply as an additional tool for identifying corporate corruption, which is not mentioned in the legislative record, there is no logical reason that disaggregated and company-specific data should be available to the SEC alone. As expressly articulated, this information has the sole purpose of benefiting citizens of resource-rich countries and investors, and thus full transparency must extend to those interested parties.

This is particularly important in countries that have secrecy laws or prohibit disclosure—countries often defined by their autocratic regimes, ripe with corruption, bribery, and conflict. The statute itself grants no exemptions, but industry challengers claimed that the SEC had discretion to provide exemptions under the Exchange Act.[156] At the same time, industry commentators failed to provide supporting evidence that the four countries they identified—Angola, Cameroon, China, and Qatar—actually have some versions of laws which prohibit disclosure.[157] In fact, several commentators disputed this assertion, noting that laws in these countries contain specific provisions

153. *See* Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(2)(D)(ii) (2012).

154. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,397. Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA-CREF) cited the importance of comprehensive disclosure in analyzing investment risk. *See* Letter from Jon Feigelson, Gen. Counsel & Head of Corporate Governance, TIAA-CREF, to Elizabeth M. Murphy, Sec'y, SEC (Mar. 2, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-54.pdf.

155. *See supra* note 24 and accompanying text.

156. *See* Complaint, *supra* note 15, at 5–6 (citing 15 U.S.C. § 78*l*(h)).

157. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,411.

that permit disclosure to stock exchanges.[158] The industry challengers have yet to produce evidence to the contrary.[159] The SEC was unconcerned by the potential impact on extraction issuers and correctly determined that such exemptions would wholly undermine the purpose of the rule. To find otherwise would necessarily mean that Congress enacted a law to achieve social ends but with no mechanism for reaching those ends—a law rendered ineffective from the outset.

4. Compelled Speech Is Within the Authority of Congress

The court did not address industry's First Amendment claim, and it will not be addressed in detail here. However, it is likely to arise again, and if accepted, could have much broader impact, "call[ing] into question thousands of reporting statutes and regulations,"[160] many of which mandate reporting of factual information similar to that required under the resource extraction disclosure rule.[161] Industry claims that the disclosure rule represents "compelled, non-commercial speech" that would place companies at a competitive disadvantage.[162] This claim is weakened by the current voluntary reporting of other companies such as Statoil, expansion of the EITI, and forthcoming EU rules.[163] But, it is important to understand the "competitive disadvantage" industry is referring to. Industry groups argued, "U.S. companies wish to avoid the speech because it is controversial with *certain* foreign governments."[164] This is an anti-corruption statute. Of course, disclosure might be controversial with some governments. As Global Witness asks, "what are [these] companies trying to hide?"[165]

In tracking the well-defined language of the statute and

158. *Id.* at 56,370–71.

159. *See Extracting Oil, Burying Data*, *supra* note 122 (noting industry has provided no examples of how local restrictions on publishing confidential contract details would upset U.S. transparency requirements).

160. Brief of Intervenor Oxfam America, Inc. at 2, Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013) (No. 12-1398), 2013 WL 179899, at *2.

161. *See* Brief of Respondent SEC, *supra* note 149, at 55–56.

162. Complaint, *supra* note 15, at 28.

163. Samuel Rubenfeld, *Oil Industry Moves Forward with Extractive Industry Rule Lawsuit*, WALL ST. J. BLOGS (Dec. 4, 2012 5:37 PM), http://blogs.wsj.com/corruption-currents/2012/12/04/oil-industry-moves-forward-with-extractive-industry-rule-lawsuit/.

164. Complaint, *supra* note 15, at 29 (emphasis added).

165. Ben Geman, *Oil, Business Groups Sue SEC over Disclosure Rule*, THE HILL (Oct. 11, 2012, 12:16 AM), http://thehill.com/blogs/e2-wire/e2-wire/261377-oil-business-groups-sue-sec-over-disclosure-rule.

legislative intent—to empower citizens of resource-rich countries to hold their governments accountable for failing to address societal needs—the SEC promulgated a rule which fully complies with Congress's mandate. The question is whether the SEC had the authority to comply or if it necessarily should have exercised discretion to act in accordance with its obligations under the Exchange Act.

