Maryland Law Review

Volume 78 | Issue 2 Article 4

Can Bad Law Do Good? A Retrospective on Conflict Minerals Regulation

Karen E. Woody

Recommended Citation
78 Md. L. Rev. 291 (2019)

CAN BAD LAW DO GOOD? A RETROSPECTIVE ON CONFLICT MINERALS REGULATION

KAREN E. WOODY*

ABSTRACT

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") created a novel approach to corporate social responsibility ("CSR") in supply chains by requiring public companies to disclose the presence of conflict minerals in their products. Dodd-Frank, as a whole, has faced a barrage of criticism since its passage, and Section 1502 was not immune from intense critical backlash. As I argued in prior scholarship and congressional testimony, Section 1502 was ill-conceived in substance and form. Its application resulted in the improper use of securities laws to the detriment of its laudable public international law goals. This Article will address whether, despite the structural and consequential shortcomings of the provision, it nevertheless has had positive normative effects related to both consumer and corporate awareness and behavior. In other words, this Article will consider whether the functional effects of the law have "moved the needle" in the direction of its intent, despite the provision's potentially fatal flaws. This inquiry will address the question of whether there is a function and purpose of "bad law." Given that the fate of Section 1502 hangs largely in the balance at present, and the current administration has indicated that it will not provide funds for the implementation of Section 1502, the time is ripe for an analysis of the effectiveness of Section 1502 to date. This Article will use a retrospective lens to analyze the effect of Section 1502 on transparency within corporate supply chains, consumer behavior and awareness, and corporate social responsibility. In doing so, this Article will consider the broader question surrounding the effects bad law can have in society.

INTRODUCTION

In 2010, in response to the financial crisis of 2008, Congress passed a sweeping bill aimed at restructuring much of the existing financial regulatory

---

* Assistant Professor of Business Law and Ethics, Indiana University Kelley School of Business. The author thanks the participants of Big10 and Friends for their comments on earlier drafts, as well as Amy Dillard for her unparalleled support. All errors and omissions are the author's.

landscape.[1] Amongst its many finance-related provisions, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") also includes a Section entitled "Miscellaneous Provisions."[2] Included in this aptly-named chapter of Dodd-Frank are regulations relating to mine safety, extractive industry disclosures, International Monetary Fund evaluations, and, of course, conflict minerals disclosures. The conflict minerals provision, Section 1502, requires issuing companies to disclose whether they use any of the minerals included in the "conflict minerals" definition[3] and to locate the source of the minerals.[4]

Eight years after the passage of Dodd-Frank, and roughly six years since the Securities and Exchange Commission ("SEC") put in place regulations regarding conflict minerals, the fate of the provision is very much up in the air. As detailed in Part I, the provision faced a robust constitutional challenge in the courts, as well as intense pressure from the Trump Administration to repeal it altogether. For this reason, it is timely to consider the provision through a holistic yet retrospective lens in order to take account of the lessons learned from this novel legislative experiment and to avoid similar legislative failures.[5]

This Article will incorporate the presumption that Section 1502 was set up to fail at its inception and will analyze whether those failures were manifested over the first six years of its implementation. In order to incorporate this presumption, it is worth unpacking the elements of Section 1502. There were three reasons that the provision was set up to fail, ex ante, which rendered the provision "bad law."

First, Section 1502 is bad law because it amended a fundamental pillar of securities law, yet the provision has nothing to do with securities, the health of an investment, investor protection, or any other financial-related information.[6] Section 1502 bastardized securities law by mandating disclosure of immaterial information. Furthermore, Section 1502 is situated in the body of securities law, as it amended the Securities Exchange Act of 1934 ("Exchange Act")[7] to require these disclosures be made to the SEC; thus, the

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

2. *Id.* title XV.

3. *See id.* § 1502(e)(4) (defining conflict mineral as "columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country").

4. *See id.* § 1502(b).

5. *See* Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129 (2016); David Zaring, *Financial Reform's Internationalism*, 65 EMORY L. J. 1255 (2016).

6. *See infra* Section II.A.

7. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended in scattered sections of 15 U.S.C.).

disclosure requirement applies to companies that have existing disclosure requirements—that is, public companies. Moreover, the disclosure requirement applies only to public companies that have products in the stream of commerce, not the middlemen suppliers to those companies, even if those middlemen suppliers are also public companies. In other words, one of the structural failures of Section 1502 is that it does not cover the full universe of companies involved in the mineral industry or supply chain.

Second, Section 1502 is bad law because it set up a wholly ineffectual public international solution to the crisis in the Democratic Republic of Congo ("DRC").[8] Establishing a de facto embargo against the DRC and its neighbors was not a tenable solution to the violence in the region and was short-sighted in terms of its effects on the global market for minerals. Indeed, as detailed in Part III, the de facto embargo that the provision sparked ended up hurting more than helping the people of the DRC and created a black market for minerals. In addition, the de facto embargo fueled, and continues to fuel, a vibrant international conflict minerals market for companies located beyond the jurisdiction of Section 1502.

Third, Section 1502 is bad law by virtue of its own legislative penalty structure.[9] Section 1502 does not include any penalties for the use of conflict minerals; rather, the provision is entirely a "name and shame" regulation. Because there is no sanction for continued use of conflict minerals, provided the company using the minerals merely discloses that use, the provision itself is essentially toothless ab initio.

Given these structural shortcomings of Section 1502, this Article will address whether there have been normative shifts in corporate and consumer behavior that mitigate the failings of the legislation. In addition, this Article will take the broader view of analyzing how Section 1502 can serve as an example for creating, or at least shifting, soft law normative behavior. In other words, the major takeaway from the flaws of Section 1502 is that the provision should be seen as an example of hard law influencing soft law, given that a shift in soft law is the only true measurable result of Section 1502.[10] That is, because there will be no enforcement actions against companies for the use of conflict minerals, the hard law is rendered meaningless.[11] Yet the abject failure of the hard law sets up a valid debate over the

8. *See infra* Section II.B.

9. *See infra* Section II.C.

10. Though scholars assert that there is some disagreement surrounding the definitions of "hard law" and "soft law," the general definitions to which I will ascribe for purposes of the argument set forth in this Article is that hard law represents the binding, codified law, whereas soft law represents the non-binding customs and normative behavioral principles. *See generally* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–17 (2010) (outlining the literature regarding definitions of hard and soft law).

11. *See infra* Part II and accompanying notes.

role of soft law as a tool in moving the needle toward better supply chain transparency and more conscious corporations and consumers. Section 1502, in essence, is an example of the softening of hard law.

