

“The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries”

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Testimony of Jana Morgan, Director of Campaigns and Advocacy, International Corporate Accountability Roundtable (ICAR)

Chairman Crapo, Ranking Member Brown, and esteemed members of the Senate Committee on Banking, Housing, and Urban Affairs:

My name is Jana Morgan, and I am the Director of Campaigns and Advocacy at the International Corporate Accountability Roundtable (ICAR). ICAR is a coalition of forty-five environmental, human rights, and corporate responsibility non-profit organizations. We harness the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality.

ICAR has long advocated for the SEC to promulgate mandatory Environmental, Social, and Governance (ESG) disclosures by public companies, as this information is material to reasonable investors. In our 2013 report, *Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure*, we demonstrated how disclosure of human rights policies, practices, and impacts was material given the increased public interest, international accords and efforts to address this information gap, and voluntary recognition of the current and potential effects of this information on companies’ performance and operations.¹ In the last six years, the substantial increase in the number of companies voluntarily reporting on ESG factors, investors calling for increased ESG disclosure, and States and stock exchanges requiring mandatory disclosure of ESG information further bolsters our argument that now is the time for the SEC to regulate.

Ernst & Young reports that ESG factors are no longer a niche consideration, with “investor interest in non-financial information span[ning] across all sectors,” and 61.5% of investors considering non-financial information relevant to their investments overall.² Worldwide, investors managing \$68.4 trillion in capital are committed to incorporating ESG factors into

¹ International Corporate Accountability Roundtable (ICAR), *Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure* (2013), <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657a0ef5e23172079532f9/1483045394268/ICAR-Knowing-and-Showing-Report5.pdf>.

² Ernst & Young & Boston College Center for Corporate Citizenship, *Value of Sustainability Reporting 18* (2013), [https://www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/\\$FILE/EY-Value-of-Sustainability-Reporting.pdf](https://www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/$FILE/EY-Value-of-Sustainability-Reporting.pdf).

decision-making through the UN Principles for Responsible Investment and 75% of the Global 250 utilizes the Global Reporting Initiative (GRI) standards to report on sustainability issues.”³ Additionally, a majority of the largest companies are currently making voluntary sustainability disclosures, with 85% of S&P 500 companies producing such reports in 2017.⁴

At least 23 countries have independently enacted legislation within the last 15 years requiring public companies to report on ESG issues.⁵ In 2014, the European Union (EU) issued the Non-Financial Reporting Directive which requires wide-scale, mandatory ESG reporting.⁶ As of May 2014, all 28 member States have transposed these reporting requirements into national law.⁷ In addition to these reporting requirements, seven stock exchanges require social and/or environmental disclosure as part of their listing requirements, including Australia’s ASX, Brazil’s Bovespa, India’s Securities and Exchange Board, the Bursa Malaysia, Oslo’s Børs, the Johannesburg Stock Exchange, and the London Stock Exchange.⁸ At least nine countries currently require pension funds to disclose the extent to which they incorporate ESG information into their investment decisions.⁹ These movements towards mandatory reporting highlight the broad-scale belief that ESG information is material and must be disclosed in order to inform investor decision-making.

In the United States, over the past year approximately 400 shareholder resolutions were filed requesting increased disclosure on ESG issues—another sign of expanding interest in these issues.¹⁰ Today, large index funds hold the majority share in over 40% of publicly owned companies. As such, index funds are necessarily being required to weigh in on these propositions in the form of their majority proxy vote. Some critics have stated that index funds and proxy advisers that vote in favor of increased ESG issues may breach their fiduciary duties

³ See, U.N. Principles for Responsible Investment, PRI-11 year growth of AO (all signatories (Asset Owners [sic], Investment Managers and seride [sic] providers) and respective AUM, Excel sheet available for download at *About the PRI*, U.N. Principles for Responsible Investment, <http://www.unpri.org/about>.

⁴ Governance and Accountability Institute Inc., “85% of the S&P 500 Index Companies Publish Sustainability Reports in 2017” (Mar. 20, 2018), <https://www.ga-institute.com/press-releases/article/flash-report-82-of-the-sp-500-companies-published-corporate-sustainability-reports-in-2016.html>.

⁵ See, Initiative for Responsible Investment, Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges (Mar. 12, 2015), http://iri.hks.harvard.edu/files/iri/files/corporate_social_responsibility_disclosure_3-27-15.pdf.

⁶ See, Directive 2014/95/EU, of the European Parliament and of The Council of 12 Oct. 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>.

⁷ European Commission, “Non-Financial Reporting Directive-Transposition Status (May 24, 2018), https://ec.europa.eu/info/publications/non-financial-reporting-directive-transposition-status_en.

⁸ See Initiative for Responsible Investment, *supra* note 5.

⁹ See, *Id.* These countries include the UK, Sweden, Australia, Belgium, Canada, France, Germany, Italy, and Japan.

¹⁰ As You Sow, “Proxy Preview 2019 Reveals Intensified Shareholder Pressure on Corporations Across a Wide Range of ESG Issues,” (Mar. 12, 2019), <https://www.asyousow.org/press-releases/proxy-preview-2019-shareholder-resolutions>.

to shareholders—as voting for ESG disclosures might be a tactical decision in order to build a fund’s reputation with the public and not a decision based on maximizing the profit of fund members. This analysis is wrong, as it presumes that ESG issues are not material.

Information about a company’s ESG policies, practices, and impacts is material to a reasonable investor. This information is material both from a strictly financial viewpoint, and a broadened conceptualization of environmental or socially material information. A multitude of studies have concluded that a company’s performance on ESG issues is directly linked to better corporate performance in the long-term. A 2014 review of numerous empirical studies analyzing ESG data and corporate financial performance found overwhelming links between sustainability and profit: 90% of the analyzed studies showed that sound sustainability standards lowered firms’ cost of capital; 80% of the studies showed that companies’ stock price performance is positively influenced by good sustainability practices; and 88% of the studies showed that better ESG practices result in better operational performance.¹¹ Since then, additional studies have confirmed these findings, including:

- A June 2017 Bank of America Merrill Lynch study which found ESG factors to be “strong indicators of future volatility, earnings risk, price declines, and bankruptcies.”¹²
- A June 2017 research report by Allianz Global Investors, which concluded that heightened transparency of ESG disclosure lowered companies’ cost of capital by reducing the “investment risk premium” that sophisticated investors would require.¹³
- A September 2017 Nordea Equity Research report, which found that there is “solid evidence that ESG matters, both for operational and share price performance.”¹⁴

Individual investors, index funds, or proxy advisors taking a long-term approach to wealth maximization, instead of seeking short-term returns on investments, necessarily find ESG information financially material.

Under the growing global concept of “double materiality,” ESG information can be considered both financially material to investors and socially or environmentally material to investors, consumers, employees, communities, and civil society organizations.¹⁵ Environmental or social

¹¹ Gordon L. Clark, Andreas Feiner & Michael Viehs, From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281.

¹² Bank of America Merrill Lynch, Equity Strategy Focus Point—ESG Part II: A Deeper Dive (June 15, 2017), https://www.iccr.org/sites/default/files/page_attachments/esg_part_2_deeper_dive_bof_of_a_june_2017.pdf.

¹³ Allianz Global Investors, “Added value or a mere marketing tool? What does ESG mean for investments?” (June 1, 2017), <https://uk.allianzgi.com/en-gb/b2c/insights/esg-matters/2017-06-01-added-value-or-a-mere-marketing-tool>.

¹⁴ Nordea Equity Research, “Strategy & Quant: Cracking the ESG Code” (Sept. 5, 2017), https://nordeamarkets.com/wp-content/uploads/2017/09/Strategy-and-quant_executive-summary_050917.pdf.

¹⁵ European Commission, Consultation Document on the Update of the Non-Binding Guidelines on Non-Financial Reporting,

materiality refers to the impact of a company's activities outside of itself. These two risk perspectives are increasingly likely to overlap, with environmental or social impacts leading to financial implications, which then render them financially material. Take, for example, information relating to human rights policies, practices, and impacts. Poor human rights policies and practices that lead to negative human rights impacts can directly affect the financial stability of a corporation. Non-compliance with national and international human rights law can lead to financial penalties levied by the State, liability for human rights abuse, and litigation associated with damages from corporate activities.¹⁶ To illustrate, in 1984 a toxic fume release at a Union Carbide factory in Bhopal, India killed between 7,000 and 10,000 people, marking it as one of "the world's worst industrial disasters."¹⁷ Union Carbide employees were later found criminally negligent by the Indian Supreme Court and ordered to pay millions in damages to both the victims and for environmental cleanup.¹⁸

Additionally, inadequate human rights policies and practices can cause financial instability in a number of other ways. For example, they can cause indirect impacts on a company's reputation affecting relationships with consumers, clients, employees, recruits, investors, and shareholders, all of whom might prefer to disassociate from operations that are complicit with adverse human rights outcomes. One such example occurred in the 1990s when Nike was accused of using child labor in its Chinese factories, paying workers less than minimum wage in Indonesia, and egregious violations of labor rights in Vietnam.¹⁹ Since then, Nike has been further implicated in labor violations, especially in Bangladesh and other Asian countries, directly leading to significant financial repercussions due to continued public protest of Nike's practices and related drop in sales.²⁰ Similarly, the potential deterioration of relationships between corporations, governments, and local communities caused by a company's adverse human rights impacts may also have a material impact on its business by undermining or eliminating the company's ability to conduct business through a social license to operate.

https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-non-financial-reporting-guidelines-consultation-document_en.pdf.

¹⁶ See ICAR, *Knowing and Showing*, *supra* note 1 at 25; E&Y & Boston College Center for Corporate Citizenship, *Value of Sustainability Reporting*, *supra* note 2, at 2; see generally Economist Intelligence Unit, *Corporate Citizenship: Profiting from a Sustainable Business* (2008), http://graphics.eiu.com/upload/Corporate_Citizens.pdf.

¹⁷ Salil Shetty, "Thirty years on from Bhopal disaster: Still fighting for justice," Amnesty International (Dec. 2, 2015), <https://www.amnesty.org/en/latest/news/2014/12/thirty-years-bhopal-disaster-still-fighting-justice/>.

¹⁸ Alan Taylor, "Bhopal: The World's Worst Industrial Disaster, 30 years later," *The Atlantic* (Dec. 2, 2014), <http://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/>.

¹⁹ Max Nisen, "How Nike Solved Its Sweatshop Problem," *BusinessInsider* (May 9, 2013), <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>.

²⁰ Shelly Banjo, "Inside Nike's Struggle to Balance Cost and Worker Safety in Bangladesh," *The Wall Street Journal*, (Apr. 21, 2014), <http://www.wsj.com/articles/SB10001424052702303873604579493502231397942> (citing a loss of \$100 million to pull soccer balls made with child labor, and causing the company to cease operations for 18 months until it could fix the labor issues in its factory); Max Nisen, *supra* note 23.

While a range of reporting standards exist for voluntary disclosure of ESG information, the application and consistency of these standards varies greatly. This variability makes it difficult for investors to compare ESG data across companies or time, hindering the effectiveness of such disclosures for investment decision-making.²¹ Without a regulatory mandate, voluntary disclosures are often incomplete, inconsistent, and not comparable. The SEC has recognized the value and importance of standardized disclosures for these same reasons.²² When reporting becomes mandatory, standards necessarily become clearer, and the disclosed information more relevant and pertinent to investor needs. The United States risks falling behind the global curve in mandating the disclosure of ESG issues important to investor assessment of long-term profitability, and is now presented with an opportunity to do so. An opportunity it must capitalize on.

Please find included in this testimony ICAR's *Knowing and Showing* report, and two issue briefs entitled "Setting the Record Straight: Common Misconceptions about Environmental, Social, and Governance (ESG) Reporting" and "Why Enhanced Securities Disclosures Matter for Long-Termism."

Should you have any questions or wish to speak in further detail about my testimony, please do not hesitate to contact me at jana@icar.ngo.

Sincerely,



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²¹ See, e.g., Jim Coburn & Jackie Cook, Cool Response: The SEC & Corporate Climate Change Reporting (2014), https://www.ceres.org/sites/default/files/reports/2017-03/Ceres_SECguidance-append_020414_web.pdf. See also, David Levy, Halina S. Brown, & Martin de Jong, The Contested Politics of Corporate Governance: The Case of the Global Reporting Initiative, 49 BUS. & SOC'Y 88 (2010); Carl-Johan Hedberg & Fredrik von Malmborg, The Global Reporting Initiative and Corporate Sustainability Reporting in Swedish Companies, 10 CORP. SOC. RESP. & ENVTL. MGMT. 153 (2003).

²² See Chair Mary Jo White, Keynote Address at the 2015 AICPA National Conference: "Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility" (Dec. 9, 2015), <https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html>.



“KNOWING AND SHOWING”

USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE

A REPORT BY

THE INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (ICAR)

ENDORSED BY

PROFESSOR CYNTHIA WILLIAMS

Endorsement

This document has been reviewed, edited, and endorsed by Professor Cynthia A. Williams.



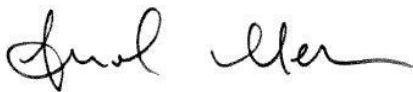
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Professor Williams writes in the areas of securities law, corporate law, corporate responsibility, comparative corporate governance, and regulatory theory, often in interdisciplinary collaborations with professors in anthropology, economic sociology, and organizational psychology.

Professor Williams' work has been published in the Georgetown Law Journal, the Harvard Law Review, the Journal of Corporation Law, Theoretical Inquiries in Law, the University of New South Wales Law Journal, the Virginia Law Review, and the Academy of Management Review.

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Introduction

After decades of economic globalization and trade liberalization, traditional legal and regulatory enforcement systems have proved to be inadequate in holding corporations accountable for the adverse social impacts of business activities. Due partly to limitations on courts' jurisdictional authority over extraterritorial activities of corporations¹ and weaknesses in the rule of law in operating jurisdictions,² corporations have functioned in an environment where regulations that are intended to hold them accountable for the way in which they conduct business are insufficiently enforced.³ Yet, public reaction to recent corporate disasters such as the factory collapse at Rana Plaza in Bangladesh,⁴ the adoption of socially responsible investment policies by a broad cross-section of investors,⁵ and international policy convergence on the responsibility of businesses to respect human rights⁶ all indicate that human rights concerns related to business activities are relevant and material to a broad set of stakeholders.

In recent years, public attention on business-related human rights abuses has grown in a wide variety of industries. Popular disapproval of corporate complicity in human rights violations has manifested in the form of direct boycotts by consumers, as well as pressure from an investor community that is increasingly interested in social issues. For instance, the garment industry has received widespread and largely negative attention after multiple deadly factory disasters in Bangladesh, including the Tazreen Fashions fire that killed 114 workers in Dhaka on November 24, 2012⁷ and the Rana Plaza factory collapse on April 24, 2013 that left more than 1100 workers dead.⁸ In addition, the information and communications technology industry has struggled to effectively self-regulate and monitor labor standards in its supply chains, as demonstrated by the frequent publicity surrounding the harsh conditions facing workers at the FoxConn factory complex in China.⁹ The extractives industry has similarly faced scrutiny for adverse working conditions, human rights abuses by security personnel at mines,¹⁰ forced labor and other modern forms of slavery,¹¹ and the contamination of ground water supplies.¹²

In response to these types of incidents, consumers have increasingly taken direct action to boycott and encourage divestment from socially irresponsible companies.¹³ Certification labels such as "Rainforest Alliance"¹⁴ and "Fair Trade"¹⁵ have become sought after by companies in order to market their products to socially-motivated purchasers. Moreover, investors are adopting socially responsible policies to guide their decisions and are expecting valuable returns on their outlays as a product of doing so, as indicated by the rising asset values of socially responsible investment funds in the United States over the past two decades (from \$639 billion in 1995 to \$3.74 trillion in 2012).¹⁶ Mainstream institutional investors, including institutional mutual and equity funds, have also signed onto international principled investing standards, joining more than 1188 signatories to the United Nations Principles for Responsible Investment—altogether commanding a total of more than \$34 trillion (or over 15% of the world's investable assets) in market capital.¹⁷

A company's reputational risk—the material damage to a company's reputation as a result of social missteps—can therefore result in significant business costs. As has been shown in a multitude of instances, consumer and client preferences can change dramatically upon the discovery of human rights risks. Employees, recruits, investors, and shareholders alike may seek to disassociate from a corporation that is implicated in human rights violations. This ripple effect from the discovery of human rights risks and impacts can negatively alter any competitive advantages that a business might have because of changes in public perception. For example, the rise in popularity of “fair trade” coffee illustrated this effect when major coffee shops faced backlash and demands from customers before agreeing to serve fair trade certified coffee.¹⁸ Now, more than ever, consumers and investors are making the conscious decision to purchase from and invest in companies that utilize an ethical supply chain and are not complicit in human rights violations. As such, companies should reasonably expect consumers and investors to prefer and even demand complete and accurate information concerning human rights risks before making the decision to purchase or invest.¹⁹

In the absence of enforceable and uniform regulations for corporate accountability at the global level, domestic law must work to answer this call for corporate accountability. U.S. securities regulation is a key and promising area for such domestic efforts as it is based on a philosophy that uses transparency to allow market actors to hold corporations accountable for social conduct and standards.²⁰ This paper applies that purposeful logic to provide a road-map for how U.S. securities laws can be used to create conditions for investors to hold companies accountable for their social and human rights impacts. Market actors can and should motivate companies to act more responsibly regarding their impact on human rights by allocating capital resources to more responsible companies. However, market actors can only do so if there is transparent, clear, and comparable disclosure of those human rights risks and impacts, as well as the policies and procedures that are related to the assessment and management of such risks and impacts.