C. INDUSTRY'S CHALLENGE TO THE SEC'S MANDATE UNDER THE EXCHANGE ACT

The industry groups challenging the rule argued that the SEC failed to exercise its discretionary authority under the Exchange Act and acted outside its statutory authority in issuing rules which imposed high costs with no quantified benefits.[166] Under the Exchange Act section 3(f), the SEC is required "to *consider* or determine whether an action is necessary or appropriate in the public interest" and to "*consider*, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[167] Under section 23(a)(2), the SEC is prohibited from adopting rules "which would impose a burden on competition *not necessary or appropriate* in furtherance of [the Act]."[168] Furthermore, if the SEC determines that any burden is necessary or appropriate, it shall include reasons for such determination in the rule's statement of basis and purpose.[169] In its consideration, the SEC recognized first and foremost that Congress intended the rule to promote a type of social benefit that differs from the type of investor-protection benefits SEC rules generally seek to achieve. In this vein, the SEC determined that any potential burden the rules impose on industry may be necessary to achieve the purpose of the statute—increased transparency for a social end.[170] With this understanding, the SEC carefully considered the economic effects of the rules and, particularly, those effects stemming from SEC action on provisions where it was granted discretionary authority, to determine whether or not the burden could be lessened without frustrating congressional

166. Complaint, *supra* note 15, at 2–7.
167. Securities Exchange Act of 1934 § 3(f), 15 U.S.C. § 78c(f) (2012) (emphasis added).
168. *Id.* § 78w(a)(2) (emphasis added).
169. *Id.*
170. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,398 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

intent.[171] In carefully reviewing all comments relating to projected costs of compliance, the SEC considered the rule's effects on competition and its ability to achieve its objective without unduly burdening industry.

1. Cost of Necessary Burden on Competition

The SEC considered the qualitative impact of the rule in addition to conducting a cost-benefit analysis. It determined that disclosure, to the extent it informed investor decision making, could improve information efficiency,[172] but disclosure had the potential to reduce allocative efficiency by diverting capital away from other opportunities as shareholders bear the cost of compliance.[173] Alternatively, the SEC also proposed that disclosure might increase capital formation by increasing investment by those who have been able to properly assess the "political risk, acquisition costs, and management effectiveness."[174] While informative, these considerations are largely speculative, absent quantification. Therefore, the bulk of the SEC's consideration involved assessing the costs of compliance.

First, the SEC considered the compliance costs stemming from the statutory mandate and the SEC's exercise of discretion in limiting the definition of "project" and defining "not de minimis" as payments over $100,000.[175] Relying on estimates submitted by one oil and gas company—ExxonMobil—and one mining company—Barrick Gold[176]—the SEC calculated the initial compliance costs using two different methods. In the first method, the SEC calculated the average initial compliance costs per company, identifying a lower bound of $88,000 (consistent with Barrick Gold estimates) and upper bound of

171. *Id.* at 56,397. While the SEC considered the costs stemming from the congressional mandate, the SEC had not been granted the authority to exercise discretion in modifying the statutory language for the purpose of reducing the economic impact of competition. *Id.*

172. *Id.* at 56,399.

173. *Id.* at 56,403.

174. *Id.* at 56,397; *see also Extracting Oil, Burying Data*, *supra* note 122 (noting one large investor's belief that the rule would help him assess political and regulatory risks and citing a poll showing investors managing $1.2 trillion support the rule).

175. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,400.

176. Because Barrick Gold and ExxonMobil are both large extraction companies, the SEC found it appropriate to scale costs to the size of the issuer, with compliance costs increasing with firm size. *Id.* at 56,408.

$929,000 (consistent with ExxonMobil estimates).[177] Multiplying that figure by the 1101 companies impacted by the rule, the SEC estimated that the total initial compliance cost would fall within the range of $97 million to $1.1 billion.[178] In the second method, the SEC conducted a similar analysis for small and large firms, which represent unequal proportions of the market.[179] This formula dropped the maximum total compliance cost for all firms by half—from $1.1 billion to $459 million—although the SEC noted that the $1 billion estimate was consistent with estimates provided by commentators and considered it valid.[180] The SEC used the same methods to calculate ongoing compliance costs[181] and concluded that the total ongoing cost of compliance would be between $200 million and $400 million annually.[182] Although the SEC recognized several limitations to its analysis,[183] its estimates were based on the data available to it and provided by commentators. Its estimates were also consistent with commentator estimates.

Additionally, the SEC estimated losses for companies operating in countries which industry claimed prohibit payment disclosure.[184] The SEC assessed the costs of withdrawing from one of these countries based on assets reported by those companies and losses a firm would incur if it could not redeploy those assets in the host country or had to sell them at a steep discount.[185] The SEC identified fifty-one out of 1101 companies that may be affected.[186] While the SEC's analysis was limited in scope, it determined that commentators' concerns were warranted—that withdrawing from countries that prohibit disclosure could add billions of dollars of costs and have a significant

177. *Id.* at 56,408–09.