This Article is organized as follows. Part I will introduce and outline the requirements of Section 1502 and its legislative intent. This Part will include an overview of the legal challenges to Section 1502. Part II will discuss the aforementioned shortcomings of Section 1502 from three different standpoints: securities law, public international law, and the legislative structure. Part III will consider whether Section 1502 has been "successful." In framing the effects of Section 1502, this Part will analyze the impact of Section 1502 in four separate arenas: (1) the effects upon the DRC, (2) the number of conflict mineral reports filed by issuing companies in the United States, (3) the changes in consumer behavior resulting from this provision, and (4) the promulgation of similar regulations in other jurisdictions. Finally, Part IV will address the lessons that can be learned from this legislative hard law "failure," dissect the phenomenon of the softening of hard law, and discuss how those lessons can be applied going forward.

I. CONFLICT MINERALS REGULATION: DODD-FRANK SECTION 1502

A. Background of Section 1502

The failure of Section 1502 stems from its legislative genesis. The goals and structure of the provision set it up to be a legislative dud. Before outlining the legislative history and intent of Section 1502, however, one must understand a bit about the history of the DRC. That is, in order to appreciate the goals of the legislation, one must contextualize the impact the crisis in the DRC had upon those drafting the legislation.

The eastern region of the DRC continues to be one of the deadliest regions of the world. Various conflicts in the region have claimed more lives than World War II.[12] "Fueled by decades of ethnic tensions, the conflict in the region reached" unprecedented heights "when groups of militiamen fled across the border into the DRC following the 1994 genocide in Rwanda."[13] The DRC is the world's eleventh largest country by size, yet ranks last in

12. *See generally* JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (2012); *see also* Nicholas Kristof, Op-Ed, *Death by Gadget*, N.Y. TIMES (June 26, 2010), https://www.nytimes.com/2010/06/27/opinion/27kristof.html (noting that over 5.4 million people have been killed in the DRC as a result of the conflict); Joe Bavier, *Congo War-Driven Crisis Kills 45,000 a Month*, REUTERS (Jan. 22, 2008), https://www.reuters.com/article/us-congo-democratic-death/congo-war-driven-crisis-kills-45000-a-month-study-idUSL2280201220080122.

13. *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role As Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1318 & n.8 (2012) (noting the DRC has been embroiled in ethnic tensions "for over a century").

gross domestic product ("GDP") per capita.[14] Moreover, the DRC ranks 156 out of 162 in assessments of peacefulness.[15]

Although not the underlying cause of the wars and ethnic battles, mineral resources in the region supply the funding necessary for local rebel militias to continue terrorizing the region.[16] The DRC is the textbook example of a region that experiences the "resource curse"—that is, a country with an abundance of natural resources that paradoxically has less economic growth, less democracy, and worse developmental outcomes than those countries with fewer natural resources.[17]

In 2001, the United Nations Security Council ("UNSC") issued a resolution condemning "all illegal exploitation of the natural resources of the [DRC], demand[ing] that such exploitation cease and stress[ing] that the natural resources of the [DRC] should not be exploited to finance the conflict in that country."[18] The UNSC then called on member states to "take measures, as they deem appropriate, to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase."[19]

After the United Nations ("UN") condemned the activities occurring in the DRC, yet before the passage of Dodd-Frank in 2010, several members of Congress and then-United States Secretary of State Hillary Clinton visited the DRC to press the Congolese government to promote a humanitarian agenda and reduce violence in the country.[20] Congressional concern, particularly by Senator Richard Durbin (D-Ill.), then-Senators Sam Brownback (R-Kan.) and Russell Feingold (D-Wis.), and Congressman Jim McDermott (D-

---

14. Dominic P. Parker & Bryan Vadheim, *Resource Cursed or Policy Cursed? US Regulation of Conflict Minerals and Violence in the Congo*, 4 J. ASS'N ENVTL. & RESOURCE ECONOMISTS 1, 2 (2017).

15. *Id.*

16. Shannon Raj, Note, *Blood Electronics: Congo's Conflict Minerals and the Legislation that Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 985 (2011); JOHN PRENDERGAST & SASHA LEZHNEV, ENOUGH PROJECT, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN 5 (2009), http://www.enoughproject.org/files/publications/minetomobile.pdf (noting that the exports from neighboring countries, including Uganda and Rwanda, have increased exponentially despite the production and mining of those minerals domestically does not match the export numbers).

17. The literature on the resource curse is abundant and found mainly within the canon of economics and political science. *See, e.g.*, Paul Collier & Benedikt Goderis, *Commodity Prices and Growth: An Empirical Investigation*, 56 EUR. ECON. REV. 1241 (2012); Paul Collier & Anke Hoeffler, *On Economic Causes of Civil War*, 50 OXFORD ECON. PAPERS 563 (1998); Ola Olsson, *Conflict Diamonds*, 82 J. DEV. ECON. 267, 268 (2007) ("In countries with weak institutions, natural resources are likely to be a curse . . . ."); Michael L. Ross, *What Have We Learned About the Resource Curse?*, 18 ANN. REV. POL. SCI. 239 (2015).

18. S.C. Res. 1376, ¶ 8 (Nov. 9, 2001).

19. S.C. Res. 1857, ¶ 15 (Dec. 22, 2008).

20. *See* Woody, *supra* note 13, at 1324 & n.49.

Wash.), culminated in the creation of Section 1502 of Dodd-Frank.[21] Their concern arose after these members of Congress and others visited the region and saw first-hand some of the human rights atrocities occurring in the DRC. Out of a sense of moral responsibility, this bipartisan group decided to pass legislation to tackle issues in the DRC.[22]

The curious story about how Section 1502 of Dodd-Frank came into existence is an interesting study in legislative sausage-making. Section 1502 was not the first attempt at this type of legislation. As early as 2006, variations of legislation similar to Section 1502 had been put forth by members of Congress, often by Senator Brownback.[23] In May 2008, Senator Brownback introduced a bill in the Senate Finance Committee, co-sponsored by Senator Durbin, called the Conflict Coltan and Cassiterite Act of 2008 ("CCCA").[24] This bill would have made it unlawful to import products from the DRC that contain coltan or cassiterite, two of the four minerals that comprise the "conflict minerals" definition ultimately found in Section 1502.[25]

The CCCA never made it to the congressional floor for a vote.[26] Less than one year later, however, Senator Brownback again introduced legislation to address the humanitarian crisis in the DRC.[27] The Congo Conflict Minerals Act of 2009 ("CCMA") was less punitive than the CCCA in that it did not include criminal penalties for willfully violating the CCMA's provisions.[28] In this way, the CCMA closely resembled the eventual Dodd-Frank

21. *See* 156 CONG. REC. 8680–81 (2010) (statement of Sen. Feingold) [hereinafter Feingold Statement] ("This amendment specifically responds to the continued crisis in the eastern region of the [DRC]. Despite efforts to curb the violence, mass atrocities and widespread sexual violence and rape continue at an alarming rate. Some have justifiably labeled eastern Congo as 'the worst place in the world to be female.' Several of us in this body, including Senators Brownback and Durbin and I, have traveled to this region and seen first-hand the tragedy of this relentless crisis.").