This paper argues that human rights are materially relevant to corporate securities reporting and encourages the U.S. Securities and Exchange Commission (SEC) to guide businesses in reporting material human rights information in their periodic and proxy disclosure reports. First, the paper outlines the legal framework for securities disclosure regulations that are relevant to human rights. Second, the paper explains the methodology for assessing whether information related to corporate activities is material and uses this methodology to analyze whether human rights information is material to corporate securities disclosures. Finally, the paper proposes a plan for implementing disclosure of material human rights information related to business activities, incorporating human rights due diligence standards at the global level to assess and identify material human rights risks and impacts.

As part of this proposed plan, this paper identifies two alternative and complementary actions that the SEC could take to clarify precisely how issuers should disclose material human rights information. First, given its authority to issue interpretive guidance, the SEC should provide such guidance in order to explain how material human rights information should be incorporated into

existing securities reporting items. Second, given its authority to promulgate new regulations for the public interest or the protection of investors,²¹ the SEC should promulgate a new rule specifically requiring disclosures of human rights information, organized in a new reporting item for periodic reports or proxy disclosures. Interpretive guidance would facilitate mandatory reporting under existing rules by clarifying the materiality of human rights information to investors, whereas a new rule could establish clear and organized disclosure of human rights matters in a new reporting item, enabling investors to easily review this information in their capital allocation decisions.

The Legal Framework: U.S. Securities Reporting Standards

The SEC was established by the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”).²² Its mission is to promote the public interest by protecting investors, facilitating capital formation, and maintaining fair, orderly, and efficient markets.²³ More recently, the Sarbanes-Oxley Act of 2002²⁴ and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010²⁵ were passed in response to accounting scandals and securities market abuses that destabilized the domestic and global economy, further impacting the SEC’s mission and mandate.²⁶

The intellectual architects of the U.S. securities regulation system favored the use of transparency as a regulatory mechanism, not only to ensure accurate pricing of securities in the marketplace,²⁷ but also to motivate changes in business behaviors by exposing corporate conduct to public scrutiny.²⁸ Based on this foundational architecture, transparency became one of the primary mechanisms for implementing the investor protection and public interest purposes of U.S. securities regulations.²⁹ The debates within the U.S. House of Representatives on both the Securities Act and the Exchange Act clearly indicate that public disclosure of information was intended to affect the way business is performed, including in ways that increase the social responsibility of business conduct.³⁰

This section will outline the legal framework of securities law in the United States. Corporate securities reporting essentially involves two steps: (1) identifying and collecting the type of information required for disclosure under securities regulations and (2) filtering that information by determining what is “material” for disclosure to the SEC, investors, and shareholders.

A. The Disclosure Provisions

Securities-issuing entities are required to publicly report information to enable investors and shareholders to make informed investment decisions and allocate capital resources efficiently. Under U.S. securities law, issuers must disclose information publicly to the SEC at the following regular intervals: (1) at the initial public issuing of securities, (2) at registration of securities, (3) at quarterly and annual periodic intervals, (4) as part of proxy solicitation disclosures for the annual shareholders meeting, and (5) at the occurrence of extraordinary events such as a tender offer, merger, or sale of the business.³¹ The integrated disclosure requirements for registered securities are organized in the comprehensive Regulation S-K (or Regulation S-B for small businesses).³² Additionally, shareholders have the authority to demand disclosures beyond those required under Regulation S-K by using their power to bring resolutions during the proxy solicitation process for annual shareholders meetings.³³ These regulations are buttressed by a number of other rules: (1) Rule 408, promulgated pursuant to the authority of the Securities Act, and Rule 12b-20 of the Exchange Act, both of which require additional disclosure of material

information necessary to ensure that required disclosures are not misleading,³⁴ and (2) Rule 10b-5, promulgated pursuant to the authority of Section 10(b) of the Exchange Act, which establishes legal liability for those responsible for fraudulent or untrue statements or omissions in disclosures connected with the purchase or sale of securities.³⁵

In order to ensure that the information disclosed in securities reports is useful to investors, issuers are only required to report information that is “material” to the users of their reports.³⁶ In the case of periodic securities reports, the intended users are potential investors and existing shareholders. Materiality is both an accounting and securities law concept for classifying information as significantly relevant to understanding the past, current, and future value and performance of the issuer’s securities. It is judged based on factoring the quantitative and qualitative importance of the information in evaluating the issuer and in relation to the intended users of the report.³⁷ For securities reports, information must be disclosed that is: (1) specifically required under Regulation S-K or necessary to ensuring that required disclosures are not misleading³⁸ and (2) material to investors’ or shareholders’ decision-making processes in accurately valuing securities, in particular for the purpose of choosing to buy or sell securities.³⁹

I. Regulation S-K and Periodic Disclosure of Non-Financial Information

Regulation S-K outlines the standard instructions for corporate securities disclosures required by U.S. securities regulations. These regulations inform the initial obligation to disclose specific types of information in prospectuses for the sale of new securities, in companies’ periodic and extraordinary occurrences reports, and in companies’ proxy statements in conjunction with their annual meeting. In addition to a company’s registration statement, there are four primary categories of disclosures for periodic reporting, including descriptions of the registrant’s (1) business, (2) securities, (3) financial information, and (4) management.⁴⁰ Issuers are required to provide periodic disclosures quarterly on the SEC’s Form 10-Q and annually on the Form 10-K.⁴¹

Several provisions of Regulation S-K require descriptive disclosures that may incorporate material non-financial information. Key provisions that require discussion of non-financial information include Item 101 (description of business), Item 103 (legal proceedings), Item 303 (management’s discussion and analysis), Item 307 (disclosure controls and procedures), and Item 503(c) (risk factors).⁴² The SEC occasionally issues interpretive guidance releases to clarify the information issuers are expected to disclose and how the Commission staff evaluates disclosures by issuers.⁴³

Description of Business, Item 101

The description of business under Item 101 should indicate general developments in the business during the previous five years, including any material changes in the mode of doing business and a forward-looking description of the plan of operation for the next reporting period.⁴⁴ Depending on the timing of the report, projections must outline the plan for the remainder of the fiscal year or for that period and an additional six-months into the next fiscal year.⁴⁵ This item includes three primary disclosures: (1) general development of business, (2) financial information about business segments, and (3) a narrative description of business.⁴⁶

The narrative description of business requires disclosures encompassing all areas of the business operations. An issuer must disclose the principal products and services involved in the issuer's business, the status of each business segment or new product (e.g. planning, prototype, design-selection, re-engineering stages), the sources and availability of raw materials, the status and importance to the business valuation of all intellectual property, and the extent to which business segments are or may be seasonal in nature.⁴⁷ There must be a description of the principal methods of competition and positive and negative factors related to the issuer's competitive position should be reported.⁴⁸ Finally, material effects on capital expenditures from compliance with federal, state and local provisions related to environmental protection must be explained appropriately.⁴⁹

Legal Proceedings, Item 103

Under Item 103, issuers must disclose information relating to any pending legal proceedings involving the issuer, any of its subsidiaries, or any of their property as a party to litigation where the proceedings could have a material impact on the issuer.⁵⁰ This reporting requirement is limited in scope by the qualifications that pending litigation must be other than routine litigation incidental to the business, and it must have the potential to result in damages exceeding ten percent of the issuer's current assets.⁵¹ Where several cases based on the same legal or factual issues are pending or are being contemplated, the amount of potential damages must be calculated by aggregating the claims.⁵² These limitations do not directly apply where the proceeding arises from a law or regulation for the purpose of environmental protection or where a governmental authority is a party to the proceeding and it involves potential monetary sanctions of more than \$100,000.⁵³ In each of these cases, an issuer may only limit their reports if the proceeding's outcome is immaterial to the business or financial condition of the issuer or if the penalty where the government is a party is unlikely to be an actual fine of \$100,000 or more.⁵⁴

Management’s Discussion and Analysis, Item 303

Management’s Discussion and Analysis (“MD&A”) under Item 303 is intended to provide a narrative description of management’s views concerning the financial condition of the company and the results of business operations, with a particular emphasis on future prospects and risks.⁵⁵ This section should add value to the overall disclosures provided by the company and supply a contextual basis for investors to analyze financial information.⁵⁶ To do so, the MD&A must include reporting covering three subjects: liquidity, capital resources, and results of operations. Detailed instructions of explicit requirements in discussing each of these subjects are found in Instruction 5 to Item 303(a).⁵⁷ Essentially, the reporting requirements focus on management identifying any known trends, events, or uncertainties that will or are “reasonably likely” to result in favorable or unfavorable material effects to the issuer’s liquidity, capital resources, or operating results—such as net sales, revenues, or costs from continuing operations.⁵⁸ These disclosures are intended by the SEC to be made in a meaningful, company-specific manner and should not use “boilerplate” phrasing and generalities.⁵⁹

Disclosure Controls and Procedures, Item 307

Item 307 requires an issuer’s principal executive or financial officers, or the functioning equivalent, to disclose their conclusions regarding the effectiveness of internal disclosure controls and procedures.⁶⁰ This will require a short, narrative explanation of the executives’ understanding of the internal processes and an affirmation of the effectiveness of the procedures that are in place. Generally, this will require disclosure outlining the due diligence and auditing measures the company uses to identify, assess, and evaluate required categories of information in preparation of the annual, quarterly, and special reports required by securities regulations.

Risk Factors, Item 503(c)

Item 503 is specific to prospectus disclosure as initially promulgated, but is recently incorporated into Item 1A for quarterly and annual reporting. In Item 503, the issuer is required to briefly summarize their prospectus in plain English, including a distinct section captioned “Risk Factors” to discuss the most significant factors that make the offering speculative or risky.⁶¹ This typically includes risks of changes in the competitive landscape or market demand, fluctuations in political stability or other operating conditions, climate change risks and associated cost increases, and other such unpredictable variations in the business environment that may damage capital formation or financial performance.⁶² This narrative discussion is specifically required to be “concise and organized logically,” with risks presented that are tailored to the specific issuer

and their business.⁶³ It must be placed immediately following the summary section or any price-related information or directly after the cover page, if there is no summary.⁶⁴

The risk factor discussion must explain how the risk affects the issuer and clearly express each risk factor in a sub-caption that adequately describes the risk.⁶⁵ The description of Item 503(c) in Regulation S-K specifically identifies risk factor categories in a non-exhaustive list, including lack of an operating history, lack of profitable operations in recent periods, financial position, business or proposed business, and the lack of a market for the issuer's common equity securities. The list provided is suggestive, but item 503(c) is clear that all of the most significant factors that make the offering speculative or risky must be disclosed.⁶⁶

II. Shareholder-Demanded Disclosure Using Shareholder Resolutions, as Permitted Under Exchange Act Section 14(a), Regulating Proxy Solicitations and the SEC's General Powers Under Section 14(a)

Company-specific disclosure may also arise based on a successful shareholder resolution (also called shareholder proposals). Under state corporate law, securities owners have the power to put appropriate items on the annual meeting agenda. In Section 14(a) of the Exchange Act, the SEC is given general authority to regulate the process of soliciting proxies in conjunction with the annual meeting. In Rule 14a-8, the SEC has identified the procedural and substantive requirements for shareholders' resolutions. If a shareholder resolution asking for information from the issuer receives majority support in the proxy solicitation process, then the information may be forthcoming.⁶⁷

Companies may seek a no-action position from the SEC staff to protect them from later SEC enforcement action if the company decides not to include certain shareholder resolutions in the company's annual proxy statement. Permissible reasons to exclude shareholder proposals are set out in Rule 14a-8, question 9.⁶⁸ Exclusion may be permissible based on the proposal violating one of the eligibility or procedural requirements of Rule 14a-8 or if it falls within one of the rule's thirteen substantive bases for exclusion.⁶⁹ If there is no basis to exclude a shareholder proposal, the issuer must include the proposal in its proxy solicitation for shareholders to consider.

Additionally, under the broad authority delegated to the SEC by Section 14(a) of the Exchange Act, the Commission is entitled to regulate the proxy solicitation process "as necessary or appropriate in the public interest or for the protection of investors."⁷⁰ It has been argued that this mandate was intentionally designed to allow the SEC to establish rules that would permit shareholders to hold companies accountable for their actions, including by promulgating proxy disclosure rules that would provide shareholders with more information about the companies' actions.⁷¹ The challenge for any proponent of new proxy disclosure rules lies in gaining

sufficient support for any proxy disclosure request in order to instigate the SEC rule-making process under section 14(a).

III. Rules 408 and 10b-5: Ensuring Completeness, Accuracy, and Responsibility in Disclosures

Supplementary provisions of the Securities and Exchange Acts buttress the specific disclosure requirements in Regulation S-K. First, Securities Act Rule 408 and Exchange Act Rule 12b-20 provide a “catch-all” requirement to disclose any further material information necessary to ensure the overall disclosures are not misleading.⁷² Then, Rule 10b-5 attaches personal liability for fraud, misstatements, or omissions to the individuals responsible for preparing and certifying the disclosures as true, accurate, and complete. These provisions act to complement disclosure requirements and ensure that managers and internal reporters have incentives to ensure that the information they are disclosing is complete, accurate, and true.

According to Securities Act Rule 408 and Exchange Act Rule 12b-20, issuers are required to add any material information necessary to ensure their disclosures are not misleading. The specific language of both Rule 408 and Rule 12b-20 require “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”⁷³ These rules act as a “catch-all” to ensure that issuers are required to disclose any additional material information necessary to ensure that information disclosed is not misleading—in essence, to guard against half-truths.

Section 10(b) and Rule 10b-5 of the Exchange Act create liability for using deceptive or manipulative devices in connection with the purchase or sale of securities.⁷⁴ In particular, according to Rule 10b-5 (b) it is unlawful for any person to directly or indirectly “make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security.”⁷⁵ This liability, in relation to periodic securities disclosures, attaches to the individuals involved in preparing the statements of material fact and to those who are required to certify that the material statements of fact are true and complete—usually the Chief Executive Officer, Chief Financial Officer, or similarly empowered high-level executive. This liability applies to materially misleading statements even where there is no affirmative duty to disclose such information.⁷⁶

In making a claim for violation of Rule 10b-5, the plaintiff must prove several elements. They must show: (1) that the defendant is subject to Rule 10b-5, (2) that there was a misrepresentation or omission, (3) of a material fact, (4) made with the intent to deceive or recklessness in the misstatement, (5) upon which the plaintiff relied, (6) in connection with either a purchase or sale of a security (7) causing (8) damages.⁷⁷ While reliance is a part of the plaintiffs’ case, it may be presumed in certain cases. In omission cases, reliance may be presumed if the omission is of a

material fact, and in misstatement cases there is a rebuttable presumption of reliance when the security is trading in an efficient market since the misstatement will operate as a “fraud on the market,” affecting the market price.⁷⁸ Therefore, incentives are created to promote accuracy and completeness in periodic disclosures in part because the individuals responsible for preparing the information and certifying the disclosures may be personally liable for any fraudulent material inaccuracies or omissions.

B. What is “Material” for Corporate Disclosures?

The first part of the disclosure process involves collecting information based on the items specifically required under Regulation S-K, any information demanded by successful shareholder disclosure proposals, and the blanket requirements to include additional material information as necessary to ensure the disclosures are not misleading. Once this information is gathered, the issuer must determine what information is “material” and thereby subject to public disclosure and what information is immaterial and thereby not required to be disclosed publicly.⁷⁹ The second part of the disclosure process requires a subjective filtering of information related to required disclosure items through a screen of materiality, with the goal of ensuring that public disclosures are useful to investors and shareholders in assessing current and prospective corporate performance.