178. *Id.*

179. *Id.* at 56,409–10. The SEC estimated that small firms represent sixty-three percent of issuers, while large firms represent thirty-seven percent. *Id.* Small firms are those whose market capitalization is less than $75 million. *Id.*

180. *Id.* at 56,408–09.

181. *Id.* at 56,410. The SEC based analysis for ongoing compliance costs on estimates submitted by Rio Tinto, National Mining Association, and Barrick Gold. *Id.*

182. *Id.* at 56,411.

183. *Id.* at 56,410 n.620.

184. *See supra* note 155 and accompanying text (noting that industry had failed to provide evidence that any country prohibited such disclosure).

185. *Id.* at 56,411.

186. *Id.* at 56,411 n.628. Only nineteen of the fifty-one companies operating in those countries provided information specific enough for the SEC to use in its analysis. *Id.*

impact on a company's profitability and competitive position.[187] Nevertheless, the SEC remained resolute in its conclusion that providing an exemption would be inconsistent with the plain language of the statute and would wholly frustrate congressional intent to promote international transparency where it is most needed—countries wrought with corruption.[188] Thus, the SEC concluded that the burden was "necessary or appropriate in furtherance of [the Act]."[189]

2. Benefits Appropriate in the Public Interest Cannot Be Quantified with Any Precision and Need Not Be

Congress adopted section 1504 with the explicit purpose of providing the transparency necessary to empower citizens of resource-rich countries to hold their governments accountable for misappropriation of funds.[190] Congress additionally noted that promoting good governance could lead to political stability, an improved investment climate, price stability, and energy security.[191] None of the benefits Congress considered are the type that would produce direct economic benefit to investors, but are characteristic of benefits that "protect investors" in accord with the SEC's mission. In fact, the SEC noted that disclosure could "materially and substantially improve investment decision making."[192] It also noted that the benefits to victims of poor governance could be significant given the per capita income of resource-rich countries.[193] Yet, the industry groups challenging the rule claim that the SEC failed to determine whether the rule was likely to achieve the desired benefits.[194] They cite Commissioner Gallagher's dissent in which he stated, "we have no reason to think the SEC will succeed in achieving complex

187. *Id.* at 56,412.

188. *Id.* at 56,413.

189. *See* Securities Exchange Act of 1934 § 23(a)(2), 15 U.S.C. § 78w(a)(2) (2012).

190. 156 CONG. REC. S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin).

191. *Id.* at S3815–16.

192. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,398.

193. *Id.* The Brookings Institute suggests that increased transparency, accountability, and governance could provide a three hundred percent development dividend to citizens of resource-rich countries. Daniel Kaufmann, *SEC's Day of Reckoning on Transparency: Dodd-Frank Section 1504 on Disclosure of Natural Resource Revenues*, BROOKINGS (Aug. 21, 2012), http://www.brookings.edu/research/opinions/2012/08/21-dodd-frank-kaufmann.

194. Complaint, *supra* note 15, at 5.

social and foreign policy objectives as to which the policymaking entities that *do* have relevant expertise have, to date, largely failed."[195]

But petitioners err in claiming that the SEC had to *determine* whether the rule would likely achieve the desired benefit. The SEC need not *determine* the likelihood of success nor even identify a mechanism for measuring success should benefits be realized. The SEC need only *consider* benefits and, where it is unable to quantify them, provide explanation.[196] As the SEC explained, the benefits "cannot be readily quantified with any precision."[197] In support of the SEC's action, members of the House and Senate stated in their amicus brief that the provision of the Exchange Act petitioners cite applies only "where Congress asks the [SEC] to consider the 'public interest.'"[198] Because section 1504 was a "congressional mandate," they note that the public interest would be served by its adoption.[199]

C. THE RULE SHOULD WITHSTAND FURTHER COURT SCRUTINY UNDER THE APPROPRIATE REVIEW STANDARD

Since 2005, the D.C. Circuit has invalidated SEC rulemaking efforts on three occasions on grounds that the SEC failed to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"—the statutory review standard required under section 3(f) of the Exchange Act.[200] In *Chamber of Commerce v. SEC*, the court held that the SEC violated the APA in stating that it would be difficult to determine the costs associated with elect-

195. *Id.* (quoting Gallagher, *supra* note 21).

196. *See generally*, OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 4 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf ("Many rules have benefits or costs that cannot be quantified or monetized in light of existing information . . . .").

197. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,398 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

198. *See* Brief Supporting Respondents, *supra* note 96, at 6.