22. *Id.* at 8681.

23. The first attempt at this type of legislation occurred in 2006 with the Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, 120 Stat. 3384 (2006).

24. Conflict Coltan and Cassiterite Act of 2008, S. 3058, 110th Cong. (2008).

25. *Id.* §§ 3, 4.

26. *See All Actions S.3058—110th Congress (2007-2008)*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/senate-bill/3058/all-actions (last visited Jan. 13, 2019).

27. Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009). Similar legislation was proposed in the House of Representatives by Representative Jim McDermott (D-WA). *See* Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

28. *See* Woody, *supra* note 13, at 1325 & n.58. *Compare* S. 891, *with* S. 3058. According to Senator Feingold,

> [W]e must tread carefully because there are many communities in eastern Congo whose livelihoods are intertwined with the mining economy. All-out prohibitions or blanket sanctions could be counterproductive and negatively affect the very people we seek to help. I am confident that [the CCMA] is sensitive to that complex reality.

155 CONG. REC. 10600 (2009) (statement of Sen. Feingold).

Section 1502.[29] Like Section 1502, the CCMA would have amended the Exchange Act by adding certain disclosure requirements, and it would have made it United States policy to "promote peace and security in" the DRC.[30] This prior iteration of Section 1502 is noteworthy because many assume that situating Section 1502 within the securities laws was due in part to the fact that Dodd-Frank was a financial reform bill.[31] That is, the "link" that tied Section 1502 to the rest of the bill was that it was essentially a securities disclosure provision. However, earlier iterations of Section 1502 already envisioned this legislation as a disclosure requirement for public companies.

The prologue to Section 1502 is of particular importance in analyzing the provision as a securities law provision. It states:

> It is the sense of Congress that the exploitation and trade of conflict minerals originating in the [DRC] is helping to finance conflict characterized by extreme levels of violence in the eastern [DRC], particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of [S]ection 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).[32]

As will be discussed in detail in Part II, the goals of Section 1502 set it up for failure. The stated aim of the provision is the reduction, or even eradication, of violence in the DRC. The means of reaching that goal, according to Congress, is a disclosure provision directed at companies with reporting responsibilities to the SEC. The tenuous link between the means and ends set the stage for both the legal challenge to Section 1502 and the bulk of my analysis of why Section 1502 is bad law.

---

29. There were, however, several differences between the CCMA and Section 1502, including the scope of those to whom the bill applied. One such difference was that the disclosure requirements under Section 1502 apply only to those who require conflict minerals for "the functionality or production of a product manufactured by such person." 15 U.S.C. § 78m(p)(2)(B) (2012). The proposed CCMA, however, would have applied to persons who engaged in "the commercial exploration, extraction, importation, exportation, or sale of" conflict minerals or use conflict minerals "in the manufacture of a product for sale." S. 891 § 5. The changes between the CCMA and Section 1502 were largely a product of industry lobbying and congressional deal-making to agree to a final bill. According to Senator Feingold, "[Section 1502] was narrowly crafted in consideration of those challenges, and it includes waivers and a sunset clause after [five] years" to help properly balance the competing concerns. Feingold Statement, *supra* note 21, at 8681.

30. S. 891 § 3.

31. *See, e.g.*, Tim Worstall, *Trump's Executive Order to Repeal the Worst Law of the Year*, FORBES (Feb. 9, 2017), https://www.forbes.com/sites/timworstall/2017/02/09/trumps-xo-to-repeal-the-worst-law-of-the-year-section-1502-of-dodd-frank-on-conflict-minerals/#64d06b7147f5 (noting that the "reason the SEC is the enforcer is because [Section 1502] was indeed part of a bill on financial regulation").

32. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010). Section 13 of the Exchange Act includes the mandated disclosure all reporting companies must provide to the SEC.

B. *What Section 1502 Requires*

Before addressing the challenge mounted by affected industries and others to Section 1502, I will provide first a brief description of what Dodd-Frank and the attendant SEC rules require. Section 1502 of Dodd-Frank amends Section 13 of the Exchange Act by increasing mandatory disclosure requirements for producers of goods that include minerals derived from the DRC.[33] The law mandates the annual disclosure of the following information: whether conflict minerals necessary in the production of a company's manufactured goods "originate in the DRC or an adjoining country."[34]

The term "conflict mineral" is defined as: "(A) columbite-tantalite (coltan) [a tantalum ore], cassiterite [a tin ore], gold, wolframite [a tungsten ore], or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country."[35] Collectively, these four minerals are often referred to as "3TG": tin, tantalum, tungsten, and gold.[36]

The process for complying with the law is as follows. First, a company must determine if its products contain one of the four enumerated minerals.[37] If so, the company then must conduct a reasonable country of origin inquiry ("RCOI") to determine the source of the minerals.[38] If a company determines, after conducting an RCOI, that the conflict minerals in use originated in the DRC or an adjoining country, the company must submit a report to the SEC that includes: (1) a description of the due diligence process undertaken by the disclosing party with regard to the source and chain of custody of those conflict minerals, which must be independently audited;[39] and (2) a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the identity of the independent auditor of the source and supply chain, the facilities that process the conflict minerals used by the disclosing party, the country from which the conflict minerals were obtained, and the efforts used to determine the origin (that is, the specific mine) of the conflict mineral.[40] For a product to be considered "DRC conflict free," the

33. 15 U.S.C. § 78m (2012).

34. 15 U.S.C. § 78m(p)(1)(A). Adjoining countries include Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

35. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502(e)(4).

36. *What Are Conflict Minerals?*, RESPONSIBLE MINERALS INITIATIVE, http://www.responsiblemineralsinitiative.org/about/faq/general-questions/what-are-conflict-minerals/ (last visited Oct. 3, 2018).

37. 15 U.S.C. § 78m(p)(1)(A).

38. *Id.* § 78m(p)(1)(A)(i)–(ii).

39. 15 U.S.C. § 78m(p)(1)(A)(i). This independent audit must be certified by the disclosing party, which is an integral part of the due diligence process. *Id.* Additionally, this audit must be considered reliable by the SEC. *See id.* § 78m(p)(1)(C).