The Supreme Court of the United States has laid out a clear legal standard for identifying what is “material” for securities reporting. The standard is driven by the rationale behind the Securities Acts to “substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”⁸⁰ It is tempered by the judicial concern that “a minimal standard might bring an overabundance of information within its reach,”⁸¹ and lead management to overburden the market with disclosures that did not enable “informed decision-making.”⁸²

A fact is material if “there is a substantial likelihood that a reasonable investor would consider it important” and would have viewed the information “as having significantly altered the ‘total mix’ of information made available.”⁸³ The Court explains that assessing whether a fact is material “requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him.”⁸⁴ Whether a fact is material “depends on the significance the reasonable investor would place on the . . . information.”⁸⁵

Regarding speculative or contingent information, including much forward-looking information, Supreme Court precedent calls for companies to balance “the indicated probability the event will occur and the anticipated magnitude of the event in the light of the totality of company activity.”⁸⁶ Adopting the reasoning from earlier cases, the Court expects the significance of each fact to be assessed in relation to all other available information.⁸⁷

The SEC has provided additional guidance in recent years to assist companies with determining materiality. In Staff Accounting Bulletin No. 99 (“SAB 99”), the SEC clarifies that materiality cannot be determined based on a bright-line quantitative criterion alone and that even information that is purely qualitative could, in the context of all other available information, be material to corporate securities disclosures.⁸⁸ In particular, SAB 99 dispelled the popular rule-of-thumb that any fact which could not result in a financial impact of at least 5% on any quantitative category was not material.⁸⁹ SAB 99 provided some guidance for accountants to consider qualitative characteristics in determining materiality by listing hypothetical situations where qualitative information would be considered material by SEC staff.⁹⁰

Materiality determinations require the accountants and managers preparing securities reports to assess the qualitative and quantitative characteristics of information to identify information that a reasonable investor would consider important enough to significantly alter the “total mix” of information available.⁹¹ The certainty or uncertainty of a fact, trend, or event’s occurrence—and the nature and scope of the impact on corporate performance of that occurrence—will all affect whether it is material.⁹² These subjective determinations should be guided by balancing the purposes of securities regulation in providing sufficiently accurate, detailed, and comparable information to protect investors and ensure fair, orderly, and efficient markets against a judicious temperance to refrain from overwhelming the market with a flood of useless information.⁹³

Demonstrating Materiality: Human Rights Impacts, Risk Assessments, and Procedures Are Material for Corporate Securities Disclosures to the S.E.C.

Materiality derives from the general public, international and national governments, and businesses treating a particular area or impact of business activity with heightened interest.⁹⁴ In 2010, the SEC re-evaluated the materiality of information related to climate change in light of increasing interest from the public, academics, businesses, domestic and international government, and other stakeholders.⁹⁵ In doing so, the Commission outlined the process for considering whether a topic has become popularly relevant to the level of “material” to corporate reporting. Key factors considered include: heightened public interest in recent years (including academic, government, business, investors, analysts, or the public at large); international accords and efforts to address a topic of concern on a global basis; federal regulations or state and local laws in the United States; and voluntary recognition of the current and potential effect of the category of information on companies’ performance and operations by business leaders.⁹⁶ The SEC addresses these key factors by analyzing the level of interest in climate change according to three primary elements: (1) recent regulatory, legislative, and other developments; (2) the potential impact of climate change related matters on public companies; and (3) current sources of climate change-related disclosures regarding public companies.⁹⁷ Within each element, the materiality of any category of information is supported by trends of public interest, international community action, domestic legislative action, and voluntary business action expressing an acknowledgment of material significance.

This section provides evidence that the significance of human rights information to investors and the public has evolved to a level that requires its disclosure as material information in securities reports. First, recent regulatory, legislative, and other developments in the US and international spheres are presented. Second, the potential impacts of human rights-related matters on public companies are outlined using examples from recent years. Finally, current sources of human rights-related disclosures regarding public companies are outlined. This evidence supports the conclusion that human rights are material to investors. Securities regulations must recognize this materiality by providing guidance for issuers to disclose information related to human rights risks and impacts in a clear, consistent, and comparable manner in their reports to the SEC.

A. Recent Regulatory, Legislative, and Other Developments

Legislators, regulators and international policy-makers have indicated that the human rights risks and impacts arising from globalized business activities require concerted global action. Domestic

legislators and regulators in the United States have adopted public policies and rules at the federal, state, and local levels that address corporate social responsibility and enhance corporate transparency relating to human rights.⁹⁸ The international community has endorsed defined roles for States and businesses in the UN’s “Protect, Respect, Remedy Framework”⁹⁹ and the “Guiding Principles” for implementing this framework in the business and human rights context.¹⁰⁰ Furthermore, the United States government has endorsed the Guiding Principles and has been encouraged by members of civil society to develop a plan for national implementation.¹⁰¹ Stakeholders in business and civil society have come together with initiatives to develop particular standards and processes for addressing human rights risks and impacts through voluntary action.¹⁰²

I. Federal Government Regulatory Efforts

Federal legislators and administrative agencies in the United States have used their authority to promote corporate respect for human rights and to provide greater transparency to investors and the public on human rights risks and impacts related to business activities. In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress required transparency from companies in special securities disclosures to address corruption and bribery, mine safety, and conflict minerals sourcing.¹⁰³ The SEC interpretive guidance for disclosures related to climate change¹⁰⁴ and to cyber-security information¹⁰⁵ has directed companies to disclose socially important information similar to human rights concerns under existing securities disclosure rules in Regulation S-K. Finally, the State Department issued rules requiring transparency for new investments in Burma in May 2013.¹⁰⁶

Dodd-Frank Special Disclosure Provisions

In the Dodd-Frank Act of 2010, the U.S. Congress employed the mechanism of securities disclosures to require transparency regarding mine safety,¹⁰⁷ payments by resource extraction companies to governments,¹⁰⁸ and supply chain due diligence by manufacturers who source minerals from the Congo region of Africa.¹⁰⁹ These provisions directed the SEC to issue rules requiring issuers to disclose information related to these three activities with the apparent goals to enhance awareness about dangerous mining conditions, combat corruption in foreign governments, and eliminate funding for armed groups perpetuating conflict and human rights violations in the Congo.¹¹⁰ Although Congress determined that these purposes fit within the mandate of the SEC, some observers have questioned the role of the SEC in compelling disclosures of this information and the materiality to investors.¹¹¹ Investors, meanwhile, have commented on the rule-making processes for each section and provided considerably favorable

feedback as they seek access to information regarding the social and human rights impacts of business activities of issuers conducting operations in conflict-affected and weak governance areas.¹¹²

Section 1502 of the Dodd-Frank Act mandates that the SEC issue a rule requiring companies to determine whether certain minerals used in the production of their manufactured goods originated in the Democratic Republic of Congo (DRC) or neighboring countries and whether the trade in those minerals has financed or benefitted armed groups. The SEC rule implementing Section 1502 requires companies that file reports with the SEC to determine whether they source designated minerals from this region. If they do, and those minerals are necessary to the functionality of the manufactured goods they are used to produce, the company should be required to conduct supply chain due diligence to determine whether their mineral purchases are providing funding directly or indirectly to armed groups perpetuating conflict and violence in the DRC.¹¹³ As part of the required disclosures, companies must describe the specific measures taken to exercise due diligence.¹¹⁴ The rule follows a “comply or explain” philosophy, requiring companies to comply and show their efforts or explain their non-compliance and show what efforts they have undertaken to comply.

Section 1503 of the Dodd-Frank Act calls for the SEC to require specific periodic disclosure by issuers operating coal or other mines of information detailing health and safety violations or a pattern of such violations in their operations.¹¹⁵ The SEC rule implementing this disclosure is based on the Federal Mine Safety and Health Act of 1977 (Mine Safety Act) and expands the level of detailed information about mine safety issues that must be publicly disclosed.¹¹⁶ This rule requires issuers to report the receipt of certain notices from the Mine Safety and Health Administration (MSHA) on current report disclosure Form 8-K, which must be filed within four business days of specific material events to provide an update to quarterly or annual reports.¹¹⁷ Further, the rule requires that quarterly and annual reports include aggregated totals for: (1) health and safety violations, orders, or citations under the Mine Safety Act; (2) the potential costs of proposed assessments from the MSHA under the Mine Safety Act; and (3) mining-related fatalities during the reporting period.¹¹⁸

Finally, Section 1504 authorizes the SEC to demand resource extraction companies disclose any and all payments made to domestic or foreign government officials. Under this requirement, companies are expected to submit information to the SEC in interactive data format, detailing: (1) total amounts of payments by category, (2) the business segment that made the payments, (3) the government that received the payments, (4) the country in which they are located, and (5) the project of the issuer to which the payments relate.¹¹⁹ The SEC is given authority to require any other information considered “necessary or appropriate in the public interest or for the protection of investors.”¹²⁰ This rule may be limited by a *de minimus* exemption, allowing companies to refrain from disclosing very minimal payments, but the statute indicates the Commission should be guided in its rulemaking by the guidelines set out in the Extractive Industries Transparency

Initiative—a voluntary international multi-stakeholder initiative for extractive companies and governments to publish payments made and received related to resource extraction projects.¹²¹

Critics of these specialized disclosure requirements argue that they go beyond the scope of the SEC’s authority by targeting public policy goals unrelated to investor protection, market efficiency, or capital formation.¹²² They argue that the original purpose of the SEC is being manipulated for federal policy-making goals because the SEC is the only regulatory body capable of commanding regulatory compliance across all industries.¹²³ However, these criticisms appear to fail to consider the legislative mandate to the SEC to regulate “as necessary or appropriate in the public interest or for the protection of investors,” as in Section 14(a) of the 1934 Act.¹²⁴ These criticisms also fail to consider the legislative history describing the original intended purposes of federal securities regulation, which have been argued to include establishing greater social responsibility in corporate conduct.¹²⁵ Congress has the authority to mandate rulemaking on specific items where it is deemed in the public interest.¹²⁶ Further, investor groups have actively advocated for the materiality of the information to be disclosed under these provisions for their decision-making processes.¹²⁷

SEC Guidance on Climate Change and Cyber-Security

The SEC has recently been engaged in clarifying the disclosure requirements of non-financial information related to climate change and cyber-security in securities reports. Each of these releases has indicated how existing securities regulations may require disclosure of information related to climate change or cyber-security matters where they are material to the issuer or any of its business segments.¹²⁸ Both discuss how the costs of compliance with laws and regulations to prevent and mitigate risks related to climate change or cyber-security may result in material expenses necessary to report in financial disclosures. Further, both detail how the description of business, legal proceedings, MD&A, and risk factors items in Regulation S-K may compel issuers to address cyber-security or climate change risks or incidents.¹²⁹ The climate change guidance identifies specific provisions in Regulation S-K that have been enacted during the past four decades of rulemaking and interpretive guidance on disclosures related to environmental protection or climate change matters.¹³⁰ The cyber-security guidance also details how the disclosure controls and procedures section may require disclosure of the effectiveness of cyber-security measures or any deficiencies that could render them ineffective.¹³¹

State Department Responsible Investment in Burma Reporting Standards

The U.S. Department of State recently released their Responsible Investment Reporting Requirements for all U.S. businesses investing more than US\$500,000 in Burma, effective May

23, 2013.¹³² Companies must publicly provide summaries or copies of the policies and procedures relating to operational impacts on human rights, community and stakeholder engagement in Burma, and grievance processes.¹³³ They must outline their human rights, worker rights, anti-corruption, and environmental due diligence policies and procedures, including those related to risk and impact assessments.¹³⁴ Further, they must report to the State Department their policies and procedures relating to security service provision and military communications.¹³⁵

Foreign Corrupt Practices Act

Congress has been involved in regulating corporate conduct in transactions and business activities abroad at least since 1977, when it passed the Foreign Corrupt Practices Act¹³⁶ (FCPA), prohibiting the use of bribery to foreign government officials to assist in obtaining or retaining business.¹³⁷ The prohibition of promises, offers, or payments of bribes to foreign officials applies anywhere in the world and extends to public companies and their officers, directors, employees, stockholders, and agents—including consultants, distributors, joint-venture partners, and others.¹³⁸ The FCPA also requires that issuers (1) make and keep books and records that accurately reflect the corporation's transactions and (2) put in place a system of internal accounting controls to adequately oversee and account for corporate assets and transactions.¹³⁹ These records and internal controls help the issuer identify, prevent, mitigate, and remedy any offending conduct.

II. State and Local Government Regulations or Laws

States have the primary legislative authority to regulate corporate governance and liability in U.S. law. Several states have engaged their legislative authority or are considering laws to address human rights risks and impacts arising from business activities. In 2011, California became the first state to pass a law preventing companies under scrutiny for ineffective compliance with the Dodd-Frank conflict minerals supply chain reporting requirements from eligibility to bid on state procurement contracts.¹⁴⁰ Maryland passed a similar law in 2012, and Massachusetts is presently considering legislation to follow suit.¹⁴¹ Additionally, California has enacted the Transparency in Supply Chains Act of 2010, requiring transparency related to corporate efforts to monitor supply chains to combat slavery or human trafficking.¹⁴² Through these laws, legislators in California, Maryland, and Massachusetts are clearly indicating that they are interested in holding corporations accountable for their conduct abroad, including the direct or indirect financing of conflict and crimes against humanity in their supply chains for mineral resources.

III. International Community Actions to Address Business and Human Rights Concerns on a Global Basis

The international community has taken actions at several levels to address business and human rights concerns on a global basis. The United Nations has engaged stakeholders and developed frameworks for global action through defined roles of governments and businesses in upholding human rights, standards for responsible and principled investing, and guiding principles for businesses to implement their responsibilities to respect human rights.¹⁴³ International organizations such as the Organization for Economic Co-operation and Development (“OECD”) and the International Organization for Standardization (“ISO”) have also released guidelines for businesses to implement their social and human rights responsibilities that incorporate and expand upon the standards of the Guiding Principles.¹⁴⁴ The European Union is currently preparing legislation to require corporations to publicly disclose information related to human rights and other non-financial social and environmental impacts of business activities.¹⁴⁵ Additionally, businesses, governments and civil society groups have come together voluntarily in multi-stakeholder initiatives (“MSIs”) to address particular concerns and create best practices approaches in the form of standards and mechanisms to protect against adverse human rights risks and impacts of business activities.¹⁴⁶ Each of these international mechanisms will be discussed in turn.