199. *Id.*

200. James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1812 (2012); *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 167–68 (D.C. Cir. 2010); Chamber of Commerce v. SEC, 412 F.3d 133, 142–44 (D.C. Cir. 2005).

ing independent directors.[201] The court stated that uncertainty did "not excuse the [SEC] from its statutory obligation to determine as best it can the economic implications of the rule it has proposed."[202] In *American Equity Investment Life Insurance Co. v. SEC*, the court assessed whether the SEC had appropriately considered whether its rule, disqualifying fixed indexed annuities from falling within the definition of an annuity contract as defined by statute, would promote efficiency, competition, and capital formation.[203] Here, the court found that the SEC had failed to properly consider the impact on competition by only finding that the rule would "bring about clarity in . . . an uncertain area of law," which would enhance competition.[204] The court held that there was no reasoned basis for this conclusion, and that the SEC necessarily should have considered the existing level of price competition under state regulation.[205] The court's most recent decision was in 2011 and pertained to a rule the SEC adopted pursuant to Dodd-Frank.[206] In *Business Roundtable v. SEC*, the court held once again that the SEC had acted arbitrarily and capriciously in failing to consider the rule's impact on efficiency, competition, and capital formation.[207] The court found that the SEC's cost-benefit analysis "had no basis beyond mere speculation" and that the SEC had failed to quantify or even estimate the costs companies may incur."[208]

In each of these decisions the court had assumed the authority to define what Congress has failed to—what it means to "consider" efficiency, competition, and capital formation, a requirement added through the enactment of the National Securities Markets Improvement Act of 1996.[209] James Cox and Ben-

201. 412 F.3d at 144; *see also* Investment Company Governance Act, 69 Fed. Reg. 46,378, 46,387 (Aug. 2, 2004) (codified at 17 C.F.R. pt. 270). *Chamber of Commerce* challenged a rule that exempted otherwise prohibited transactions if a certain percentage of a mutual fund's board were independent. 412 F.3d at 136.

202. *Chamber of Commerce*, 412 F.3d at 144. The court reasoned that the SEC has a statutory obligation to inform the public and Congress of the economic costs of a rule before it is adopted. *Id.*

203. 613 F.3d at 167.

204. *Id.* at 177.

205. *Id.* at 177–78.

206. *See generally* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010) (codified at 17 C.F.R. pts. 200, 232, 246, 249).

207. 647 F.3d 1144, 1156 (D.C. Cir. 2011).

208. *Id.* at 1150.

209. National Securities Markets Improvement Act of 1996 § 106(b), Pub.

jamin Baucom argue that the level of review invoked by the D.C. Circuit in these decisions is "dramatically inconsistent with the standard enacted by Congress."[210] Congress neither defined "consider" nor suggested that the SEC must abandon a rule determined not to promote efficiency, competition, and capital formation.[211] According to Cox and Baucom, "[n]owhere in the legislative history did any member of Congress ever specify, or even suggest, exactly how the SEC should go about 'considering' the enumerated factors, nor did any member ever specify exactly what aspect of 'efficiency,' 'competition,' or 'capital formation' the SEC should consider."[212] Their review of the legislative history supports the requirement that the SEC analyze the potential costs and benefits, including specific analysis where practicable. But according to the Congressional Budget Office, the 1996 provision was nothing new. It concluded that it did not expect the provision to result in any additional cost because the SEC already conducted such analysis in rulemaking.[213] Furthermore, Cox and Baucom note that the provision does not require the SEC to "determine" the rule's effect on efficiency, competition, or capital formation, nor does it prevent the SEC from adopting a rule because of uncertainty or negative impacts.[214] This, they assert, provides further evidence that Congress did not intend the provision to be particularly demanding on the SEC.[215]

Under the plain language, the SEC considered whether its rule adopted out of section 1504 would promote efficiency, competition, and capital formation. It conducted a cost-benefit analysis based on information provided by industry and concluded that costs of compliance may reach or potentially exceed the highest costs companies claimed they would incur.[216] It fur-

L. No. 104-290, 110 Stat. 3416, 3424–25 (adding § 3(f) to the Securities Exchange Act, 15 U.S.C. § 78c(f) (2012)).

210. Cox & Baucom, *supra* note 200, at 1813.

211. *Id.* at 1819 (noting that language in a competing Senate version of the bill, requiring the SEC's chief economist to provide an assessment of likely effects of the rule on the U.S. economy and markets, received a "cool reception" in that it placed undue burdens on the SEC and was unnecessary given the notice and comment procedure).