40. *Id.* § 78m(p)(1)(A)(i)–(ii).

product must not contain minerals that finance, directly or indirectly, any armed groups in the DRC or adjoining countries.[41]

The disclosure requirement extends to any individual or company subject to any of the Exchange Act's disclosure requirements if such companies or individuals require conflict minerals in the production of the products they manufacture or contract to be manufactured.[42] In addition to making the relevant disclosures to the SEC in a Specialized Disclosure Report, "Form SD," the complying companies also must post the required disclosures on their company websites.[43]

C. Legal Challenges to Section 1502

Although Dodd-Frank was signed into law by President Obama in July 2010, the SEC rules implementing Section 1502 were not finalized and effective until November 13, 2012.[44] Within two months of the promulgation of the finalized SEC rules, the National Association of Manufacturers ("NAM"), the Chamber of Commerce of the United States of America, and Business Roundtable challenged the SEC's final rule.[45] The challenge consisted of the following arguments: (1) the SEC failed to meet its statutory obligations to consider the effects of the rule; (2) the SEC misinterpreted the statute as precluding a de minimus exception; (3) the SEC arbitrarily rejected less-costly alternatives; and (4) Section 1502 violated the First Amendment because it compelled corporate speech.[46] After argument, the District Court for the District of Columbia held that each of NAM's arguments did not rise to a compelling legal claim and granted summary judgment in favor of the SEC.[47] On appeal to the Court of Appeals for the District of Columbia in 2014, the appellants again challenged the conflict minerals rule based on the SEC's alleged failure to consider the effects and costs of the rule to the exclusion of considering less-costly alternatives and reiterated the argument that Section 1502 violates the First Amendment.[48]

---

41. *Id.* § 78m(p)(1)(D).

42. *Id.* § 78m(p)(2)(A)–(B).

43. *Id.* § 78m(p)(1)(E).

44. 77 Fed. Reg. 56,362, 56,365 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p–1, 249b.400 (2013)).

45. Brief for Petitioners at 16–17, Nat'l Ass'n of Mfrs. v. S.E.C., 956 F. Supp. 2d 43 (D.C. Cir. 2013) (No. 12-1422). Petitioners first petitioned the United States Court of Appeals for the District of Columbia, and the court removed the case to the District Court for the District of Columbia. Nat'l Ass'n of Mfrs. v. S.E.C., 956 F. Supp. 2d 43, 53 (D.D.C. 2013). Interestingly, this same group of petitioners had already challenged a number of provisions in Dodd-Frank and were seemingly marching through the massive regulation challenging every possible line of it. *Id.*

46. Brief for Petitioners, *supra* note 45, at 16–17.

47. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 46.

48. Brief for Appellants at 40, Nat'l Ass'n of Mfrs. v. S.E.C., 748 F.3d 359 (D.C. Cir. 2013) (No. 13-5252); Reply Brief for Appellants at 28–29, 35, Nat'l Ass'n of Mfrs. v. S.E.C., 748 F.3d 359 (D.C. Cir. 2013) (No. 13-5252).

Disagreeing with appellants on three of their four arguments in the case, the Court of Appeals for the District of Columbia upheld the SEC's conflict minerals regulation with one major caveat.[49] The court agreed with the appellants that forcing companies to declare that their products were "not conflict free" was tantamount to forcing a company to "confess blood on its hands" and, therefore, violated corporate free speech.[50] Thus, the court reasoned that the mandated language in the SEC regulation was a violation of the First Amendment.[51] Interestingly, the court did not strike down the entire provision but instead allowed the regulation to proceed while carving out the mandatory language of "not found to be 'DRC conflict free.'"[52] In other words, companies are still required to comply with all of the law as it stands but do not have to use the words "not conflict free" when describing their products.[53]

The SEC, joined by Amnesty International, requested a panel rehearing in November 2014, and upon rehearing in August 2015, the D.C. Circuit upheld its prior ruling in a 2-1 vote.[54] The SEC's October 2015 petition for a rehearing en banc was denied. Finally, in March 2016, then-Attorney General Loretta Lynch issued a letter to Congress stating that the SEC will not be seeking a review by the Supreme Court of the United States, leaving in place

---

49. Nat'l Ass'n of Mfrs. v. S.E.C., 748 F.3d 359, 366–67, 369, 373 (D.C. Cir. 2014).

50. *Id.* at 371.

51. *Id.* at 371, 373.

52. *Id.* at 375.

53. *See id.* at 373 n.14. The D.C. Circuit assessed which standard applied to compelled corporate speech: A "rational basis" standard set forth by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), or the "intermediate standard" set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980). *Nat'l Ass'n of Mfrs.*, 748 F.3d at 370–71, 72. The standard for *Central Hudson* requires the government to prove that the compelled corporate speech relates to a substantial government interest that is directly advanced by the regulation and that the government regulation is narrowly tailored. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564, 565. The D.C. Circuit held in the April 2014 conflict minerals decision that the *Zauderer* standard applied only to cases related to consumer deception and, therefore, was not applicable to the conflict minerals disclosure rule. *Nat'l Ass'n of Mfrs.*, 748 F.3d. at 371. The court further held that the conflict minerals rule did not survive the *Central Hudson* standard because the SEC had no evidence that a less restrictive measure would have failed to achieve the stated government interest. *Id.* at 372–73. In an interesting twist in this litigation, the parties resubmitted briefs at the request of the court after the intervening decision in *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18, 20 (D.C. Cir.), *reh'g en banc*, 746 F.3d 1065 (D.C. Cir. 2014). Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 520–21 (D.C. Cir. 2015). In *American Meat Institute*, which dealt with compelled country of origin disclosures for meat products, the court recognized that *Zauderer* could apply more broadly than mere consumer deception cases and held that forced meat labeling was not a violation of the First Amendment. *Am. Meat Inst.*, 760 F.3d at 27. Nevertheless, the D.C. Circuit's rehearing of the conflict minerals provision reaffirmed its original April 2014 holding. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 520–21. The court determined in its August 2015 decision that because the conflict minerals disclosure is not related to commercial or voluntary advertising, *Zauderer* did not apply. *Id.* at 522–23. Further, the court reiterated that the SEC did not meet the *Central Hudson* standard either. *Id.* at 524.

54. Nat'l of Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 520–21 (D.C. Cir. 2015).

the current conflict minerals rule without the mandated "not conflict free" language.[55]

After years of litigation, the future of the provision remains somewhat in question. The proposed Financial Choice Act of 2017[56] includes language that would not allow the SEC to allocate any funding toward the implementation of Section 1502.[57] Likewise, the Trump Administration made clear that it is not a fan of the provision.[58] As his first act of signing legislation in February 2017, Trump repealed the "sister provision" of Section 1502, Section 1504, requiring companies in the extractive industries to disclose any payments made to foreign governments.[59] Many assumed the conflict minerals provision would suffer the same fate.[60] It seems, however, that unlike enacting legislation that would affirmatively strike down the law, Section 1502 will proverbially "die on the vine" through lack of enforcement and resources.

Given that the fate of the provision remains in question under the current administration, and that it has been in effect for over six years, it is timely to take a retrospective look at Section 1502's effectiveness, as well as its shortcomings, both detailed below.

II. THE FAILURE OF HARD LAW IN SECTION 1502

The crux of this Article turns on the effectiveness and function of "bad" or flawed law. However, before one can assess whether bad law has any normative merit, one first must address the fundamental presumption inherent in this Article: The conflict minerals rule was, in fact, bad law. As I referenced in earlier scholarship,[61] and expand upon here, Section 1502 was a legal disaster, ex ante, for three critical reasons. First, in terms of securities laws, it represented an unmitigated extension of disclosure rules to pursue a

55. Letter from Loretta Lynch, Attorney Gen., Office of the Attorney Gen., to Paul Ryan, Speaker, U.S. House of Representatives (March 4, 2016), https://www.justice.gov/oip/foia-library/osg-530d-letters/3-4-2016.pdf/download.