UN Frameworks and International Standards

The United Nations has progressed from voluntary multi-stakeholder initiatives—such as the UN Global Compact¹⁴⁷—to consultative approaches seeking to develop international standards that can be incorporated into domestic laws and that follow the “Protect, Respect Remedy” Framework¹⁴⁸ and the Guiding Principles for Business and Human Rights.¹⁴⁹ These frameworks provide a “common global platform for action” for governments and businesses to act to prevent and remedy adverse human rights risks and impacts related to business activities and operations.¹⁵⁰ The OECD has provided insight and standards with its Guidelines for Multinational Enterprises (OECD Guidelines),¹⁵¹ and the ISO has introduced direction with its Standard 26000 for “Social Responsibility.”¹⁵²

The UN Global Compact was launched in July 2000 as a “platform for the development, implementation, and disclosure of responsible and sustainable corporate policies and practices.”¹⁵³ It is a voluntary initiative which calls on corporations and interested stakeholders to join the Compact and commit to embracing, supporting, and enacting—within their spheres of influence—its Ten Principles, covering human rights, labor, environment, and anti-corruption standards.¹⁵⁴ The Ten Principles are derived from the Universal Declaration of Human Rights, the International Labour Organization’s Declaration of Fundamental Principles and Rights at

Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.¹⁵⁵ Since its inception, it has grown to contain over 10,000 corporate participants and to include stakeholders from over 130 countries.¹⁵⁶

Building from the “Protect, Respect, Remedy” framework that was passed in 2008, the UN Special Representative on Business and Human Rights developed the Guiding Principles on Business and Human Rights.¹⁵⁷ The Guiding Principles provide a “common global platform for action, on which cumulative progress can be built” towards realizing the protection of, and respect for, human rights through State and business actions.¹⁵⁸ They are a series of 31 practical principles to guide the implementation of the State duty to protect human rights, the business responsibility to respect human rights, and the provision of access to remedy for human rights abuses and violations.¹⁵⁹ Businesses are encouraged to apply these principles appropriately according to their size, complexity, and operating contexts to ensure that they are respecting human rights.¹⁶⁰

In particular, the Guiding Principles call for businesses to adopt policies and build a corporate culture that respects human rights. They are advised to do this by implementing human rights due diligence processes to identify, prevent, mitigate, and account for how they address adverse human rights impacts arising from their business.¹⁶¹ This due diligence should include “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹⁶² Businesses are advised to engage with stakeholders throughout the process and to be prepared to communicate their human rights impacts externally when concerns are raised or when risks of severe human rights impacts are identified.¹⁶³

Additionally, the UN has developed widely accepted Principles for Responsible Investing (“UN PRI”). These principles were launched in 2006 and now have almost 1200 investor signatories, with assets under management standing at more than \$34 trillion—or more than 15% of the world’s investable assets.¹⁶⁴ The rapid growth of the UN PRI shows that investors—in particular large, institutional investors—are quickly integrating responsible investment policies and criteria into their decision-making calculus. The UN PRI emphatically believes that environmental, social, and governance issues are materially relevant to investors and, although it recognizes the limitations of available research data, it is firm in its confidence that these issues are financially significant.¹⁶⁵

The OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) provide a set of non-binding principles and standards for responsible business conduct in the global context that follow applicable local laws and internationally recognized standards.¹⁶⁶ These standards are implemented through the National Contact Points (NCPs) mechanism, which are government agencies tasked with promoting the OECD Guidelines and assisting MNEs and their stakeholders in implementing the standards.¹⁶⁷

Under the Guidelines, MNEs are required to disclose material information regarding their: (1) policies and codes of conduct; (2) performance in relation to those statements and codes; (3) internal audit, risk management, and legal compliance systems; and (4) relationships with workers and other stakeholders.¹⁶⁸ The “Commentary on Disclosure” indicates that the purpose of transparency should be to address the increasingly sophisticated public demands for information, including social, environmental, and risk reporting.¹⁶⁹ The 2011 edition of the Guidelines aligns its human rights standards with the UN Framework and Guiding Principles.¹⁷⁰ They require companies to “respect human rights” through: (1) policy commitments; (2) actions to prevent or mitigate adverse human rights impacts directly linked to their operations, products, or services; (3) carry out human rights due diligence appropriate to their circumstances, and (4) empower legitimate processes for the remediation of human rights impacts where they are implicated.¹⁷¹

The OECD has developed sector-specific standards in the Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High Risk Areas¹⁷² (OECD Due Diligence Guidance). The OECD Due Diligence Guidance provides a five-step process for companies to conduct due diligence, undertake risk assessments, mitigate and monitor risks in the supply chain, and participate in audit programs for external, independent assurance.¹⁷³ Finally, the process requires annual disclosure of risk assessment reports, detailed descriptions of how due diligence processes have been reviewed and verified, and what steps are taken to regularly monitor changing circumstances of supply chains.¹⁷⁴

The ISO has developed a standard to reflect consensus, state-of-the-art standard best practice for social responsibility to assist organizations in contributing to sustainable development.¹⁷⁵ Through a holistic approach that incorporates seven core subjects, the ISO 26000 standard provides practical guidance on how to adopt principles of social responsibility, recognize that responsibility, and engage with stakeholders to integrate that responsibility throughout an organization.¹⁷⁶ For human rights, ISO 26000 guides organizations to implement due diligence, monitor and mitigate risks, avoid complicity, and support the resolution of grievances.¹⁷⁷ It describes these issues in relation to broad categorization of human rights, including civil, political, economic, social, cultural, and labor rights.¹⁷⁸

European Union Legislation

The European Commission (EC) has recently proposed a directive on non-financial disclosure requirements that would, in part, require corporations to report publicly their respect for human rights. The proposed standards would require companies to report relevant and material information on policies, results, risks, and risk management efforts pertaining to respect for human rights, as well as other environmental, social, and governance issues.¹⁷⁹ The proposal is currently awaiting a vote in the European Parliament, after which it would come into force in 18

months. At that time, EU member-state governments would be required to begin the process of implementing the standards into national domestic law. The actual standards of non-financial disclosure required regarding specific types of information may vary from State-to-State but the EU directive will provide the basic requirements.

Multi-Stakeholder Initiatives (MSIs)

There are a number of MSIs developed through business and civil society leadership to address sector-specific or issue-specific concerns relating to the intersection of business and human rights. Through these platforms, stakeholders have worked together to formulate strategies and exchange feedback to develop operational approaches to address adverse human rights risks and impacts. Examples of MSIs include the Extractives Industry Transparency Initiative (“EITI”) and the Global Network Initiative (“GNI”).

The EITI is a global standard to promote revenue transparency and accountability in the extractive sector.¹⁸⁰ It requires companies to report payments to governments and governments to disclose their receipts of payments to the EITI multi-stakeholder oversight group, which verifies and reconciles tax and royalty payments from resource extraction operations. A multi-stakeholder group representing business, civil society, and governments oversees the process and communicates the EITI Report findings.¹⁸¹ The goal is that, by requiring both sides to transparently report their exchange, the independent verification will prevent under-reporting and combat corruption and bribery in resource rich countries with poor governance, which can often contribute to conflict and a high risk of human rights violations.¹⁸² Governments are required to apply to be a member of EITI and must effectively implement all aspects of the EITI requirements in order to become a member.¹⁸³ Failure to effectively implement the requirements can result in EITI suspending operations, as recently occurred in the DRC.¹⁸⁴

The GNI is a sector-specific, multi-stakeholder initiative for the information and communications technology (“ICT”) industry that requires participating companies to implement its Principles on Freedom of Expression and Privacy to protect and advance the enjoyment of these human rights globally.¹⁸⁵ Implementation of the Principles includes a Governance, Accountability, and Learning process that requires participating companies to submit to independent compliance monitoring and transparent reporting that outlines compliance activities, results of independent assessments, impacts on freedom of expression and privacy, and the path forward.¹⁸⁶

Recent legislative, regulatory, and other developments clearly indicate that policy-makers at the federal, state, and international levels are increasingly interested in taking action to address adverse human rights risks and impacts related to globalized business activities. Domestic legislators have enacted transparency requirements to address public interest in eliminating direct

or indirect support for corrupt governance, violent conflict, and human trafficking. International organizations have been engaged in creating consensus and global standards for business responsibilities related to human rights and have gathered global support for concerted action to implement those principles. Business and civil society actors have engaged with the international community to take direct action on specific concerns and in specific contexts through practical operational frameworks. Altogether, these recent developments indicate the increasing materiality of human rights-related matters to corporate activities.

B. Potential Impact of Human Rights-Related Matters on Public Companies

The “business case” for disclosure of human rights information rests on growing evidence that human rights performance has a real impact on long-term corporate value.¹⁸⁷ As investors learn how companies predict, mitigate, and manage risks and impacts, capital should be allocated efficiently to businesses with stronger capacities to overcome challenges. Therefore, in an efficient market, the potential direct and indirect impacts of human rights-related matters are material to investor decision-making.

Direct impacts—such as capital costs related to compliance with laws and regulations, financial penalties for non-compliance, or damages related to liability for abuses or violations—are material risks that affect the future corporate outlook. Indirect impacts—such as the market effects of rising supply chain costs, increasing prices of raw materials, or changes in the competitive advantage based on varying capability to attract and retain workers, customers, clients, or users—could materially affect corporate performance. Finally, political effects—arising from human rights risks and impacts connected to business activities, operations, or relationships—may have a material impact on business and the social license to operate.

I. Direct Impacts

Dealing with human rights-related matters directly impacts corporate performance through additional costs, changes in operating conditions, and unpredictable delays in production and revenue generation.¹⁸⁸ Investors are materially interested in the potential and actual costs that a company faces related to human rights risks and impacts because these directly impact corporate financial performance and securities valuations.¹⁸⁹ Where new laws or regulations add compliance requirements, there are costs associated with complying. Where a company is implicated in human rights abuses or violations, they will face costs in mitigating the impacts, additional expenses in public relations, and potentially for litigation, mediation, or some other grievance or remediation process. Where human rights abuses or violations occur in one operating context, a company may face extra costs in re-assuring its stakeholders that its other

operations are not subject to the risk of similar incidents. Based on the potential for these direct impacts—where a human rights risk or change in political environment resulting in stronger human rights regulation is a possibility—the expected direct costs of those eventualities are material to investors’ valuations of securities.¹⁹⁰

II. Indirect Impacts

The indirect costs related to human rights risks are more difficult to predict and are much more costly to business. These can arise in the form of reputational damage, changes in consumer preferences that alter the definition of competitive advantages in the marketplace, or unexpected changes in local upstream conditions that cause price and cost fluctuations in the supply chain. Other indirect impacts may occur, and each of these is material to corporate performance as a result of human rights risks or impacts.

One of the most powerful costs from implication with human rights risks or impacts related to business activities is the reputational cost.¹⁹¹ This affects relationships with consumers or clients,¹⁹² employees and recruits,¹⁹³ and investors and shareholders¹⁹⁴ who prefer to disassociate from operations that are complicit with adverse human rights outcomes.

If human rights risks and impacts are discovered by one actor in a particular sector, the ripple effect can re-define competitive advantage by changing public perception of the consequences of their consumer decisions.¹⁹⁵ This can radically alter the landscape for strategy to gain market share and consumer confidence and leave companies unprepared to show that they respect human rights risks at the back of the pack. As was witnessed with the growth of the fair trade coffee campaign, the major chain coffee shops faced pressure from consumers to carry fair trade coffee, reflecting their new understanding of the indirect costs of their purchasing decisions.¹⁹⁶ Some consumers were no longer satisfied with their previous criteria for coffee and instead chose to shop based on ethical supply chain practices of coffee merchants.

Finally, human rights risks in the supply chain can result in sudden changes to supply costs or prices for raw materials where conditions deteriorate or where regulation gets stronger to improve conditions. As conditions improve and regulations get stronger in countries where low labor standards keep supply chain costs low, the increase in costs will necessarily be passed up the supply chain and increase costs on the end-producer.¹⁹⁷ If conditions in supply chains change rapidly, for better or for worse, the resulting impact on manufacturing costs or raw materials prices may have a material impact on corporate performance.

III. Political Effects That Could Have a Material Impact on Business and Operations

Companies that are implicated in human rights abuses or violations may face greater scrutiny from government licensing agencies, and popular pressure could force the government to revoke or deny business licenses necessary to operate within the country.¹⁹⁸ This is a particular risk for major foreign multinational enterprises engaged in high-risk activities such as resource extraction, where public relations are strained by the nature of exporting natural resources from the land for a limited return to local populations.¹⁹⁹ Where society becomes passionately inflamed against a company that is complicit with human rights abuses, the government may have no choice but to follow the revocation of the social license to operate with a revocation or denial of the official business license to operate.²⁰⁰ Alternative scenarios could include changes in government, resulting in the nationalization of particular industries or a rapid descent into civil conflict.²⁰¹

C. Current Sources of Human Rights-Related Disclosure Regarding Public Companies

Business managers and accountants have voluntarily recognized the materiality of human rights-related information in some cases and have generally recognized the value of reporting social sustainability information informally as a public relations practice.²⁰² Auditing firms have directly recognized that human rights and other environmental, social and governance factors are material to investors and that businesses should investigate, assess, and disclose their risks and impacts where these are material to business performance.²⁰³ Market analysts are gathering information on businesses' social and human rights records and risks,²⁰⁴ and investment news services are providing analysis to the market in recognition of the materiality of these factors to decision-making.²⁰⁵

Voluntary disclosures by business and marketplace aggregation and publication of environmental, social, and governance factors show that this information is material to investment decision-making. The SEC considers the availability and current sources of disclosures in determining whether information is material. First, the SEC considers whether shareholders are demanding the information from public companies through the shareholder proxy proposal process. Second, it considers whether institutional investors or other groups are petitioning the SEC for interpretive advice for disclosing the information. Finally, it evaluates the existing public disclosures available through alternative sources.

I. Increasing Calls for Human Rights-Related Disclosure by Shareholders of Public Companies

Shareholder resolution proposal powers have been a primary tool to engage corporations in dialogue relating to human rights policies and practices for decades, and resolutions have frequently been advanced where dialogue has been unsuccessful. In 2013 alone, thirteen of the biggest corporations in America faced shareholder resolutions relating to human rights.²⁰⁶ Many social-issue proposals brought by shareholders are withdrawn prior to the annual meeting because an agreement is reached with the company.²⁰⁷ The majority of human rights proposals over the past four decades have been filed by institutional investors, such as the Interfaith Center on Corporate Responsibility (ICCR), the California Public Employees Retirement System,²⁰⁸ or the New York State Common Retirement Fund.²⁰⁹

Shareholder proposals—and even just the potential to bring proposals—have been a useful tool for engaging corporations in dialogue to enhance their transparency regarding human rights issues, although few have achieved majority support as Boards routinely advocate voting against any social disclosure proposals.²¹⁰ The As You Sow Foundation has used shareholder advocacy to lead or participate in hundreds of shareholder dialogues and resolutions to impact policies and practices at companies, including Chevron, ExxonMobil, Dell, HP, PepsiCo, Starbucks, Target, Home Depot, and Walt Disney.²¹¹ As You Sow generally operates by building coalitions with shareholder allies and engaging companies in proactive dialogue—resorting to active resolution proposals where dialogue alone is not enough to spur companies to action.²¹² Other groups, such as Investors Against Genocide, advocate similar tactics for institutional investors to bring companies to align with their principles for responsible investment and have successfully promoted a shareholder resolution at ING Emerging Countries Fund to a wide 59.8% passing margin.²¹³ Additionally, shareholder activism by the New York State Comptroller has recently resulted in settlement agreements that require companies to disclose human rights risks and impacts related to their business activities.²¹⁴

The New York State Comptroller also acts as trustee of the New York State Common Retirement Fund and has incorporated social and human rights considerations into investment decisions and long-term valuations in recent years.²¹⁵ Similar actions have been taken by institutional pension funds, such as the American Federation of State, County, and Municipal Employees (AFSCME) Pension Plan, which has sought to protect and enhance the economic value of its long-term investments by proposing heightened accountability and transparency by management to shareholders on issues including human rights risks arising out of companies' operations.²¹⁶ The U.S. Presbyterian Church also recently proposed that Caterpillar review and amend its human rights policies to conform more closely to international human rights and humanitarian standards.²¹⁷

II. Petitions for Interpretive Advice Submitted to the SEC by Large Institutional Investors or Other Investor Groups

The SEC has only a few petitions on record that it has received from a large institutional or other investor group, demanding interpretive advice regarding disclosure relating to human rights matters.²¹⁸ However, this does not mean that investors are not interested in these issues. In fact, investor interest in human rights and other social impacts related to business activities has increased dramatically in recent years.

The socially responsible investment (SRI) industry has expanded in the United States, from controlling assets worth \$639 billion in 1995 to \$3.74 trillion in 2012.²¹⁹ This expansion is mirrored internationally by the wide acceptance of the UN PRIs, which now command assets of over \$32 trillion—approximately 15% of the global market for securities—after launching in 2006 with signatories managing only \$4 trillion in assets. SRI has grown to command significant market share and several large institutional investor groups, including pension funds and mutual funds. Even Goldman Sachs has developed its own fund based in sustainability metrics, known as GS Sustain.²²⁰

EIRIS Conflict Risk Network is a prime example of a coalition of almost 80 institutional investors, financial service providers, and other stakeholders calling upon corporate actors to fulfill their responsibility to respect human rights and to take steps that support peace and stability in areas affected by genocide and mass atrocities, such as Sudan and Burma.²²¹ The Network leverages the investment power of more than \$6 trillion in assets under management in this mission to advocate for the corporate fulfillment of the responsibility to respect human rights in conflict environments, and coordinates groundbreaking research methods for the implementation of responsible investment policies relating to these challenging locations.²²² In May 2013, the Network became a part of EIRIS—a leading global provider of research into corporate environmental, social, and governance performance.²²³

This is reflected in other components of investment valuation, such as the change in metrics used to evaluate corporate market value. In 1975, tangible assets accounted for up to 80% of the valuation assessment for corporate securities' market value. In 2005, tangible assets accounted for only 20% of that valuation assessment, as intangible assets—including risk management, intellectual property, human and social capital—have come to be used to calculate 80% of the market valuation equation for corporations.²²⁴

III. Existing Public Disclosures Available Through Other Sources

Businesses, traditional financial accounting firms, and marketplace analyst research services have recognized that human rights-related matters are material to investors. Businesses have

demonstrated this through voluntary disclosures in securities reports and participation in social sustainability reporting systems or social auditing frameworks.²²⁵ Over the past few years, financial accounting firms have expressed the materiality of human rights to investors in several reports from Deloitte, Ernst & Young, and others that have engaged in research collaborations with business schools and institutional investor groups.²²⁶ Finally, market analysts and research companies have developed indices for measuring social impacts, including human rights risks and impacts, of business activities and offer these for investors who are seeking to apply the information in their decisions.