212. *Id.* at 1821.

213. *Id.* at 1820.

214. *Id.* at 1821.

215. *Id.*

216. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,408–11 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

ther concluded that, in certain circumstances, the rule would necessarily place a burden on competition and would have a negative impact on both efficiency and capital formation.[217] Industry asserted that the SEC acted arbitrarily and capriciously in failing to use discretion to reduce the burden incurred.[218]

The court's authority for judicial review of agency action is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[219] Under *Chevron*, the court must first ask whether the agency had the authority to act[220] and, second, whether the agency permissibly exercised the authority Congress granted it.[221] Congress not only granted the SEC the authority to act, but mandated action through section 1504 of Dodd-Frank. SEC action may be distinguished from earlier cases in this regard. While under *Business Roundtable*, *Chamber of Commerce*, and *American Equity* the SEC had the authority to act, Congress had not mandated action. This arguably allows the court greater scrutiny in assessing the SEC's interpretation of its authority.

Under the second step of *Chevron*, the court can invalidate an agency-made rule only if it finds that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[222] The *American Petroleum Institute* court determined that it need not consider this standard.[223] According to the court, the SEC had erroneously stopped at *Chevron* step one when it took the position that it was bound by the plain language of the statute.[224] The rule was vacated and remanded

217. *Id.* at 56,399.

218. Complaint, *supra* note 15, at 2–7.

219. 467 U.S. 837 (1984).

220. *Id.* at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (alteration in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

221. *Id.* at 844 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

222. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

223. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 12–13 (D.D.C. 2013).

224. *Id.* at 13. The SEC argued that it had "properly determined [at *Chevron* step one] . . . that Section 13(q) requires the public disclosure of the issuers' payment information." Defendant Securities and Exchange Commission's Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment at 39–40, *Am. Petroleum Inst.*, 953 F. Supp. 2d 5 (No. 12-1558 (JDB)), 2013 WL 2182599. The court responded that "the [SEC] 'itself has stopped at step one,' believing 'that it is without discretion to reach another result.'" *Am. Pe-*

to the SEC for further consideration.

There is no reason that the SEC could not promulgate a substantially similar rule, so long as it exercises the discretion the court states it has.[225] Congress expressly stated that the disclosure mandate was necessary to promote good governance abroad. This places the SEC in a good position to come out with an equally strong rule. However, the SEC will be cautioned to exercise greater restraint, to follow the intent of Congress without unduly burdening industry, and to conduct rigorous analysis. This will be no easy feat.

D. Section 1504 Is but One Effort in a Growing Movement to Legislate Transparency for Social Benefit

The SEC pointed to the widening global influence of the EITI, proposed disclosure rules in the EU, and listing requirements adopted by the Hong Kong Stock Exchange as further support of a growing international effort to increase transparency in the extraction industry.[226] Alone, the U.S. disclosure rule pertains to ninety percent of the major international oil companies, including Chinese companies, and eight out of ten of the world's largest mining companies—only two of which are based in the United States.[227] While there has been some speculation that companies will leave the U.S. stock exchanges to avoid U.S. reporting requirements,[228] this would be unlikely under a new EITI reporting standard[229] and similar EU disclo-

troleum Inst., 953 F. Supp. 2d at 13 (quoting Arizona v. Thompson, 281 F.3d 248, 254 (D.C. Cir. 2002)). The court thus concluded, "[a]ccordingly, no deference to its interpretation is warranted." *Id.*

225. *See* Samuel W. Cooper & S. Joy Dowdle, *Federal Court Vacates the SEC's Section 1504 Reporting Requirements for Payments to Governments by Oil, Gas, and Mining Companies*, STAY CURRENT (Paul Hastings, Houston, Tex.), July 2013, at 2, *available at* http://www.paulhastings.com/Resources/Upload/Publications/Federal_Court_Vacates_the_SEC%E2%80%99s_Section_1504_Reporting_Requirements_for_Payments_to_Governments_by_Oil,_Gas,_and_Mining_Companies.pdf ("Indeed, a subsequent rulemaking process that takes account of Judge Bates's concerns could still result in rules substantially similar to those vacated.").

226. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,413 (Sept. 12, 2012) (originally codified at 17 C.F.R. pts. 240, 249).

227. 156 CONG. REC. S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin); Jamie Drummond, *Committing to Natural Resource Transparency in Africa Pays*, ONE (Sept. 14, 2012), http://www.one.org/us/2012/09/14/committing-to-natural-resource-transparency-in-africa-pays/.

228. *See generally* Berns, *supra* note 74.