56. H.R. 10, 115th Congress (as passed by House, June 8, 2017).

57. *Id.*; Dynda A. Thomas, *Financial CHOICE Act Passes in the House—Would Repeal SEC Conflict Minerals Rule*, SQUIRE PATTON BOGGS (June 8, 2017), https://www.conflictmineralslaw.com/2017/06/08/financial-choice-act-passes-in-the-house-would-repeal-sec-conflict-minerals-rule/.

58. *See, e.g.*, *Trump Administration Recommends Dodd-Frank "Conflict Minerals" Disclosure Repeal*, ITSCI (Oct. 12, 2017), https://www.itsci.org/2017/10/12/trump-administration-recommends-dodd-frank-conflict-minerals-disclosure-repeal/.

59. Roger Yu, *Trump Signs Legislation to Scrap Dodd-Frank Rule on Oil Extraction*, USA TODAY (Feb. 14, 2017), https://www.usatoday.com/story/money/2017/02/14/trump-scraps-dodd-frank-rule-resource-extraction-disclosure/97912600/.

60. *See, e.g.*, John Filitz, *The Dodd-Frank Repeal: What It Means for Conflict Minerals*, MINING.COM (Aug. 8, 2017), http://www.mining.com/web/dodd-frank-repeal-means-conflict-minerals/.

61. *See* Woody, *supra* note 13.

foreign policy goal.[62] Second, the provision was an ineffectual and half-hearted effort of public international law, leading to global arbitrage in the world market for the minerals and a de facto embargo by the United States.[63] Third, the provision was doomed to fail from the rule of law standpoint because there was no penalty attached to the use of conflict minerals.[64] In other words, the structure of the law allowed for the continued and unsanctioned use of conflict minerals despite its condemnation of that same use. This Part will address each of these three flaws of hard law in turn in order to evaluate, in Part III, whether Section 1502 overcame any of these flaws in its application.

A. Improper Use of Securities Law

Section 1502 was bad law from the standpoint of securities laws for the following reasons: first, the provision requires disclosure of non-material and non-financial information; second, it extends the SEC jurisdiction to extraterritorial firms and conduct. Both of these reasons point to Section 1502 as an improper use of both securities law and the disclosure regime to affect a foreign policy goal, which falls well outside of the SEC's expertise and mandate.

1. Rendering Non-Material Information (to Investors) Material

The foundation of securities law is housed in its two legislative pillars: the Securities Act of 1933[65] and the Exchange Act. The disclosure regime established in these Acts is intended to be a regulatory mechanism that allows for investor protection and accurate valuations of securities.[66] Those defending the disclosure regime of securities law often point out that disclosure regulations also boost investor confidence and incentivize corporate managers to behave more diligently.[67]

62. *Id.*; *see infra* Section II.A.; *see also* Karen E. Woody, *Securities Laws as Foreign Policy*, 15 NEV. L.J. 297, 298 (2014) (analyzing three distinct congressional regulations that use securities law as a tool of foreign policy: The Foreign Corrupt Practices Act, Section 1502 of Dodd-Frank, and Section 1504 of Dodd-Frank).

63. *See infra* Section II.B.

64. *See infra* Section II.C.

65. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

66. *See generally* Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123, 133–135 (2004) (noting that benefits of the disclosure regime are accurate price valuation and a reduction of agency costs due to informed investors and managers).

67. *See* Woody, *supra* note 13, at 1322 n.34 (citing Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 146 (2006)) ("The emphasis in securities law on providing information to the public is premised on the belief that individuals are rational, self-governing actors who are willing and able to process the information wisely. If we assume that investors are rational

In general, the disclosure regulations require that companies provide investors with information regarding the company in order to allow the investor to make an informed decision.[68] This is defined as material information.[69] The Supreme Court, and the SEC through its disclosure regulations, has largely considered material information as that which would have an impact on the economic value of an investment.[70] Moreover, the audience for the disclosed corporate information is investors, not the consuming public.[71] In other words, the disclosure rules are aimed at Apple's stockholders, not those who merely purchase Apple products.[72] In the same vein, the SEC is charged with protection of investors, not the American public at large.[73]

This critical importance of disclosure in securities law is relevant to the critique of Section 1502 because it is hard to argue that the presence of conflict minerals in the product of a public company would be considered material to investors.[74] The SEC rules, while not explicitly adopting an economic standard for materiality, implicitly define material information as that which bears on the economic value of an investment.[75] Indeed, the SEC's proposed rule for Section 1502 stated exactly that point:

---

risk calculators who are consistently capable of weighing the costs and benefits of risky alternatives and selecting the best option, then a system of disclosure makes good sense.").

68. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (determining information that must be disclosed is that which "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 230, 231–32 (1988).

69. *See TSC Indus.*, 426 U.S. at 449; *see also Basic Inc.*, 485 U.S. at 231–32.

70. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1208–09 (1999); *see also* BENN STEIL & ROBERT E. LITAN, FINANCIAL STATECRAFT: THE ROLE OF FINANCIAL MARKETS IN AMERICAN FOREIGN POLICY 64 (2006) ("[T]he SEC assesses materiality on the basis of its relevance to investor financial interests. The SEC's role is not to advise investors about what is good for them—let alone what might be good for the United States—or even to educate investors regarding ethical, religious, or foreign policy matters which may attach to doing business overseas. These matters may well be assigned, through appropriate legislation, to other arms of government but ill-suit an agency whose reputation for integrity across the globe is intimately bound up with its ability to remain scrupulously neutral in questions as to which businesses do and do not 'deserve' private capital. This reputation is critical to America's ability to attract capital markets activity within its legal jurisdiction.").

71. "[M]ateriality is . . . 'about what is important to investors, nothing more and nothing less.'" Woody, *supra* note 13, at 1323 (quoting Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152 (2009)).

72. Karen Woody, *Wall Street Watchdog SEC Can't End Violence in Congo*, THE CONVERSATION (Dec. 7, 2015, 5:46 AM), https://theconversation.com/wall-street-watchdog-sec-cant-end-violence-in-congo-51227.

73. *See* STEIL & LITAN, *supra* note 70, at 71 (underscoring that the SEC is "chartered to protect American investor interests").

74. *See* Woody, *supra* note 13, at 1340–41.

75. *See generally* Matthew C. Turk & Karen E. Woody, *The* Leidos *Mix-up and the Misunderstood Duty to Disclose in Securities Law*, 75 WASH. & LEE L. REV. 957, 974 (2018) (outlining the role of materiality in securities law and securities fraud cases); *see also* Williams, *supra* note 70, at 1264.