Voluntary Reporting in Periodic SEC Securities Disclosures

Many businesses are already voluntarily disclosing information regarding human rights-related matters,²²⁷ and both accounting and law firms have published their acknowledgment that these matters are material to investors.²²⁸ Certain companies, including Coca-Cola, have already begun to report human rights risks under their “Risk Factors” disclosures in item 1A of their annual Form 10-K securities reports to the SEC.²²⁹ As companies proceed to identify, monitor, and address human rights risks and impacts in their activities, the acknowledged materiality of these matters by accounting firms may result in those firms and in-house corporate auditors deciding to report human rights-related matters when they pass the in-house materiality filter for significant relevance to investors and shareholders.

In their 2012 annual report, Coca-Cola specifically details concerns that negative publicity related to human rights, even if unwarranted, could damage their brand image and corporate reputation and cause the business to suffer.²³⁰ This risk factor disclosure rests on Coke’s recognition that their success “depends on our ability to maintain the brand image” and “maintain our corporate reputation.”²³¹ Coke addresses their responsibility to respect human rights under the Guiding Principles and acknowledges that—based on their Human Rights Statement, including a Workplace Rights Policy and Supplier Guiding Principles—any allegations of a failure to respect internationally accepted human rights could have a significant impact on their corporate reputation.²³² They conclude that the reputational harm attached to any allegations of human rights violations, even if untrue, could significantly impact corporate reputation and long-term financial results.²³³

The analysis provided by Coca-Cola of the risks related to human rights violations, or even untrue allegations, to long-term financial results are consistent with the views emerging from accounting and auditing firms acknowledging that human rights issues are material to investors. Deloitte has proposed that environmental, social, and governance information, including information related to human rights matters, are material where disclosure informs an understanding of changes in company valuation.²³⁴ They indicate that the materiality filter should capture these topics by considering how stakeholder actions related to reported

information regarding topics such as human rights risks and impacts—including boycott, activism, divestiture, seeking employment, or changing purchasing habits—yield potential impacts for company valuations within a relevant time frame.²³⁵

Ernst & Young, in collaboration with the Boston College Center for Corporate Citizenship, has also recently identified the benefits of corporate transparency for financial performance. Their research shows that informally reporting social sustainability performance has demonstrated direct benefits to the corporate balance sheet—a conclusion that implies information such as human rights risks and impacts are material to corporate performance.²³⁶ The conclusions of both Deloitte and Ernst & Young’s research shows that traditional accounting firms are finding that non-financial information, such as human rights risks and impacts, may be material to investors as they impact corporate performance financially or, in the alternative, lead to intangible advantages to reputation and image.²³⁷

Voluntary Informal Social Sustainability or Responsibility Reporting

There has been a proliferation of voluntary social sustainability reporting frameworks, and a significant majority of businesses are participating by voluntarily releasing informal corporate social responsibility or sustainability reports. The Global Reporting Initiative (GRI)²³⁸ and the International Integrated Reporting Council (IIRC)²³⁹ are the most popular frameworks, and the Sustainability Accounting Standards Board (SASB)²⁴⁰ is also developing human rights and sector-specific disclosure standards to guide companies. Companies have subscribed to these standards in order to grant their reports a level of credibility, but most of the standards have still allowed companies considerable discretion in reporting details. These standards have made more information available, but the quality, comparability, and usefulness of the information varies across sectors and between businesses. Therefore, informal voluntary sustainability reports have been useful in making some information available to investors, but they have failed to allow investors to clearly understand, evaluate, and compare how different companies are identifying, reviewing, mitigating, and remedying human rights risks and abuses.²⁴¹

The GRI was initiated in 1990 and the first reporting standard was announced in 2000, providing companies with a framework for reporting on sustainability topics. The standard has evolved over time, with the fourth “G4” guidelines released in May 2013.²⁴² The guidelines have been designed to harmonize with existing sustainability standards, including the OECD Guidelines for Multi-National Enterprises (MNEs), ISO 26000, and the UN Global Compact. In 2011-2012, more than 3900 companies participated in GRI certification training.²⁴³

Under the G4 Guidelines, companies may prepare a sustainability report “in accordance” with the standard by reporting only the “Core” elements or by preparing a “Comprehensive” report, including additional “Standard Disclosures” and more extensive performance analysis of

identified material “Aspects.”²⁴⁴ The determination of aspects of the GRI reporting standard that are material to the specific company is instrumental in determining what disclosures are made under the standard, since only aspects that are material to the company must be reported under the GRI standard.²⁴⁵ Under the G4 guidelines, material aspects are those that: (1) “reflect the organization’s significant economic, environmental, and social impacts” or (2) “substantively influence the assessments and decisions of stakeholders.”²⁴⁶

The IIRC is an international standard for integrated corporate reporting that is currently piloting a program to result in communication by companies about how their “strategy, governance, performance and prospects lead to the creation of value over the short, medium, and long term.”²⁴⁷ The integrated reports are intended to target investors and decision-makers in capital markets by communicating the full range of factors that materially affect the issuer’s ability to create value over time.²⁴⁸ The IIRC envisions its standard as building on financial and other reporting to evolve corporate reporting to consider all aspects that interested stakeholders find relevant in capital allocation decisions.²⁴⁹ These integrated reports will identify the factors that the organization believes are most important for their value creation over time and will provide additional details including financial statements and sustainability reports.²⁵⁰ In that way, it complements and works with the GRI standards to incorporate sustainability reports alongside financial statements to reflect the integrated information that is material to investors.

The SASB is a standards organization that is developing sector-specific accounting standards related to material issues in those sectors for corporate reporting of non-financial information. SASB aims to provide relevant, useful, applicable, cost-effective, comparable, complete, directional, and auditable standards to improve the quality of corporate reporting for investors.²⁵¹ In developing their standards, they seek to support the convergence of international accounting standards and support the shift to integrated reporting of material sustainability issues in SEC reports such as the Form 10-K.²⁵² They are in the process of developing standards related to accounting and reporting human rights issues in order to continue towards meeting their vision where industry-specific standards enable companies to compete and improve performance on sustainability issues—such as respect for human rights—so that investors can capitalize the most sustainable companies.²⁵³

Marketplace Information Analysis and Investor Analytical Services

The marketplace has naturally organized to provide analytical services, information aggregation, and dedicated news categories to sustainability and human rights matters relating to business activities. Investor analytics and research database firms have been providing and refining indices and collections of information relating to environmental, social, and governance business practices, including human rights, for years. Investor-focused news services are dedicating web pages to reporting social impacts of business and sustainability issues.²⁵⁴

The MSCI risk and investment analytics firm produces indices for its clients related to environmental, social, and governance analysis and is related to socially-responsible investment criteria.²⁵⁵ MSCI has consolidated many of the competing databases and indices under its umbrella with the KLD Research & Analytics, RiskMetrics, and Barra analytical methods offered to clients as part of their investment support tools.²⁵⁶ These tools can be customized to meet particular investors' interests in analyzing performance related to specific categories, including human rights. Goldman Sachs has developed its own analytical approach to sustainability metrics, and incorporated it into a sustainable and principled investment fund.²⁵⁷

Bloomberg, the investment news provider, has a dedicated category for sustainability news, where human rights matters related to business activities are reported regularly.²⁵⁸ Bloomberg has maintained a database that integrates sustainability into its market analytics since 2008 and has expanded its commitment to providing investors transparent information on these issues by offering a sustainability section in its news services since 2010.²⁵⁹ However, the fact that this information is being provided by the information services marketplace does not mean that it is equally reliable, comparable, or useful to investors—SEC action to specifically require human rights disclosures could vastly improve the quality of information available to investors and stakeholders.²⁶⁰

The problem with these marketplace information and analytical resources for investors is that they are relying on incomplete, inconsistent, and sometimes incomparable information from companies. The data deficiency holds back the measurement of financial impacts from socially responsible corporate policies and processes and prevents investors from adequately incorporating this information into their decision-making process.²⁶¹ Although business, institutional investment funds, and marketplace information services providers have recognized that this information significantly alters the total mix of information available to investors, there is no standardized practice for delivering useful, objective data.²⁶²

The availability of current sources of human rights-related disclosure shows that businesses, accounting firms, civil society, news services, and other stakeholders expect investors to be interested in human rights for making capital allocation decisions. As shareholders and investors are demanding increasingly detailed and sophisticated disclosures related to human rights matters using shareholder resolutions, information providers are filling the gap in available information as best they can. Investors are demanding information by adhering to international standards of socially responsible investment principles and criteria. Businesses are voluntarily disclosing information by including it in existing items of their SEC formal reports or by informally providing public sustainability or corporate social responsibility reports. International standards for these sustainability reports have developed in order to guide companies to report material information in a clear, useful manner. Finally, marketplace information analysis providers, major investment and brokerage houses, and business news publications are including sustainability and human rights information prominently in their metrics and news services.

Unfortunately, this information is not consistent, comparable, or reliable across industries and even individual businesses—making it less useful to investors.²⁶³

Reporting Material Human Rights Information to the S.E.C.

Broad human rights disclosure allows shareholders to access comparable information about corporate activities and to more adequately assess risks to their portfolio companies.²⁶⁴ This section outlines the two steps involved in implementing securities disclosure in the context of this type of broad human rights disclosure: (1) assessing business-related human rights risks and impacts through human rights due diligence and disclosure of such processes and (2) disclosing material human rights risks and impacts.

Under the second step of broad human rights disclosure, this section proposes two ways in which the SEC should act to require companies to disclose material human rights information under Regulation S-K. First, the SEC should issue interpretive guidance, clarifying the responsibilities of issuers to disclose material human rights risks, impacts, and due diligence processes and results under existing Regulation S-K reporting items. Second, the SEC should engage in a comprehensive rulemaking process to develop rules for disclosing human rights risks, impacts, and due diligence processes and results in a distinct reporting item. Engaging in either or both of these approaches will allow the SEC to enable investors to access key information that addresses management's integrity and a corporation's capacity to manage risks and create long-term, sustainable value through respect for human rights in business activities and relationships. Any clarification from the SEC, whether in the form of interpretive guidance or a new rule, should clearly extend disclosures to include the activities of a company's subsidiaries, contractors, and business partners, in line with the standards of the UN Guiding Principles and the OECD Guidelines for MNEs.²⁶⁵

A. Assessing Human Rights Risks and Impacts Related to Business Activities: Human Rights Due Diligence

The first step in securities disclosure always involves gathering, reviewing, and assessing information that fits within specifically required disclosure items. In this case, human rights risks and impacts related to business activities can arise from a variety of sources and may develop from supply chain or other business relationships, as well as directly in principal business operations. In order for issuers to effectively identify, review, mitigate, and report human rights risks and impacts related to their activities, they should conduct human rights due diligence.²⁶⁶

Generally, human rights due diligence should involve several steps to: (1) identify risks and impacts, (2) review and integrate findings, (3) track responses and mitigate potential impacts, (4) remedy any existing adverse impacts, and (5) communicate to stakeholders how impacts are addressed.²⁶⁷ The UN Guiding Principles, in Principles 17-20, provide a flexible framework for

issuers to adapt based on their size, complexity, risk environment, and operational context.²⁶⁸ By referencing these existing and developing standards, companies can provide clarity to investors while having the flexibility to adapt best practices (or not) as they emerge over time. Sector specific guides—like the OECD Due Diligence Guidance, which is geared towards supply chain due diligence in conflict-affected and high-risk areas—also provide a framework for human rights due diligence that could be used as an illustration by the SEC, while leaving the exact parameters of due diligences processes, if any, to issuers.²⁶⁹

B. Disclosing Material Human Rights Risks and Impacts

The second step for making securities disclosures is filtering and appropriately organizing the gathered information in material disclosures to allow investors and shareholders to understand corporate performance and prospects. The material information must be disclosed and organized in reports according to required disclosure items. In this case, material human rights information could be required to be disclosed based on: (1) existing securities regulation disclosure items or (2) the implementation of a new rule providing for a new item sub-heading for human rights-related risks and impacts.

I. Interpretive Guidance on Existing Securities Reporting Item Requirements for Human Rights-Related Matters

Material human rights risk and impacts should already be being disclosed by issuers under existing requirements in Regulation S-K, but the SEC should clarify these requirements using an interpretive guidance for human rights-related matters. Following the approach recently used to clarify reporting requirements for climate change matters and cyber-security information, the SEC should identify how issuers are required to disclose material human rights information under existing rules.²⁷⁰ In particular, the description of business (Item 101), legal proceedings (Item 103), reporting of disclosure controls and procedures (Item 307), MD&A (Item 303), and risk factors (Item 503(c)) may already require disclosure of material human rights information.

Human rights risks and impacts are relevant to disclosures under item 101, the description of business, because they are a significant element of operating contexts where they exist. Further, any policies and processes in place to identify, assess, mitigate, and remedy human rights risks and impacts will be relevant to investors' understanding of an issuer's risks management strategies and capacities. These should be outlined and described in detail, and any known or potential risks should be disclosed in the description of business as part of the description of the plan of operation for the next period.

Legal proceedings related to human rights risks and impacts should be disclosed under item 103. The SEC should clarify that legal proceedings involving allegations of human rights abuses or violations are not “ordinary routine litigation incidental to the business” and thus are material to investors. As has been suggested by Coca-Cola and stakeholder research, even untrue allegations of human rights violations can have a material impact on corporate reputation and long-term value.²⁷¹ Similar to legal proceedings related to climate change, there is sufficient evidence to support disclosure of legal proceedings implicating a corporation or any subsidiary or business segment in human rights violations at a lower standard of materiality than is generally required for item 103 disclosures.²⁷²

Further, as management is required to provide a narrative perspective of business performance, including trends, uncertainties, and future prospects, there should be some discussion of human rights risks and impacts in the MD&A under item 303. Any known or uncertain trends relating to human rights risks and impacts should be described and management should provide a narrative explanation of how the issuer is prepared to identify, prevent, and mitigate potential or existing occurrences.

Human rights due diligence policies and procedures should be disclosed as part of the item 307 reporting of disclosure controls and procedures.²⁷³ These reports should include: (1) the concrete steps taken to identify risks to human rights; (2) the results of the company’s inquiry, including risks and impacts identified; and (3) steps actually taken to mitigate the risks and prevent human rights abuses. This would require senior management to assess and take responsibility for the effectiveness of these internal controls and procedures and vouch for the resulting human rights disclosures.

The direct and indirect effects to securities valuations, corporate reputation, and competitive advantage related to human rights risks and impacts should result in material disclosures under item 503(c) as risk factors for corporate performance. Coca-Cola has led the way with their recognition that the potential for damage to their reputation and resulting stakeholder actions could significantly affect their bottom line.²⁷⁴ It is clear from the consistent findings of research on the impact of sustainability reporting that social responsibility issues, including human rights, are important sources of risk and potential value.²⁷⁵ The SEC should clarify that issuers need to be assessing their human rights risks and impacts to identify risk factors for disclosure under item 503(c) that could affect corporate performance.

II. The Development of a New Rule for Human Rights Reporting

The SEC may engage in rulemaking related to required disclosures where it is mandated by Congress under existing securities laws (such as the Exchange Act or Dodd-Frank Act²⁷⁶), according to a fresh congressional mandate, or following rule-making petitions proposed by the

public.²⁷⁷ According to Section 14(a) of the Securities Act, Congress has delegated broad authority to the SEC to engage in rulemaking relating to proxy solicitations “as necessary or appropriate in the public interest, or for the protection of investors.”²⁷⁸ As this paper has documented, human rights risks and impacts are a matter of domestic and global public interest, and are relevant to corporate performance and the protection of investors. Interested stakeholders should petition the SEC to promulgate a new mandatory disclosure rule related to human rights in periodic disclosures, including through annual proxy disclosures and through updates in periodic disclosures regarding material changes.

In developing a new rule, the SEC should consider how to incorporate disclosures of human rights-related matters in order to provide clear, consistent, and comparable information between issuers. Certain sectors will, due to the nature and context of their operations, be more prone to risks and impacts related to human rights. Disclosure of their policies and processes for identifying, tracking, mitigating, and remedying those risks and impacts are materially relevant to investors’ understanding of management’s integrity, and capability to manage risks.