229. *See* Short, *supra* note 112, at 8 (noting that it was recognized that the "EITI could not require lower reporting standards than Dodd-Frank and the

sure rules—a combined effect which will very nearly cover all companies in the extraction industry.[230] Furthermore, independent initiatives of some companies[231] and industry groups[232] to improve transparency may be indicative of a broader industry shift toward acceptance of expanded disclosure rules for social benefit.

Section 1504 was just one of several efforts by Congress to increase corporate transparency for the primary benefit of citizens of foreign nations. As noted, both the conflict minerals rule enacted as section 1502 of the Dodd-Frank Act and the proposed Business Transparency on Trafficking and Slavery Act seek to increase transparency for similar ends.[233] Business entities and, particularly, transnational corporations have long been recognized for the power they have to significantly impact human rights—both positively and negatively, directly and indirectly.[234] And the pressure on states to enforce laws aimed at requiring business entities to respect human rights—not just within their own territory, but with extraterritorial implications—is growing.[235] After more than a decade of work to draft

EU regulations"); *see also* O'Sullivan, *supra* note 111 ("The EITI needs a way of assessing these various innovations against global benchmarks or it will struggle to say anything meaningful about them . . . .").

230. *See Oil & Mining Companies on Global Stock Exchanges*, REVENUE WATCH INST., http://data.revenuewatch.org/listings/ (last visited Apr. 22, 2014).

231. *See* REVENUE WATCH INST., *supra* note 115; *supra* text accompanying note 115.

232. *See* Bauer, *supra* note 84; *supra* text accompanying note 115.

233. *See supra* note 88 and accompanying text.

234. *See generally* Daniel Aguirre, *Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation*, 42 CAL. W. INT'L L.J. 123 (noting corporate control over government policy, the competing interests of states to protect human rights and attract investment, and the need to hold transnational corporations accountable for human rights violations); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003) ("Transnational corporations evoke particular concern in relation to recent global trends because they are active in some of the most dynamic sectors of national economies, such as extractive industries, telecommunications, information technology, electronic consumer goods, footwear and apparel, transport, banking and finance, insurance, and securities trading.").

235. *See* OLIVIER DE SCHUTTER ET AL., HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES 1 (2012), *available at* http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf (exploring the ways in which states use due diligence regulations for business and generally finding that "governments have increasingly failed to find a balance between the power of business and the duty of the State to

international norms on business and human rights that could garner broad support from business, government, and civil society, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights in 2011.[236] The Guiding Principles implement the UN's "Protect, Respect and Remedy" framework, whereby states have the responsibility to protect against human rights violations by business entities and businesses have the responsibility to respect human rights in their business activities.[237] These principles have been endorsed and implemented by several international organizations, including the OECD and the International Finance Corporation, private and multi-stakeholder groups, and several UN Member States, including the EU.[238] They complement existing voluntary corporate social responsibility initiatives, such as the UN Global Compact, which boasts over 10,000 corporate participants,[239] and the UN Principles for Responsible Investment Initiative, which supports investment principles that incorporate environmental, social, and corporate governance issues.[240] In

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protect human rights."); Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37, 42 (2011) (discussing the efforts to articulate a transnational regulatory framework including state regulatory jurisdiction over corporations beyond their borders); *Human Rights Due Diligence*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, http://accountabilityroundtable.org/initiatives/human-rights-due-diligence/ (last visited Apr. 22, 2014) (announcing the Human Rights Due Diligence Initiative).

236. Backer, *supra* note 235, at 65–68; *see also Guiding Principles*, *supra* note 10.

237. *See* Rep. of the Working Grp. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., U.N. Human Rights Council, 20th Sess., June 18, 2012–July 6, 2012, ¶¶ 7–8, U.N. Doc. A/HRC/20/29 (Apr. 10, 2012) [hereinafter U.N. Human Rights Council]; U.N. Secretary-General, *Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 18, 22–23, 28–29, U.N. Doc. A/67/285 (Aug. 10, 2012). Guiding Principles will be embedded into U.N. human rights treaty bodies and other U.N. programs, policies, and activities. *See id.* ¶¶ 19, 21.

238. U.N. Human Rights Council, *supra* note 237, ¶¶ 24–32.

239. *Overview of the UN Global Compact*, UN GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Apr. 22, 2014).