> It appears that the nature and purpose of the Conflict Minerals Provision is for the disclosure of certain information to help end the emergency humanitarian situation in the eastern DRC that is financed by the exploitation and trade of conflict minerals originating in the DRC countries, *which is qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act*.[76]

Although there has been a recent push to include environmental, social, and governance disclosures ("ESG") in securities filings, there remains a tenuous link to financial materiality for such proposals.[77] Conflict minerals are no different.[78]

At the time the SEC's conflict minerals regulations were passed, then-SEC Commissioner Daniel Gallagher succinctly stated this position:

> It is easy to see that the SEC role in this provision is the anomaly. That's because disclosure requirements in the securities laws are about telling investors what they reasonably should want to know before investing in a company. The point is to give investors information that is inherently "material" to their investment decisions. Disclosure is, and should be, the primary tool for the SEC to use in satisfying its mission. And so it is paramount that we focus on getting timely, material disclosures to investors.
>
> . . . .
>
> Unfortunately, Section 1502 is *about* curtailing violence in the DRC; it is not about investor protection, promoting fair and efficient markets, or capital formation. Warlords and armed criminals

76. Conflict Minerals, 75 Fed. Reg. 80,948, 80,960 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249) (emphasis added).

77. *See* Woody, *supra* note 13, at 1340 & n.168 (citing David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 161, 185, 196–97 (2007)) ("Monsma and Olson observe, however, that nonfinancial information can be considered 'economic' in sustainable development . . . . Monsma and Olson argue that socially responsible investor firms consider nonfinancial social responsibility and environmental performance as material information for their funds. . . . Without a clear economic link to the valuation of an investment, however, the social and environmental information may not rise to the legal definition of materiality as espoused by the SEC and the Supreme Court.").

78. Of course, the rise of socially responsible investing should not be overlooked. There are many who advocate for increased nonfinancial disclosures, or financial disclosures clearly linked to corporate social responsibility efforts. *See, e.g.*, Shlomit Azgad-Tromer, *The Virtuous Corporation: On Corporate Social Motivation and Law*, 19 U. PA. J. BUS. L. 341, 353 (2017); Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 169, 186, 200 (2018); Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63, 84–86 (2006); Monsma & Olson, *supra* note 77, at 161.

> need to fund their nefarious operations. Their funding is their lifeline; it's a chokepoint that should be cut off. That is a perfectly reasonable foreign policy objective. But it's not an objective that fits anywhere within the SEC's threefold statutory mission.[79]

The importance of materiality being tied to the financial health of an investment is also important for proving any corporate misconduct in omitting or mischaracterizing certain information. Consider, for example, a scenario in which a company files a Form SD and an accompanying conflict minerals report that includes a clear misstatement of fact regarding the source of the minerals. Imagine that the company is subsequently sued by a shareholder or class of shareholders. The materiality question that would be paramount to the analysis of such a securities case is whether the shareholder could prove loss or loss causation.[80] This element of a securities claim is typically proven retrospectively by evaluating the change in stock price when the issuer makes various announcements, such as the corrective disclosure.[81]

This retrospective lens also makes sense when considering the standing of injured investors in such a suit. That is, investors are not bringing securities claims in cases where the information omitted did not cause them an injury in the form of lost profits.[82] It seems highly unlikely that an omission or misstatement regarding conflict minerals would drastically move a company's share price, "thus proving the immateriality of the information."[83] That is, if Boeing was in fact unable to locate the source of the gold in its wiring but, nevertheless, declared in its Form SD that its planes do not contain minerals from the DRC, it would be a stretch to imagine that such a misstatement and subsequent corrective statement would drastically move the stock price of Boeing, if at all.

The use of non-financial corporate disclosures to promote and require corporate social responsibility has been debated in much of the securities law and CSR literature for a number of years.[84] Indeed, the use of disclosure

---

79. Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd-Frank Act—the "Conflict Minerals" Provision (Aug. 22, 2012), https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-statement-dmg [hereinafter Statement of Commissioner Gallagher]. The threefold mission of the SEC is to facilitate capital formation, maintain fair, orderly markets, and to protect investors. *See* Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, A Renewed Focus on SEC Priorities, Speech at AICPA/SIFMA Financial Management Society Conference on the Securities Industry (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513dmg.

80. *See* Lucian A. Bebchuk & Allen Ferrell, *Rethinking* Basic, 69 BUS. LAW. 671, 692–96 (2014) (defining loss causation as the attribution of economic losses to the dissipation of fraudulent distortion resulting from a corrective disclosure).

81. *See generally* Jon Koslow, *Estimating Aggregate Damages in Class-Action Litigation Under Rule 10b-5 for Purposes of Settlement*, 59 FORDHAM L. REV. 811 (1991).

82. *Id.*

83. *See* Woody, *supra* note 13, at 1341.

84. *See, e.g.*, Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 788 (2002).

requirements seems to be a preferred legislative tool, certainly in Dodd-Frank and elsewhere. Dodd-Frank, in particular, required disclosures about mine safety, extractive industry payments, and conflict minerals. Other legislation, including the National Environmental Policy Act of 1969 ("NEPA"),[85] requires climate and environmental disclosures.[86] Other required disclosures, for example, are related to cybersecurity, sustainability, corporate business in Iran and Syria, and other non-financial topics.[87]

The use of non-financial, and arguably non-material, mandated disclosures can result in information overload and stray beyond the goal of investor protection.[88] This dilutes the importance of material information and stretches thin the resources of the SEC, which is tasked with ensuring adequate and verified information.[89]

2. *Indirect Extraterritorial Jurisdiction*

The second reason that Section 1502 raises alarms from a securities law standpoint is the expansion of expertise and jurisdiction of the SEC as primary regulator. This situation likely could have been avoided by more careful crafting of the legislation. In attempting to curb violence in the DRC—the stated aim of Section 1502—Congress could have asserted more direct extraterritorial jurisdiction and banned all companies, domestic or foreign, from selling any product in the United States that contained conflict minerals. In the case of Section 1502, however, Congress chose a more indirect approach to meet its extraterritorial goals.[90]

Section 1502 does not create extraterritorial jurisdiction for the SEC over foreign firms, per se, but it does create indirect extraterritorial jurisdiction. Here's why: Foreign firms not registered on an American exchange, and, therefore, not subject to the jurisdiction of the SEC, may be forced to comply with the provision because they are part of a supply chain in which the final product is manufactured by an issuing company subject to SEC jurisdiction. Although outside of the reach of any SEC disclosure requirement or liability scheme, a foreign company may feel the pressure from an issuing company to have an entire supply chain in compliance with Section 1502, which may result in foreign companies rising to meet the standard required by the provision despite the lack of any similar requirements in their home

85. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.).