A new rule—and the rulemaking process—could investigate the value of consolidating human rights risk and impact disclosures under one item heading or sub-heading. This “Human Rights Due Diligence” section would provide transparent and accountable disclosure of all material information and allow stakeholders to engage the corporation to improve or assist with issues related to human rights. Finally, this rule could be used to meet part of the U.S. government’s duty to protect human rights-related to business activities, under the UN Guiding Principles, which it has already endorsed. This would require, at minimum, that the rule include a disclosure of the issuer’s human rights policies and details of the human rights due diligence process and results.

Conclusion

Heightened interest from the public, policy-makers, academics, investors, and businesses indicate that information relating to human rights matters is in fact material to investor decision-making. Domestic and international legislative and policy action have built—and continue to build—a global consensus around the need to tackle the adverse social and human rights impacts of globalized business activities. Investors are increasingly demanding corporate transparency through shareholder resolutions and endorsement of responsible investment principles. In turn, businesses are recognizing the importance of their performance relating to social responsibility issues and are publishing both formal and informal reports to gain positive publicity and investor support for their efforts in meeting these changing global standards. At the same time, marketplace information analysts and investor support service providers are gathering and integrating available information into useful analyses for investors' capital allocation decisions.

The UN Guiding Principles provide a set of foundational benchmarks for building human rights considerations into internal auditing and risk mitigation processes through human rights due diligence and reporting. Since the United States government has endorsed the Guiding Principles, it should examine implementation of these Principles through its own existing laws and regulations. Furthermore, the OECD Guidelines for MNEs and ISO 26000 have entrenched and expanded upon the Guiding Principles to formulate best practices standards for corporations around the world to tackle the challenges of business impacts relating to human rights. These systems have developed as legislators, civil society, and businesses have converged on a common understanding of the responsibility for businesses to respect human rights. The implementation of the responsibility to respect human rights demands that corporations conduct human rights due diligence to investigate their operations for adverse human rights risks and impacts and communicate those findings to stakeholders and the public.

In order to promote orderly, efficient capital markets and protect investors from misleading or inaccurate information that affects the value of the securities on the market (such as in stand-alone social reports), the SEC should act to require issuers to disclose their human rights due diligence processes and findings regarding risks and impacts related to their business activities. Under existing securities regulations, issuers may have an obligation to disclose human rights risks and impacts related to their operations, and the SEC should provide interpretive guidance clarifying those items where material human rights issues should be reported. Based on the heightened interest from the public, legislators, the international community, and voluntary business disclosures, the SEC should provide interpretive guidance and engage in a comprehensive rulemaking process to establish clear, consistent, and comparable disclosure requirements that will allow investors to effectively consider the human rights risks and impacts connected to investment in certain companies. This information is highly important as it significantly alters the total mix of available information to investors. It should therefore be provided in a manner that adequately allows investors to usefully decide how to allocate their resources.

Endnotes

¹ The United States does have several statutes that apply certain laws and standards to U.S. companies in their activities abroad. These include the Foreign Corrupt Practices Act, Pub. L. 95-213 (1977), the Torture Victim Protection Act, Pub. L. 102-256 (1991), and the Trafficking Victims Protection Reauthorization Act, H.R. 7311 (2008). The Alien Tort Claims Act, 28 U.S.C. § 1350 (2013) has been used in recent decades to hold companies liable for violations of the law of nations committed abroad.

² Many human rights violations resulting from business activities occur in challenging political environments, where conflict or other high-risk factors have limited the capacity or willingness of the State to effectively establish the rule of law or to operate a functioning judiciary.

³ Profits are at an all-time high for the world's largest, most powerful corporations. See Henry Blodget, *Corporate Profits Just Hit an All-Time High, Wages Just Hit an All-Time Low*, BUS. INSIDER (June 22, 2013), <http://www.businessinsider.com/corporate-profits-just-hit-an-all-time-high-wages-just-hit-an-all-time-low-2012-6>. The example of the lack of enforcement for clear violations of law and regulation by financial institutions in the “too big to fail” category highlights this phenomenon in the context of the 2008/09 financial system collapse. See, e.g., Peter Schroeder, *Holder: Big Banks' Size Complicates Prosecution Efforts*, HILL (June 3, 2013), <http://thehill.com/blogs/on-the-money/banking-financial-institutions/286583-holder-big-banks-size-complicates-prosecution-efforts>.

⁴ E.g., Andrew North, *Dhaka Rana Plaza Collapse: Pressure Tells on Retailers and Government*, BBC NEWS ASIA (May 14, 2013), <http://www.bbc.co.uk/news/world-asia-22525431>; *Bangladesh Accord on Fired and Building Safety released*, IndustriALL Global Union (May 15, 2013), <http://www.industriall-union.org/bangladesh-accord-on-fire-and-building-safety-released>.

⁵ E.g., United Nations, *Principles for Responsible Investment*, <http://www.unpri.org/> (last visited July 18, 2013).

⁶ Human Rights Council, *Report of the Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/URC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter Guiding Principles].

⁷ Chris Power & Arun Devnath, *Bangladesh's Tazreen Fire is Followed by Further Garment Factory Blazes*, BLOOMBERG BUS. WEEK (Dec. 27, 2012), <http://www.businessweek.com/articles/2012-12-27/after-the-tazreen-fire-in-bangladesh-more-fires-in-garment-factories>; Declan Walsh & Steven Greenhouse, *The Human Price: Certified Safe, a Factory in Karachi Still Quickly Burned*, N.Y. TIMES (Dec. 7, 2012), <http://www.nytimes.com/2012/12/08/world/asia/pakistan-factory-fire-shows-flaws-in-monitoring.html?pagewanted=all>.

⁸ Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?smid=fb-nytimes&WT.z_sma=WO_BBC_20130424&_r=0; *Disaster in Bangladesh: Rags in the Ruins*, ECONOMIST (May 4, 2013), <http://www.economist.com/news/asia/21577124-tragedy-shows-need-radical-improvement-building-standards-rags-ruins>; Dan Viederman, *Supply Chains and Forced Labour After Rana Plaza: Lessons Learned*, GUARDIAN (May 30, 2013), <http://www.guardian.co.uk/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains>.

⁹ See Rebecca Greenfield, *Apple is Breaking Up with Foxconn for a New iPhone Builder with Labor Problems*, ATLANTIC WIRE (May 29, 2013), <http://www.theatlanticwire.com/technology/2013/05/apples-foxconn-pegatron/65706/>; Christina Bonnington, *Probe Finds ‘Serious and Pressing’ Violations at Foxconn Plants*, WIRED.COM: GADGET LAB (May 29, 2012), <http://www.wired.com/gadgetlab/2012/03/apple-foxconn-audits/>.

¹⁰ E.g., *Papua New Guinea: Serious Abuses at Barrick Gold Mine*, HUMAN RIGHTS WATCH (Feb. 1, 2011), <http://www.hrw.org/news/2011/02/01/papua-new-guinea-serious-abuses-barrick-gold-mine>.

¹¹ See FREE THE SLAVES, *Congo's Mining Slaves: Enslavement at South Kivu Mining Site* (2013), available at <https://www.freetheslaves.net/Congo>.

¹² E.g., *Pinera Blasts Environmental Licensing for Giant Pascua-Lama Gold Mine Project*, MERCOPRESS (June 8, 2013), <http://en.mercopress.com/2013/06/08/pinera-blasts-environmental-licensing-for-giant-pascua-lama-gold-mine-project>; Julie Gordon, *Barrick Gold to Submit Water Plan for Pascua Lama to Chile Authorities Soon*, GLOBE & MAIL (June 5, 2013), <http://www.theglobeandmail.com/report-on-business/international-business/latin-american-business/barrick-gold-to-submit-water-plan-for-pascua-lama-to-chile-authorities-soon/article12360914/>; Alexandra Ulmer & Fabian Cambero, *Barrick's Pascua-Lama Gold Project Frozen for at Least 1-2 Years: Chile Regulator*, REUTERS (May 30, 2013), <http://www.reuters.com/article/2013/05/31/us-chile-pascualama-regulator-idUSBRE94T14X20130531>.

¹³ E.g., CONE COMMUNICATIONS/ECHO, 2013 GLOBAL CSR SURVEY 25, available at <http://www.conecomm.com/2013-global-csr-study-report> (last visited July 18, 2013) (citing results that 55% of respondents have boycotted and refused to purchase products from companies they know to have behaved irresponsibly); Jayne O'Donnell, *Survey: Most Would Boycott Irresponsible Company*, USA TODAY (May 21, 2013), <http://www.usatoday.com/story/money/business/2013/05/21/consumers-boycott-companies-bad-behavior-gap-protests/2343619/>; *Boycotts List*, ETHICAL CONSUMER (Mar. 25, 2013), <http://www.ethicalconsumer.org/boycotts/boycottlist.aspx>.

¹⁴ See RAINFOREST ALLIANCE, <http://www.rainforest-alliance.org/> (last visited July 24, 2013) (certifying products as responsibly mitigating their impact on the rainforest).

¹⁵ E.g., FAIR TRADE USA, <http://www.fairtradeusa.org/> (last visited July 24, 2013) (assuring consumers “that the farmers and workers behind the product got a better deal . . . [and] that their purchases are socially and environmentally responsible”).

¹⁶ U.S. SOCIAL INVESTMENT FORUM FOUNDATION, EXECUTIVE SUMMARY: REPORT ON SUSTAINABLE AND RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES (2012) at 11, available at http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf.

¹⁷ See *PRI Fact Sheet*, UN Principles for Responsible Investment (May 2013), <http://www.unpri.org/news/pri-fact-sheet/> (last visited July 18, 2013).

¹⁸ See Margaret Levi & April Linton, *Fair Trade: A Cup at a Time?*, 31 POL. & SOC'Y 407, 424 (2003) (highlighting the success of activists who, in the early 1990s, challenged Starbucks to stop buying from plantations where workers were not paid fair wages); DOUGLAS HOLT & DOUGLAS CAMERON, CULTURAL STRATEGY: USING INNOVATIVE IDEOLOGIES TO BUILD BREAKTHROUGH BRANDS 104-05 (2010) (citing the pressure exerted on Starbucks by Transfair USA before Starbucks's decision to purchase a small percentage of fair trade coffee, to which customers responded positively); Colleen Haight, *The Problem with Fair Trade Coffee*, 9 STAN. SOC. INNOVATION REV. 74, 77 (2011) (discussing Whole Foods Market's evolution from initially rejecting the fair trade model based on concern over the quality of fair trade coffee to more recently purchasing fair trade coffee due to customers' demands).

¹⁹ Conflict Risk Network, *CRN Letter to the Burman Human Rights Officer on Title of Information Collection: Reporting Requirements on Responsible Investment in Burma* (Oct. 4, 2012), available at http://crn.eiris.org/files/Burma%20Reporting%20Requirements%20-%20Investor%20Comment_4%20Oct%202012.pdf.

²⁰ See Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211-35 (1999) (discussing the brain trust relied upon by President Roosevelt and the legislative drafters in forming the SEC, its purposes, philosophical foundation, and design).

²¹ U.S. Securities & Exchange Comm'n, *Rulmaking: How It Works*, <http://www.sec.gov/answers/rulemaking.htm> (last visited July 26, 2013) [hereinafter *Rulemaking: How It Works*].

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- ²² See Securities Act of 1933, Pub. L. 112-106 (2012); Securities Exchange Act of 1934, Pub. L. 112-158 (2012).
- ²³ See *id.*; Trust Indenture Act of 1939, Pub. L. 111-229 (2010); Investment Company Act of 1940, Pub. L. 112-90 (2012); Investment Advisers Act of 1940, Pub. L. 112-90 (2012).
- ²⁴ Sarbanes Oxley Act of 2002, 116 Stat. 745 (2002).
- ²⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 §§1502-04, 15 U.S.C. §78a et seq. (2013) [hereinafter Dodd-Frank Act].
- ²⁶ See Steven J. Markovich, *The Dodd-Frank Act*, COUNSEL ON FOREIGN RELATIONS (July 23, 2012), <http://www.cfr.org/united-states/dodd-frank-act/p28735>; Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1136&context=facpub>; Allison Fass, *One Year Later: The Impact of Sarbanes-Oxley*, FORBES.COM (July 22, 2003), http://www.forbes.com/2003/07/22/cz_af_0722sarbanes.html.
- ²⁷ See Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 764-65 (1995).
- ²⁸ See Williams, *supra* note 20, at 1211-35 (discussing the writings of Louis D. Brandeis, Adolf A. Berle, and Gardiner C. Means that champion disclosure as a regulatory method “to bring to bear public pressure to change the actions and attitudes of corporate managers, bankers, and other insiders” and their roles in influencing President Roosevelt, as well as Representative Rayburn and Senator Fletcher, the key drafters of the Securities Act (1933) and the Securities and Exchange Act (1934)).
- ²⁹ See *id.* at 1228.
- ³⁰ See *id.* at 1234 (discussing the House Committee Reports and introductory statements of Representative Rayburn and the general tone of the debate—which was overwhelmingly positive, with the only criticism being that the bill perhaps did not go far enough to regulate corporate conduct—and attesting to the belief of legislators that they had a right to demand that the people who run businesses operate according to clean, fair, and honorable standards) (citing the statement of Rep. Rayburn of the House Commerce Committee, 77 Cong. Rec. 2910-55, 2919 (1933)); *id.* at 1241 (citing the statement of Sen. Fletcher, 78 Cong. Rec. 8161 (1934)), where he re-introduced the second draft of the Securities and Exchange Act of 1934, where he identified the “cardinal principles [he] conceived to be, first, restoring as a rule of moral and economic conduct, a sense of fiduciary obligation; and, second, establishing social responsibility, as distinguished from individual gain, as the goal”).
- ³¹ Securities Exchange Act of 1934, *supra* note 22, §§12-15.
- ³² 17 C.F.R. § 229 (2012); see Securities Exchange Act of 1934, *supra* note 22, §§12-15.
- ³³ See 17 C.F.R. § 240.14a-1 (2012).
- ³⁴ 17 C.F.R. § 230.408 (2012).
- ³⁵ 17 C.F.R. § 240.10b-5 (2012); 15 U.S.C. § 78j (2013).
- ³⁶ See 17 C.F.R. § 229 (2012).
- ³⁷ See SIMON ZADEK & MIRA MERME, ACCOUNTABILITY, REDEFINING MATERIALITY: PRACTICE AND PUBLIC POLICY FOR EFFECTIVE CORPORATE REPORTING, 12-13 (July 2003), available at <http://www.accountability.org/images/content/0/8/085/Redefining%20Materiality%20-%20Full%20Report.pdf>.
- ³⁸ See 17 C.F.R. § 229 (2012); 17 C.F.R. § 230.408 (2012).
- ³⁹ See *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).
- ⁴⁰ 17 C.F.R. § 229 (2012).
- ⁴¹ U.S. SECURITIES & EXCHANGE COMM’N, FORM 10-Q, OMB No. 3235-0070, available at <http://www.sec.gov/about/forms/form10-q.pdf>; U.S. SECURITIES & EXCHANGE COMM’N, FORM 10-K, OMB No. 3235-0063, available at <http://www.sec.gov/about/forms/form10-k.pdf>. Foreign private issuers must file an annual report using Form 20-F, which requires essentially the same information. See U.S.

SECURITIES & EXCHANGE COMM'N, FORM 20-F, OMB NO. 3235-0288, *available at* <http://www.sec.gov/about/forms/form20-f.pdf>.

⁴² 17 C.F.R. § 229 (2012).

⁴³ *E.g.*, U.S. SECURITIES & EXCHANGE COMM'N, COMPLIANCE AND DISCLOSURE INTERPRETATIONS: REGULATION S-K (2013), *available at* www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm; U.S. SECURITIES & EXCHANGE COMM'N, INTERPRETATION: COMMISSION GUIDANCE REGARDING MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS, SECURITIES ACT, RELEASE NO. 33-8350 (Dec. 19, 2003), *available at* <http://www.sec.gov/rules/interp/33-8350.htm> [hereinafter Securities & Exchange Comm'n, Release No. 33-8350].

⁴⁴ 17 C.F.R. § 229.101 (2012).

⁴⁵ 17 C.F.R. § 229.101(a)(2)(iii)(B) (2012).

⁴⁶ 17 C.F.R. § 229.101 (2012).

⁴⁷ 17 C.F.R. § 229.101(c) (2012).

⁴⁸ 17 C.F.R. § 229.101(c)(x) (2012).

⁴⁹ 17 C.F.R. § 229.101(c)(xii) (2012).

⁵⁰ *See* 17 C.F.R. § 229.103 (2012).

⁵¹ *See* 17 C.F.R. § 229.103 (2012); 17 C.F.R. § 229.103, Instr. 2 (2012).

⁵² *See* 17 C.F.R. § 229.103, Instr. 2 (2012).