240. *Introducing Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, http://www.unpri.org/introducing-responsible-investment/ (last visited Apr. 22, 2014). The more than 1000 signatory firms are "estimated to represent 20 percent of the total value of global capital markets." U.S. SIF FOUND., REPORT ON SUSTAINABLE AND RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 5 (2012), *available at* http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf.

fact, growth in sustainable and responsible investing has outpaced the market, rising from $639 billion in 1995 to $3.7 trillion in 2012.[241] According to the *Financial Times*, "[t]he case for public reporting has long been clear."[242]

III. ACHIEVING THE OBJECTIVES OF SECTION 1504 AND TRANSPARENCY BEYOND RESOURCE EXTRACTION

Through section 1504 and the SEC's adoption of a final rule, the United States has taken a leadership role in bringing transparency to an industry that has fueled corruption, instability, and poor governance (over development and prosperity), and has contributed to the growing needs of some of the world's most vulnerable populations. While there is no false hope that U.S. disclosure rules alone will alter practices of revenue mismanagement or misappropriation, this information is a critical piece of the solution.

Industry groups may have gained a victory in the court, but there is no reason to believe that it will last. It is clearly within the SEC's authority to promulgate the same or a substantially similar rule upon further review. And it should. Of course, it must be prepared to fight new challenges by some in industry—it is important to note that API membership is seemingly divided on the issue. Some critics suggest that this challenge reveals a great deal about those crying foul. Their fear is an inability to compete, yet not everyone shares this concern. Surely there are multiple ways of competing. One involves efficiency and innovation in a level playing field; the other involves deriving gains from "rent-seeking, monopolistic behavior, bribery of foreign officials and tax avoidance or outright evasion."[243] If this is the group that finds favor with the courts, we are clearly on the wrong side of the global call for action.

241. U.S. SIF FOUND., *supra* note 240, at 11.

242. *Transparency Rules*, *supra* note 145. Michael Kerr, Richard Janda, and Chip Pitts note a growing global trend to increase transparency in environmental and social performance and the important roles both regulatory measures and volunteer initiatives have played in driving this trend. KERR ET AL., *supra* note 10, at 241–84.

243. *See* Daniel Kaufmann & Veronika Penciakova, *SEC Passes Natural Resource Transparency and Conflict Minerals Rules: The Glass Is Fuller than Expected*, BROOKINGS (Aug. 28, 2012), http://www.brookings.edu/research/opinions/2012/08/28-sec-transparency-kaufmann.

A. ACHIEVING THE OBJECTIVES OF SECTION 1504: THE WORK IS JUST BEGINNING

First and foremost, the SEC must promulgate a new rule which closely mirrors the rule the court vacated. This will not be easy, but it can be done. The primary challenges the SEC faces are exercising discretion where it believed it had none and preparing for a second round of judicial scrutiny. There is significant pressure on the SEC not to weaken the rule—not only by members of Congress,[244] but by investor groups as well. With the new EU Transparency Directive, investors are particularly concerned that "reporting obligations in [U.S. and EU] jurisdictions are as uniform as possible."[245] Consistency in reporting requirements—including the definition of project, the type of payments, and the minimum reportable payment—will reduce the compliance burden for those multinational companies traded on multiple exchanges and regulated by multiple bodies. Additionally, investors claim that the impact the disclosure will have on competiveness has been "significantly overstated," and as such, there should be no exemptions for countries that prohibit disclosure.[246] One group of investors stated, "as investors, we stand to benefit more from efficient, competitive markets that enable ethical behaviour than we do from isolated instances of companies gaining a temporary negotiating advantage through secrecy."[247]

Promulgating a rule capable of withstanding judicial scrutiny is only one hurdle. The SEC must also effectively implement the rule. The SEC received due criticism over its failures in oversight that contributed to the global financial crisis.[248] In issuing a strong disclosure rule that matched Congress's mandate, the SEC took a step in the right direction. But, in order for the regulation to have effect, companies must disclose pay-

244. Letter from Sens. Benjamin L. Cardin et al. to Mary Jo White, Chair, SEC (Aug. 2, 2013) ("The new rule should continue to make all reports public and should not allow for host country exemptions. We believe the SEC has the discretion and authority to retain both of these key aspects of the initial rule as long as sufficient analysis and justification is provided in the rulemaking process.").

245. Letter from Steve Berexa et al. to Mary Jo White, Chair, SEC (Aug. 14, 2013); *c.f.*, Letter from Jacob de Wit et al. to Mark Pearson, Dir. Gen., External Relations, Natural Res. Can. (Aug. 14, 2013) (pressing for similar rules in Canada).

246. Letter from Jacob de Wit et al., *supra* note 245, at 2.

247. *Id.*

248. Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES, Sept. 27, 2008, at A1.

ments, and it will be up to the SEC to ensure compliance.