86. *Id.*

87. *See generally* Roberta S. Karmel, *Disclosure Reform—The SEC Is Riding Off in Two Directions at Once*, 71 BUS. LAW. 781 (2016).

88. *Id.*

89. *Id.*

90. *See* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY 37–39 (2012) (dissecting the intersection of territoriality and financial statecraft and offering a number of examples of direct extraterritorial jurisdiction of foreign firms or foreign conduct by firms falling within American jurisdiction).

jurisdiction.[91] In other words, the SEC is indirectly monitoring non-U.S. companies that are involved in the supply chains of companies under SEC jurisdiction. This indirect expansion of SEC jurisdiction cuts against the purpose and scope of the agency.[92]

B. Failed Public International Law

The second, and arguably most important, failure of Section 1502 is how far it missed its mark from its well-intended goals. The failure of Section 1502 as a public international measure is distressing and should force legislators to consider how to effectively tackle violence in the DRC. Instead, Section 1502 instituted a de facto embargo, thereby hurting the people of the DRC more than it helped. In addition, the de facto embargo did not change the international and black markets for minerals, thereby failing to make a dent in the supply and demand of the illicit products. Finally, Section 1502 represents a failure in public international law because it was enacted at the expense of better, more thought-out legislation. That is, the opportunity cost of not doing something more effective was overlooked. This Section addresses each of these issues in turn.

1. De Facto Embargo

As was widely reported in news outlets within twenty-four hours of the passage of Dodd-Frank, the implementation of Section 1502 led to a de facto embargo on formal trade.[93] This concern was raised during the Congressional discussion surrounding Dodd-Frank: Senator Feingold addressed the issue in his statement to the Senate Banking, Housing, and Urban Affairs Committee, wherein he reiterated that the goal of the legislation is not to shut down the mineral trade, but to support a conflict-free mining economy that

---

91. The issue of extraterritorial jurisdiction by the SEC is not remedied when other jurisdictions enact similar legislation, despite the fact that copycat legislation in other jurisdictions would increase the legitimacy of the conflict minerals legislation. Interestingly, Section 1502 is not unique in that it allowed for the SEC to assert extraterritorial jurisdiction in enforcing domestic law. *See* Woody, *supra* note 13, at 1342. The Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1–dd-3 (2012), passed in 1977, allows the SEC to investigate foreign payments and illegal bribery occurring abroad. *Id.* Yet, the FCPA is more closely related to the goals of the SEC because its goal involves corporate transparency in books and records. This is significantly distinguishable from the extraterritorial reach and goal of Section 1502, which is aimed at reducing violence in the DRC, and is, therefore, a foreign policy, rather than a securities law, goal. *But see* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is* Not *Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1111–12, 1116–17 (2012) (arguing that the FCPA is not within the congressional mandate of the SEC).

92. *See* Section II.C.2 and accompanying notes.

93. Rick Paulus, *How the Conflict Minerals Rule Failed*, PAC. STANDARD (Aug. 3, 2017), https://psmag.com/economics/how-the-conflict-minerals-rule-failed.

benefits the Congolese people.[94] Nevertheless, Congolese activists and others continually asserted that this regulation will lead, and has already led, to an embargo of Congolese minerals, resulting in a drastic cost that would outweigh any purported benefits of the regulation.[95] The de facto embargo was not merely an academic theory; upon passage of Dodd-Frank, the DRC felt the impact of this legislation nearly immediately. The effects of the de facto embargo and the attendant international black market for minerals are discussed in Part III.

2. *Opportunity Cost*

Section 1502 is a legislative failure in terms of public international law because it took away the opportunity for Congress to do something better for the people of the DRC, who continue to experience a humanitarian crisis. The atrocities occurring in the DRC are real; they are pervasive; and they need to be addressed with the best possible solutions for increased peace in the region. Creating a disclosure regulation for U.S. public companies did not take on the full market for conflict minerals, nor did it make the DRC safer. While these ramifications in themselves are sufficient to deem Section 1502 a failure of public international law, one must additionally consider the opportunity cost of not creating a diplomatic solution.

This is not to say, of course, that diplomatic solutions could not be deployed in addition to Section 1502. Indeed, many defenders of Section 1502, particularly the active non-governmental organizations ("NGOs"), such as the Enough Project and Global Witness, point out that there may not be a silver bullet diplomatic solution; thus, we should try every possible method to help the DRC.[96] The counterpoint to that argument is that the administrative state, comprised of agencies with specialized expertise, is most effective when used properly.[97] As argued below, the SEC is not the agency to handle humanitarian crises abroad and should not be deployed to do so.[98] When

94. 155 CONG. REC. 10599 (2009) (statement of Sen. Feingold); *see* Statement of Commissioner Gallagher, *supra* note 79; Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt a Final Rule Regarding Conflict Minerals Pursuant to Section 1502 of the Dodd-Frank Act (Aug. 22, 2012), https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-statement-tap.

95. *See, e.g.*, David Aronson, *How Congress Devastated Congo*, N.Y. TIMES, Aug. 8, 2011, at A19; *see also* Hans Bader, *Thousands of Jobs and Billions in Wealth Wiped out by Dodd-Frank Conflict Minerals Provision*, OPEN MARKET (July 27, 2011), http://www.openmarket.org/2011/07/27/thousands-of-jobs-and-billions-in-wealth-wiped-out-by-dodd-frank-conflict-minerals-provision/.

96. *See, e.g.*, GLOBAL WITNESS, PUTTING PRINCIPLES INTO PRACTICE: RISKS AND OPPORTUNITIES FOR CONFLICT-FREE SOURCING IN EASTERN CONGO (2013), https://www.globalwitness.org/en/campaigns/democratic-republic-congo/putting-principles-practice/.

97. *See generally* Woody, *supra* note 62 (arguing that there are varying degrees of institutional harm when agencies are not used for their specialized expertise within the administrative state).

98. *See infra* Section II.C.2 and accompanying notes.

Section 1502 placed the responsibility of reducing violence in the DRC essentially within the jurisdiction of the SEC, the world lost an opportunity for a better solution with proper experts taking the helm. Yet, there likely is both fatigue by lawmakers from continuing to discuss other options for the DRC, as well as a sense that they have already come up with a solution to the problem and, therefore, do not want to consider other alternatives.

C. Ineffective Legal Structure

The third category in which Section 1502 can be considered bad law is in the structure of the legislation itself. This Section analyzes the penaltyless structure of the provision, as well as its enforcement mechanism, to point out additional critical flaws with the law.