⁵³ 17 C.F.R. § 229.103, Instr. 5 (2012).

⁵⁴ 17 C.F.R. § 229.103, Instr. 5 (2012).

⁵⁵ *See* U.S. SECURITIES & EXCHANGE COMM'N, INTERPRETATION: COMMISSION GUIDANCE REGARDING MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS; CERTAIN INVESTMENT COMPANY DISCLOSURES, RELEASE NO. 33-6835 (May 18, 1989), *available at* <http://www.sec.gov/rules/interp/33-6835.htm>.

⁵⁶ *See* Securities & Exchange Comm'n, Release No. 33-8350 (Dec. 19, 2003), *supra* note 43.

⁵⁷ 17 C.F.R. § 229.303a, Instr. 5 (2012).

⁵⁸ *See generally, id.*

⁵⁹ *See* Securities & Exchange Comm'n, Release No. 33-6835 (May 18, 1989); Securities & Exchange Comm'n, Release No. 33-8350 (Dec. 19, 2003), *supra* note 43; *see also* John D. Moore, *SEC Calls for a Clearer View From Management*, 23 INT'L FIN. L. REV. 25, 26-7 (2004).

⁶⁰ 17 C.F.R. § 229.307 (2012).

⁶¹ 17 C.F.R. § 229.503 (2012).

⁶² *See, e.g.*, DEERE & CO., ANNUAL REPORT (FORM 10-K), at 11-16 (2012), *available at* http://www.deere.com/en_US/docs/Corporate/investor_relations/pdf/financialdata/reports/2013/10kreport2012.pdf.

⁶³ 17 C.F.R. § 229.503(c) (2012).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 17 C.F.R. § 240.14a-8 (2013).

⁶⁸ *Id.*

⁶⁹ *See* 17 C.F.R. § 240.14a-8(f)-(i) (2013) (identifying the reasons why an issuer may be permitted to exclude a proxy disclosure request, including: eligibility or procedural deficiencies, impropriety under state law, violation of law, violation of proxy rules, personal grievance or special interest, irrelevance (measured by the proxy request relating to something that accounts for less than 5% of the companies' total assets at the end of the last fiscal year), absence of power/authority, overriding management functions, director elections, conflict with company's proposal, substantial implementation having been achieved already, duplication of request, resubmission of significantly unpopular proposal over time, or relation to a specific amount of dividends.); David M. Lynn, *The Dodd-Frank Act's Specialized*

Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues, 6 J. BUS. & TECH. L. 327 (2011), available at <http://digitalcommons.law.umaryland.edu/jbtl/vol6/iss2/3>.

⁷⁰ See Exchange Act §14(a); 15 U.S.C. §78n (2013).

⁷¹ See generally, Williams, *supra* note 20.

⁷² See 17 C.F.R. §230.408 (2012); 17 C.F.R. §240.12b-20 (2012).

⁷³ See 17 C.F.R. §240.12b-20 (2013).

⁷⁴ See 17 C.F.R. §240.10b-5 (2013).

⁷⁵ 17 C.F.R. §240.10b-5(b) (2013); 15 U.S.C. 78j (2013).

⁷⁶ See Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward An Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L. ECON. L. 1439, 1449 (2004).

⁷⁷ See *id.* at 1449-50.

⁷⁸ See *id.* at 1451 (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968)). For omission cases, see *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153-54 (1972). For misstatement and fraud-on-the market cases, see *Basic Inc. v. Levinson*, 485 U.S. at 246-47.

⁷⁹ See *American Petroleum Institute et al. v. Securities & Exchange Comm'n et al.*, Civil Action No. 12-1668 (JDB) (D.C. Dist. 2013) (noting how the judge identified that there are exceptions under 78m, n, etc., where the SEC may make exemptions for requiring all disclosures made to the agency be public and identifying the bases for that); see also *Basic Inc.*, 485 U.S. at 231-32 (highlighting the Court's "materiality requirement" requiring the disclosure of the seemingly immaterial fact if there was a substantial likelihood that the omitted fact would have been viewed by the reasonable investor as having significantly altered the totality of all information made available).

⁸⁰ *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (cited in *Basic, Inc.*, 485 U.S. at 234.).

⁸¹ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).

⁸² *Id.*

⁸³ *Id.* at 449 (defining the "total mix" standard of materiality in the context of a controversy relating to proxy statement disclosure under section 14a-9 of securities law); see also *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (adopting the *TSC Industries* "total mix" standard of materiality for the section 10(b) and Rule 10(b)5 context of securities law).

⁸⁴ *TSC Industries, Inc.*, 426 U.S. at 450; see also *Basic, Inc.*, 485 U.S. at 236.

⁸⁵ *Basic, Inc.*, 485 U.S. at 238.

⁸⁶ *Id.* at 238 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d at 849 (2d Cir. 1968)).

⁸⁷ *Id.* at 236 (citing *TSC Industries, Inc.*, 426 U.S. at 450).

⁸⁸ SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45 (1999).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Basic, Inc.*, 485 U.S. at 231-32; *TSC Industries, Inc.*, 426 U.S. at 449-50.

⁹² See *id.*; see also Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417 (2003).

⁹³ See *Basic, Inc.*, 485 U.S. at 231-32; *TSC Industries, Inc.*, 426 U.S. at 448-49.

⁹⁴ See Lucian A. Bebchuck & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, Discussion Paper No. 728, prepared for publication in 101 GEO. L.J. 923, 928-29 (2013); see also *TSC Industries, Inc.*, 426 U.S. at 449.

⁹⁵ Securities & Exchange Comm'n, Commission Guidance Regarding Disclosure Related to Climate Change (Jan. 27, 2010), Release Nos. 33-9106; 34-61469; FR-82, available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf> [hereinafter Climate Change Guidance (2010)].

⁹⁶ See *id.* at 1-2.

⁹⁷ See *id.* at 3-7.

⁹⁸ E.g., Dodd-Frank Act, *supra* note 25; California Transparency in Supply Chains Act, S.B. No. 657 (2010), available at <http://www.state.gov/documents/organization/164934.pdf>; Maryland H.B. 425, Procurement – Required Disclosure – Conflict Minerals Originated in the Democratic Republic of the Congo (May 2, 2012), available at http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/Text_of_Maryland_House_Bill_425_on_Conflict_Minerals.pdf [hereinafter Maryland Conflict Minerals Bill].

⁹⁹ Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [hereinafter PRR Framework].

¹⁰⁰ Guiding Principles, *supra* note 6.

¹⁰¹ International Corporate Accountability Roundtable, *ICAR Coalition Letter to President Obama on Implementation of the UN Guiding Principles* (July 24, 2013), available at <http://accountabilityroundtable.org/analysis/icar-coalition-letter-to-president-obama-on-implementation-of-the-un-guiding-principles/>.

¹⁰² E.g., EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI), <http://eiti.org> (last visited July 25, 2013); GLOBAL NETWORK INITIATIVE (GNI), <http://globalnetworkinitiative.org> (last visited July 25, 2013); ELECTRONIC INDUSTRY CITIZENSHIP COALITION (EICC), <http://www.eicc.info> (last visited July 25, 2013); RESPONSIBLE JEWELLERY COUNCIL (RJC), <http://www.responsiblejewellery.com> (last visited July 25, 2013); CONFLICT-FREE SMELTER INITIATIVE (CFSI), <http://www.conflictreesmelter.org> (last visited July 25, 2013); VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org> (last visited July 25, 2013) [hereinafter VOLUNTARY PRINCIPLES].

¹⁰³ Dodd-Frank Act, *supra* note 25, §§1502-04; 15 U.S.C. §78(a), et seq. (2013).

¹⁰⁴ See Climate Change Guidance (2010), *supra* note 95.

¹⁰⁵ SECURITIES & EXCHANGE COMM’N, DIVISION OF CORPORATE FINANCE, CF DISCLOSURE GUIDANCE: TOPIC NO. 2 CYBERSECURITY (2011), available at <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm> [hereinafter Cyber-Security Guidance].

¹⁰⁶ U.S. DEPT. OF STATE, RESPONSIBLE INVESTMENT IN BURMA REPORTING REQUIREMENTS, OMB NO. 1405-0209, available at <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

¹⁰⁷ Dodd-Frank Act, *supra* note 25, §1503; 17 C.F.R. §§229.104, 239, 249 (2013).

¹⁰⁸ Dodd-Frank Act, *supra* note 25, §1504; 17 U.S.C. §78m(q) (2013).

¹⁰⁹ Dodd-Frank Act, *supra* note 25, §1502; 15 U.S.C. §78m(p) (2013).

¹¹⁰ See Dodd-Frank Act, *supra* note 25, §§1502-04; 15 U.S.C. §78(a), et seq. (2013); Lynn, *supra* note 69, at 330 (discussing the intent of Congress to advance the purposes identified).

¹¹¹ See Lynn, *supra* note 69, at 330.

¹¹² See *Reinforcing the Investor Case: Conflict Minerals and Revenue Transparency*, CALVERT INVESTMENTS (Feb. 21, 2012), <http://www.calvert.com/newsArticle.html?article=19119>; Boston Common Asset Management et al., *Comment on Rulemaking Related to Dodd-Frank Act Conflict Minerals Section 1502* (Feb. 1, 2012), available at <http://www.sec.gov/comments/s7-40-10/s74010-475.pdf>.

¹¹³ 17 C.F.R. §240, §249b (2012); Conflict Minerals, Exchange Act Release No. 34-67716 (Aug. 22, 2012), available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>; see also OECD PUBLISHING, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS FROM CONFLICT-AFFECTED AND HIGH RISK AREAS (2011) [hereinafter OECD Due Diligence Guidance].

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- ¹¹⁴ Dodd-Frank Act, *supra* note 25, at §1502; 15 U.S.C. §78m(p)(1)(A)(i) (2013) (requiring companies to conduct supply chain due diligence in accordance with the standards to be established by the Comptroller of the United States and the rules promulgated by the SEC in consultation with the Secretary of State).
- ¹¹⁵ Dodd-Frank Act, *supra* note 25, at §1503; 17 C.F.R. §§229.104, 239, 249 (2013).
- ¹¹⁶ Securities & Exchange Comm'n, Mine Safety Disclosure, Securities Act Release No. 9,164, Exchange Act Release No. 63,548, 75 Fed. Reg. 245, 80,374 (proposed Dec. 22, 2010); Mine Safety Disclosure, 17 C.F.R. §§229.104, 239, 249; Federal Mine Safety and Health Act (1977); 30 U.S.C. §801 *et seq.* (2012).
- ¹¹⁷ See Mine Safety Disclosure, 17 C.F.R. §229.104 (2012); Securities & Exchange Comm'n (Form 8-K), Current Report, available at <http://www.sec.gov/about/forms/form8-k.pdf>.
- ¹¹⁸ Dodd-Frank Act, *supra* note 25, §1503; 15 C.F.R. §229.104, 239, 249 (2013).
- ¹¹⁹ Dodd-Frank Act, *supra* note 25, §1504(q)(2)(A); 17 U.S.C. §78m(q) (2013); Securities & Exchange Comm'n, Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717 (Nov. 13, 2012), available at <http://www.sec.gov/rules/final/2012/34-67717.pdf>.
- ¹²⁰ *Id.*
- ¹²¹ See *id.*; EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) FACT SHEET, <http://eiti.org/files/EITI-fact-sheet-English.pdf> (last visited July 25, 2013).
- ¹²² See, e.g., Lynn, *supra* note 69, at 337.
- ¹²³ See *id.*
- ¹²⁴ See Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 53 VA. J. INT'L L. (forthcoming 2013).
- ¹²⁵ See Williams, *supra* note 20, at 1234, 1241 (citing legislative history of House and Senate debates, as well as the intellectual foundation of the securities regulation system in the United States as based in theories that transparency will motivate fair and honest conduct in corporate behavior and encourage social responsibility by requiring public disclosures).
- ¹²⁶ See Dodd-Frank Act, *supra* note 25; 15 U.S.C. §78(a) *et seq.* (2013); Lynn, *supra* note 69, at 337.
- ¹²⁷ Calvert Awaits Dodd-Frank Rules on Conflict Minerals and Extractive Revenue Payments, CALVERT INVESTMENTS (Aug. 21, 2012), <http://www.calvert.com/newsArticle.html?article=19803>; *Materiality of Disclosure Required by the Energy Security Through Transparency Act*, CALVERT INVESTMENTS (Apr. 2010), <http://www.calvert.com/NRC/literature/documents/10003.pdf>.
- ¹²⁸ Climate Change Guidance, *supra* note 95; Cyber-Security Guidance, *supra* note 105.
- ¹²⁹ See Climate Change Guidance, *supra* note 95, at 12-20; Cyber-Security Guidance, *supra* note 105, at 2-6.
- ¹³⁰ See Climate Change Guidance, *supra* note 95, at 10.
- ¹³¹ See Cyber-Security Guidance, *supra* note 105, at 2-5.
- ¹³² U.S. DEPT. OF STATE, *supra* note 106.
- ¹³³ *Id.*
- ¹³⁴ *Id.*
- ¹³⁵ *Id.*
- ¹³⁶ See 15 U.S.C. § 78dd (2012).
- ¹³⁷ See *Foreign Corrupt Practices Act: An Overview*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited June 24, 2013).
- ¹³⁸ See *Spotlight on Foreign Corrupt Practices Act*, SECURITIES & EXCHANGE COMM'N, <http://www.sec.gov/spotlight/fcpa.shtml> (last visited June 24, 2013).
- ¹³⁹ See *id.*; *Foreign Corrupt Practices Act: An Overview*, *supra* note 137.
- ¹⁴⁰ California S.B. No. 861 (2011), available at http://accountabilityroundtable.org/wp-content/uploads/2011/10/sb_861_bill_20111009_chaptered.pdf; see Corrine Hauth, *Gov. Brown Signs California's Conflict Minerals Bill*, ENOUGH PROJECT (Oct. 14, 2011), <http://www.enoughproject.org/blogs/gov-brown-signs-ca-conflict-minerals-bill/>; see also, *Conflict Minerals Provision of Dodd-Frank*, KPMG LLP (June 1, 2012),

<http://www.kpmginstitutes.com/government-institute/insights/2012/conflict-minerals-provision-dodd-frank.aspx>.

¹⁴¹ See Maryland Conflict Minerals Bill, *supra* note 98; B.H. 2898, 188th Leg. (Ma. 2013), available at <https://malegislature.gov/Bills/188/House/H2898>.

¹⁴² See California Transparency in Supply Chains Act of 2010, *supra* note 98.

¹⁴³ E.g., PRR Framework, *supra* note 99.

¹⁴⁴ See *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011), available at <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> [hereinafter OECD Guidelines]; *ISO 26000 – Social Responsibility*, ISO (2010), available at <http://www.iso.org/iso/home/standards/iso26000.htm> [hereinafter ISO 26000].

¹⁴⁵ See EUROPEAN COMM’N, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL DIRECTIVES 78/660/EEC AND 83/349/EEC AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE COMPANIES AND GROUPS 207 (2013), available at http://ec.europa.eu/internal_market/accounting/docs/non-financial-reporting/com_2013_207_en.pdf [hereinafter European Commission Proposal]; see also EUROPEAN COMM’N, MEMO: DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE COMPANIES AND GROUPS (PROPOSAL TO AMEND ACCOUNTING DIRECTIVES) – FREQUENTLY ASKED QUESTIONS (2013), available at http://europa.eu/rapid/press-release_MEMO-13-336_en.htm [hereinafter European Commission Memo]. The European Union adopted a resolution May 23, 2013 that reinstated Burma/Myanmar’s access to generalized tariff preferences, which included provisions that call on large European companies doing business in Burma/Myanmar to report on their human rights due diligence policies and procures and calling on the European Commission to monitor the commitments made by European businesses in light of corporate social responsibility principles. See *Resolution on Reinstatement of Burma/Myanmar’s Access to Generalized Tariff Preferences*, EUR. PARL. DOC. B7-0198 (2013).

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¹⁴⁷ UN GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited July 18, 2013).

¹⁴⁸ PRR Framework, *supra* note 99.

¹⁴⁹ Guiding Principles, *supra* note 6.

¹⁵⁰ See *id.* at Introduction.

¹⁵¹ OECD Guidelines, *supra* note 144.

¹⁵² ISO 26000, *supra* note 144.

¹⁵³ UN Global Compact, *Corporate Sustainability in The World Economy*, http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf (last visited June 14, 2013).

¹⁵⁴ See UN Global Compact, *The Ten Principles*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited June 14, 2013).

¹⁵⁵ See *id.*

¹⁵⁶ UN Global Compact, *Overview of the UN Global Compact*, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited June 14, 2013).