Finally, in an effort to move governments toward increasing transparency in resource extraction and further develop best practices for disclosure, the United States must remain a leader in the EITI. The EITI represents an opportunity to continue to engage all stakeholders—government, industry, and NGOs—in the discussion of transparency and ultimately good governance practices. While industry has a large stake in this action, it also has a powerful voice. To limit the rule's impact on competition, industry has an interest in using its position within the EITI governing board and multi-stakeholder groups, as well as the EU and other markets, to push for a consistent international standard that levels the playing field and achieves the objectives that all parties seek without unnecessarily burdening economic interests.

Finally, NGOs and civil society have perhaps the greatest challenge. Transparency alone cannot bring better governance. Civil society must advocate for justice and the appropriation of revenues to provide social benefit for those in greatest need.

B. Legislating Transparency Beyond Resource Extraction

With growing international focus on corporate social responsibility, particularly in the EU,[249] Congress may seek to expand disclosure mandates to issues of human trafficking, labor standards, environmental risk, or other corrupt practices which demand financial transparency. Legal challenge may not be avoided; thus, it will be critical that Congress employ similar thoroughness in articulating its objectives and attention to detail in drafting new rules, while recognizing the importance of removing all hints of agency discretion where it intends to provide none. This is particularly difficult because it will require that Congress take rulemaking authority out of the hands of those with particular expertise in the area. It will be incumbent on Congress to conduct more rigorous analysis of the potential benefits and detriments of a rule up front.

Alternatively or additionally, it may be necessary for Congress to clarify the SEC's obligation to "consider" whether action is necessary or appropriate in the public interest and whether it will promote efficiency, competition, and capital formation, as required under the Exchange Act. The type of so-

249. *See supra* note 92 and accompanying text.

cial benefit sought may never be quantifiable, and compliance may necessarily place companies that operate internationally at a competitive disadvantage if rules are not universally accepted. Therefore, while "considering" a rule's impact may generally be necessary to ensure that regulation does not unnecessarily hinder business activity and growth, striking a balance between this and social objectives may not be possible for regulation that is almost purely motivated by a social agenda.

This was clearly the case in the SEC's cost-benefit analysis. Although the court should find the analysis sufficient, it was largely an exercise in futility. For instance, the SEC had no intention of granting exemptions for companies operating in countries where disclosure was prohibited, thus the effort of calculating lost assets and revenue was an exercise in futility. If Congress determines that these considerations are nonetheless important, it may be necessary to further articulate what purpose they serve in the SEC's evaluation and implementation of a legislative mandate.

Finally, the SEC, after undergoing what is likely to be only part one of judicial scrutiny, must be prepared to rigorously analyze the statutory language and legislative intent and defend its analysis in each part of the rulemaking process. What is required absent congressional action will become clearer as the SEC is further tested.

As noted, disclosure mandates may not fall under the SEC's purview. For instance, the State Department, Department of Labor, or Environmental Protection Agency may be better equipped to handle issues related to environmental damage or the violation of human rights as a result of corporate activity. The new SEC disclosure rules—particularly section 1504, but also the rule on conflict minerals—should serve as useful models for expanding social disclosure laws.

Calls for transparency continue. For some issues, voluntary initiatives such as the UN Principles of Responsible Investment Initiative may achieve the objective, but for others, mandatory reporting will be necessary. The right balance must be struck, but Congress should continue to seek means to quell corruption, promote better governance, and foster a strong investment environment.

CONCLUSION

The international movement for transparency in the extraction industry has been steadily growing over the last decade. The EITI has made significant progress in recent years, but has been limited to those countries that have been willing to take steps toward accountability and better governance. The United States is not alone in its push for transparency. The EU has also adopted strong disclosure rules, as have other markets. Congress adopted rules it determined necessary to empower citizens in resource-rich countries to hold their leaders accountable for misappropriation of extraction revenues, and the SEC adopted Congress's mandate. Following a successful challenge by industry groups, in which the court held that the SEC failed to exercise discretion because it erroneously believed it had none, the rule was vacated and remanded for further review. There is no reason that, with careful reconsideration, the SEC cannot promulgate an equally strong rule to bring transparency to an industry ripe with corruption, and to promote better governance, political stability, and market stability.

The rule should serve as a model for future social disclosure initiatives. However, to limit legal challenges, Congress should clarify what the SEC must consider in its evaluation and implementation of a legislative mandate that seeks social benefit and exercise restraint in providing agency discretion. Transparency alone is not sufficient to achieve positive social ends, but it is necessary.