¹⁵⁷ See Guiding Principles, *supra* note 6.

¹⁵⁸ See *id.* at 5.

¹⁵⁹ See generally, *id.*

¹⁶⁰ See generally, *id.*

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- ¹⁶¹ *Id.* at Principle 17.
- ¹⁶² *Id.* at Principles 17-20.
- ¹⁶³ *Id.* at Principle 21.
- ¹⁶⁴ See *PRI Fact Sheet*, *supra* note 17.
- ¹⁶⁵ See *Responsible Investment and Investment Performance*, PRI: PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/viewer/?file=wp-content/uploads/5.Responsibleinvestmentandinvestmentperformance.pdf> (last visited July 14, 2013).
- ¹⁶⁶ See OECD Guidelines, *supra* note 144.
- ¹⁶⁷ See *id.*
- ¹⁶⁸ *Id.* at 28.
- ¹⁶⁹ See *id.* at 28-29.
- ¹⁷⁰ *Id.* at 31 (Commentary on Human Rights).
- ¹⁷¹ *Id.* at 31.
- ¹⁷² OECD Due Diligence Guidance, *supra* note 113.
- ¹⁷³ *Id.*; see also, *Due Diligence Guidance: Towards Conflict-Free Mineral Supply Chains*, OECD (2012), available at http://www.oecd.org/daf/inv/mne/EasytoUseGuide_English.pdf.
- ¹⁷⁴ OECD Due Diligence Guidance, *supra* note 113; see also, *Due Diligence Guidance: Towards Conflict-Free Mineral Supply Chains*, *supra* note 173.
- ¹⁷⁵ See *Discovering ISO 26000*, ISO 26000 (2010), available at http://www.iso.org/iso/discovering_iso_26000.pdf.
- ¹⁷⁶ See *id.* at 4-10.
- ¹⁷⁷ See *id.* at 6.
- ¹⁷⁸ See *id.* at 6.
- ¹⁷⁹ See European Commission Proposal, *supra* note 145; see also, European Commission Memo, *supra* note 145.
- ¹⁸⁰ EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE, <http://eiti.org/eiti> (last visited July 26, 2013).
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¹⁸⁹ See *Value of Sustainability Reporting*, *supra* note 187; *Ocean Tomo's Intangible Asset Market Value Study: Components of S&P 500 Market Value*, OCEAN TOMO LLC (June 15, 2010), <http://www.oceantomo.com/media/newsreleases/Intangible-Asset-Market-Value-Study>; *Corporate Citizenship: Profiting from a Sustainable Business*, ECONOMIST INTELLIGENCE UNIT (2008), available at http://graphics.eiu.com/upload/Corporate_Citizens.pdf.

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¹⁹¹ See *Value of Sustainability Reporting*, *supra* note 187, at 14; *Disclosure of Long-Term Business Value: What Matters*, *supra* note 190, at 2.

¹⁹² See *Value of Sustainability Reporting*, *supra* note 187; European Commission Memo, *supra* note 145.

¹⁹³ See *Value of Sustainability Reporting*, *supra* note 187; European Commission Memo, *supra* note 145.

¹⁹⁴ E.g., *PRI Fact Sheet*, *supra* note 17 (noting how investor members apply PRI standards in their investment analysis and decision-making processes, and into ownership policies and practices).

¹⁹⁵ See *Disclosure of Long-Term Business Value: What Matters*, *supra* note 190.

¹⁹⁶ See Levi & Linton, *supra* note 18, at 424; HOLT & CAMERON, *supra* note 18, at 104-105; Haight, *supra* note 18, at 77.

¹⁹⁷ See Emily Jane Fox, *Bangladesh: Cheap Clothes Lead to Danger and Tragedy*, CNN MONEY (Apr. 29, 2013), <http://money.cnn.com/2013/04/29/news/companies/bangladesh-factory-collapse/index.html>; Brian Montopoli, *Bangladesh Factory Disaster: How Culpable are Western Companies*, CBS NEWS (Apr. 26, 2013), http://www.cbsnews.com/8301-202_162-57581673/bangladesh-factory-disaster-how-culpable-are-western-companies/.

¹⁹⁸ See Jennifer Howard-Grenville, Jennifer Nash & Cary Coglianese, *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 LAW & POL'Y 73 (2008); Sarfaty, *supra* note 124.

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²⁰⁰ See Howard-Grenville, Nash & Coglianese, *supra* note 198.

²⁰¹ E.g., Jacey Fortin, *Whatever Happened to Libyan Oil? For Western Oil Giants, The Crude is Sweet But China and Russia May Get the Biggest Taste*, INT'L BUS. TIMES (May 24, 2013), <http://www.ibtimes.com/whatever-happened-libyan-oil-western-oil-giants-crude-sweet-china-russia-may-get-biggest-taste#>.

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INTERNATIONAL CORPORATE
ACCOUNTABILITY ROUNDTABLE

Setting the Record Straight

Common Myths about Environmental, Social, and Governance (ESG) Reporting

Over the past few decades, investors have become increasingly concerned not only with the short term profits of their investments, but also the long-term viability of the public companies in which they invest. As a result, investor calls for corporate disclosures of a company's environmental, social, and governance (ESG) policies, practices, and impacts as a means to assess the long-term health, profitability, and viability of companies have also increased. In response, public companies have begun voluntarily disclosing ESG information, and U.S. allies and peer countries have begun to, or have already enacted, mandatory reporting on ESG issues. The United States' lack of action puts the country at risk of falling behind the global curve in mandating the disclosure of ESG issues important to investor assessment of long-term profitability. Common misconceptions about ESG reporting must be addressed in order to push forth meaningful reporting requirements that respond to investor needs.

MYTH 1: *Only socially responsible or impact investors care about ESG issues*

Today, a wide array of investors are looking towards ESG factors as an integral part of their decision-making processes. Worldwide, investors with \$68.4 trillion of capital are committed to incorporating ESG factors in their investing and voting decisions as part of the U.N. Principle for Responsible Investment ("PRI").¹ According to a recent Ernst & Young report, ESG factors are no longer a niche consideration, with "investor interest in non-financial information span[ning] across all sectors,"² and 61.5% of investors consider non-financial information relevant to their investments overall.² Accordingly, some ESG issues such as climate change or human rights are of increasing concern to investors. For example, investors with \$95 trillion in invested capital support the Carbon Disclosure Project's ("CDP") annual survey of global companies regarding their greenhouse gas emissions and strategies for addressing climate change.³ In relation to human rights, an Ernst and Young report found that 19.1% of investors would rule out an investment immediately and 63.2% would reconsider investing if there were significant human rights risks associated with the investment.⁴

¹ See, *PRI-11 year growth of AO (all signatories (Asset Owners [sic], Investment Managers and seride [sic] providers) and respective AUM*, Excel sheet available for download at *About the PRI*, U.N. Principles for Responsible Investment, <http://www.unpri.org/about>.

² *Value of Sustainability Reporting*, Ernst & Young Boston Coll. Ctr. For Corporate Citizenship 18 (May 2013), available at [http://www.ey.com/Publication/vwLUAssets/ACM_BC/\\$FILE/1304-1061668_ACM_BC_Corporate_Center.pdf](http://www.ey.com/Publication/vwLUAssets/ACM_BC/$FILE/1304-1061668_ACM_BC_Corporate_Center.pdf).

³ *Catalyzing business and government action*, Carbon Disclosure project, <https://www.cdp.net/en-US/Pages/About-Us.aspx>.

⁴ Ernst & Young, *Value of Sustainability*, *supra* note 2 at 16.

MYTH 2: ESG issues are not financially material

ESG information is critical to assessing the long-term investment success of a company, especially in relation to assessing risks, and is therefore financially material. Numerous studies, including a June 2017 Bank of America Merrill Lynch study, found ESG factors to be “strong indicators of future volatility, earnings risk, price declines, and bankruptcies.”⁵ A 2014 review of empirical studies analyzing ESG data and corporate financial performance found overwhelming links between sustainability and profit: 90% of the analyzed studies showed that sound sustainability standards lowered firms’ cost of capital; 80% of the studies showed that companies’ stock price performance is positively influenced by good sustainability practices; and 88% of the studies showed that better ESG practices result in better operational performance.⁶ These reports and statistics, coupled with the support of investors with trillions of dollars in assets under management, help to illustrate that ESG information is financially material to a reasonable investor. Furthermore, information need not be financially material, to be material to a reasonable investor.⁷ There is growing global consensus that ESG disclosures should be seen from a “double materiality” perspective, as they provide both financially and environmentally/socially material information to investors.⁸

MYTH 3: The SEC doesn’t have the mandate to require ESG disclosures

The SEC was granted broad authority by both the Securities Act and the Exchange Act to promulgate disclosure rules “as necessary or appropriate in the public interest or for the protection of investors.”⁹ As discussed above, ESG disclosures are material to investors, and therefore fall under the SEC’s mandate of investor protection. In addition, disclosure of ESG information is also in the public interest, as it “promote[s] efficiency, competition, and capital formation.”¹⁰ Mandatory ESG disclosures would increase both informational efficiency, through the creation of consistent, comparable, and complete ESG reporting, and allocative efficiency, as investors would have a better understanding of the long-term profitability of their potential investments. These disclosures would also help U.S. markets keep their competitive edge. Today, more than twenty countries have mandated public company disclosures of certain ESG issues, and seven stock exchanges require social or environmental disclosures as a listing requirement.¹¹ As global investors increasingly demand and expect these types of disclosures, the SEC should also require the same in order to stay competitive. Such disclosures would increase investor confidence in the long-term profitability of U.S. markets and encourage increased capital formation in the form of new investments.

⁵ Bank of America Merrill Lynch, Equity Strategy Focus Point—ESG Part II: A Deeper Dive (June 15, 2017).

⁶ See Gordon L. Clark, Andreas Feiner & Michael Viehs, *From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance* (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281.

⁷ See, e.g. Cynthia Williams, et. al, “Knowing and Showing” Using U.S. Securities Laws to Compel Human Rights Disclosure (Oct. 2013), <https://bit.ly/2FEyCSZ>.

⁸ European Commission, Consultation Document on the Update of the Non-Binding Guidelines on Non-Financial Reporting, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-non-financial-reporting-guidelines-consultation-document_en.pdf.

⁹ Securities Act of 1933 §§ 7, 10, and 19(a); Securities and Exchange Act of 1934 §§ 3(b), 12, 13, 14, 15(d), and 23(a).

¹⁰ Securities Act of 1933, §2(b); Securities and Exchange Act of 1934, § 23(a)(2).

¹¹ See Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges* (March 12, 2015), available at <http://hausercenter.org/iri/wp-content/uploads/2011/08/CR-3-12-15.pdf>.

MYTH 4: ESG disclosures would be too costly for reporting companies

The value of complete, comparable, and consistent ESG disclosures far outweighs any related costs. Studies have shown that companies with strong disclosure practices have positive shareholder returns and better stock returns.¹² Additionally, a majority of the largest companies are currently making voluntary sustainability disclosures, with 85% of S&P 500 companies producing such reports in 2017.¹³ Costs associated with larger companies are usually higher given complex supply chains and global operations. That a number of large companies are already disclosing ESG information voluntarily reinforces the notion that the benefits of ESG reporting outweigh the associated costs and that the cost of shifting from voluntary to mandatory reporting would be minimal.

MYTH 5: Voluntary ESG disclosures already provide investors what they need to know

While a range of reporting standards exist for voluntary disclosure of ESG information, the application and consistency of these standards varies greatly. This variability makes it difficult for investors to compare ESG data across companies or time, hindering the effectiveness of such disclosures for investment decision-making.¹⁴ Without a regulatory mandate, voluntary disclosures are often incomplete, inconsistent, and not comparable. The SEC has recognized the value and importance of standardized disclosures for these same reasons.¹⁵ When reporting becomes mandatory, standards necessarily become clearer, and the disclosed information more relevant and pertinent to investor needs.

For more information, please contact Jana Morgan, Director of Campaigns and Advocacy, at Jana@icar.ngo.

The International Corporate Accountability Roundtable (ICAR) harnesses the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality.

Visit www.icar.ngo to learn more.

¹² See, Andy Green & Andrew Schwartz, Corporate Long-Termism, Transparency, and the Public Interest (2018); Gordon L. Clark, et. al, *From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance*, *supra* note 6.

¹³ Governance and Accountability Institute Inc., “85% of the S&P 500 Index Companies Publish Sustainability Reports in 2017” (2018), available at <https://www.ga-institute.com/press-releases/article/flash-report-82-of-the-sp-500-companies-published-corporate-sustainability-reports-in-2016.html>.

¹⁴ See, e.g. Jim Coburn & Jackie Cook, Cool Response: The SEC & Corporate Climate Change Reporting (2014). See also, David Levy, Halina S. Brown, & Martin de Jong, The Contested Politics of Corporate Governance: The Case of the Global Reporting Initiative, 49 BUS. & SOC’Y 88 (2010); Carl-Johan Hedberg & Fredrik von Malmborg, The Global Reporting Initiative and Corporate Sustainability Reporting in Swedish Companies, 10 CORP. SOC. RESP. & ENVTL. MGMT. 153 (2003).

¹⁵ See Chair Mary Jo White, Keynote Address at the 2015 AICPA National Conference: “Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility,” Dec. 9, 2015, available at <http://www.sec.gov/news/speech/keynote-2015-aicpa-white.html>

Why Enhanced Securities Disclosures Matter for Long-Termism

Environmental, social, and governance (ESG) reporting provides critical information to investors that helps to guide their investment decisions, and as such is critical for the long-term health and well-being of a public company. These disclosures are essential for companies that want to be seen as good corporate citizens. When a company is transparent around these important issues it often receives a reputational boost and greater access to capital. ***The Securities and Exchange Commission should initiate a rulemaking to ensure that ESG disclosures are comprehensive, consistent, and comparable.***

1) Strong disclosure reporting is the new normal, and a smart business strategy

ESG reporting has become a common practice of the twenty-first century business. In [2013](#), 44% of investors in stock markets worldwide either mandated or strongly encouraged corporate ESG reporting. This drove ESG disclosure to become standard practice – [today](#), 75% of 4,900 companies studied by KPMG issue ESG reports and 78% of the world’s 250 largest companies disclose such data in their annual financial reports. [Some countries](#) also require pension funds to consider ESG factors as a part of their fiduciary responsibilities. Choosing not to align reporting is choosing the path to less competitiveness, or worse, it is choosing to be presumed a laggard in global best practices, which could hurt corporate brands with investors and the consumers. As [Christopher Meyer](#) said: “we now live in the age of transparency where companies that do not own up to their responsibilities will find themselves in the worst of all worlds where they will be *made* responsible and still not *considered* responsible.”

2) Enhanced reporting of environmental, social, and governance risks boosts corporate reputation and creates a competitive advantage

Major scandals such as the Rana Plaza collapse in Bangladesh, Target’s political donations, and BP’s Deepwater Horizon oil spill in the Gulf of Mexico have yielded ever-growing consumer demands that corporations be honest with their consumers and investors, who clearly care about ESG reporting. Nearly [9-in-10 consumers](#) in the richest countries in the world believe corporations should make clear, searchable disclosures and be held accountable for reporting and communicating the findings. Corporations that do are rewarded: [more than 50%](#) of corporations engaging in ESG reporting noticed it helped boost company reputation. ESG reporting indeed permits corporations to brand themselves as [good corporate citizens](#) and ensures that they are not unfairly linked to abuses.

3) ESG information is *material* to a broad range of investors and provides corporations with increased access to capital¹

Today investors worth nearly \$30 trillion in financial assets have signed the United Nations Principles for Responsible Investment, and are [actively looking to invest](#) in companies with high ESG performance - ESG disclosure and financial returns go hand in hand. As the [responsible investment space is growing](#), good corporate citizens stand to benefit from additional access to capital, whereas corporations that do not may miss out. ESG disclosure plays an ever-increasing pivotal role in 320 global investors’ decision-making processes. In [2016](#), 68% affirmed having frequently made an investment decision based on ESG information during the year. [Larry Fink](#), the CEO of BlackRock, with \$6 trillion under management recently strongly encouraged companies to make long-term planning a priority, focusing on ESG factors, and also indicated BlackRock would not hesitate to back activists in proxy ballot fights on these issues if corporations resist. ESG reporting in this context is especially important as responsible investors need [“measurable and comparable”](#) indicators as benchmarks against which to compare a wide range of companies.

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¹ *TSC v. Northway* 426 U.S. 438, 449 (1976): a “reasonable shareholder would consider important in deciding how to vote.”