1. Name and Shame: Laws Without Penalty

Shockingly, Section 1502 was designed to minimize its effect on the global market for 3TG because of the lack of any penalty or sanction included therein.[99] This provision has no penalty attached to the continued use of conflict minerals. That is, the legislation does not punish companies for continuing to engage in the activity that the legislation is attempting to eradicate. As merely a "name and shame" provision, the drafters ostensibly hoped to rely on public consciousness to drive market pressures that would, in turn, alter corporate behavior.[100] In other words, the efficacy of the provision turns on the public behavior, and modification of that behavior, upon learning that certain corporations have products that contain conflict minerals. In order to accomplish this, consumers and the public at large, rather than simply investors, will need to be apprised of the conflict mineral reports of various companies.[101] Of course, this is demanding a fair amount from mere consumers: first, research and information gathering; second, even if the consumer is aware of the information, the consumer needs to be motivated enough to modify his or her buying habits.

Absent this consumer action, there is no sanction related to conflict minerals. For instance, in a situation in which a company has disclosed that it uses conflict minerals, the SEC obviously plays no role because the company has complied with regulatory standards by the disclosure. In other words, a

99. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 626 (2008) ("When lawmaking authorities create laws that by their own terms or common understanding have no effect, one immediately suspects a cynical public-relations ploy.").

100. *See generally* Kish Parella, *Reputational Regulation*, 67 DUKE L.J. 907 (2018) (discussing the efficacy of boycotts and other reputational sanctions upon companies).

101. *See* Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 146 (2006) ("In order for a disclosure system to be effective, not only must the information that is supplied be disclosed completely . . . but it must also be read and comprehended by the consumer.").

company can file a Form SD with the SEC, publish the Form SD on its website, and hope that there is no resultant public backlash for the conflict minerals usage. From a public international law standpoint, it would seem that the possibility of a remorseless, albeit SEC-compliant, company reduces the law to a toothless tiger.[102]

2. *Lack of Regulatory Agency Expertise*

Another indication of the ineffective structure of Section 1502 is the inappropriateness of the agency charged with enacting the provision. The SEC has a three-part mandate: (1) protect investors; (2) maintain fair, orderly, and efficient markets; and (3) facilitate capital formation.[103] In other words, the primary aim of the agency is the preservation of market integrity.[104] The method for ensuring that the first two parts of the mandate, investor protection and assurance of fair markets, are met "lies in market transparency and is achieved through disclosure of material information to investors."[105] As stated by the SEC, "Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions."[106] The SEC is not charged with foreign policy regulations or goals, nor is the agency equipped with the expertise or the resources to take on a regulation that has a goal of reducing violence in the DRC.

Moreover, just as there exists an opportunity cost when considering what other methods were not employed to help the DRC,[107] there also is the opportunity cost to the SEC. That is, the SEC spends some of its finite resources and time working on the regulations, litigating the SEC rule, and reviewing Form SDs, to no real effect.[108] This is an inefficient and improper use of an agency tasked with investor protection, market fairness, and capital formation.

III. MEASURING THE SUCCESS AND FAILURE OF SECTION 1502

Having arrived at the point wherein I hope to have established the presumption that Section 1502 was a failure of hard law ab initio, this Article turns to an assessment about the positive and normative effects of Section

---

102. *See, e.g.*, Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129, 161–67 (2016).

103. *About the SEC*, SEC. & EXCH. COMM'N, https://www.sec.gov/about.shtml (last updated May 21, 2018).

104. *See, e.g.*, Woody, *supra* note 13, at 1320.

105. *Id.*

106. *What We Do*, SEC. & EXCH. COMM'N, https://www.sec.gov/Article/whatwedo.html (last updated June 10, 2013).

107. *See supra* Section II.B.3 and accompanying notes.

108. *See, e.g.*, Woody, *supra* note 62, at 318 (discussing the institutional harm incurred by requiring the SEC to take on the tasks related to conflict mineral disclosure).

1502. The only true metric for success, by design of Section 1502, was the reduction of violence in the DRC.[109] However, other potential measures of success should be considered, given that Section 1502 is entirely a "name and shame" provision. That is, the true measure of the provision's effectiveness should come in the form of increased consumer awareness of conflict minerals and increased corporate awareness of supply chains surrounding conflict minerals. In addition, copycat provisions in other jurisdictions such as the European Union ("EU") suggest that Section 1502, possibly, was the rock that caused some international ripples. This Part details the effect the provision had on the people of the DRC, as well as its effect internationally. In particular, this Section considers the diverse normative effects of Section 1502 felt domestically and internationally.

A. Effect on the DRC

Since the passage of Dodd-Frank, major American corporations shied away from using Congolese minerals.[110] As a result, certain mines in the DRC suspended operations, forcing many Congolese out of work.[111] As early as 2011, before the SEC even finalized its regulations for Section 1502, exports of the "3T"—tin, tantalum, and tungsten—from the DRC fell by seventy percent since the previous summer, a phenomenon that the local miners referred to as "Obama's embargo."[112]

Of course, going hand-in-hand with economic embargoes is market and regulatory arbitrage.[113] Companies incorporated in other countries, or companies without reporting requirements with the SEC, are able to take advantage of the de facto embargo.[114] China, for example, capitalized on the stringent U.S. regulation as early as 2011 and now seems to possess a virtual monopoly on the Congolese minerals.[115] A Congolese civil society member stated:

---

109. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010).

110. Mary Kay Magistad, *Slideshow*: *Why Chinese Mineral Buyers Are Eying Congo*, PRI'S THE WORLD (Oct. 26, 2011, 11:40 AM), http://www.theworld.org/2011/10/chinese-conflict-minerals-congo.

111. *Id.*

112. Editorial, *Africa and "Obama's Embargo"*, WALL ST. J. (July 18, 2011), https://www.wsj.com/articles/SB10001424052748703956604576109773538681918; *see also* Parker & Vadheim, *supra* note 14, at 2.

113. *See generally* Harald Baum, *Globalizing Capital Markets and Possible Regulatory Responses*, *in* LEGAL ASPECTS OF GLOBALIZATION: CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY 77, 86 (Jurgen Basedow & Toshiyuki Kono eds., 2000).

114. *See* Remi Moncel, *Cooperating Alone*: *The Global Reach of U.S. Regulations on Conflict Minerals*, 34 BERKELEY J. INT'L L. 216, 216 (2016).

115. Magistad, *supra* note 110 (quoting Jason Luneno Maene, Congolese civil society leader).

> [The Chinese mineral buyers] are paying [twenty] percent less, maybe even [thirty] percent less than the old price, because now they are the only buyers . . . . The lower price means fewer people are bringing minerals to sell, and a lot of mines have suspended operations. But the Chinese are buying what comes to them. Their warehouses are full, with constant turnover.[116]

In addition, there has been an increase in the exportation and mining of gold, in particular, from the DRC since the implementation of Section 1502.[117] Scholars suggest that the reason for this is that "approximately [ninety-eight percent] of gold mined in the eastern DRC is smuggled" and that much of the gold from the DRC supply markets that are not regulated by Dodd-Frank, such as the Middle East and Asia.[118] Even for companies that do fall under the ambit of Dodd-Frank, gold is particularly difficult to trace and regulators have essentially "exempted" gold for this reason.[119]

Moreover, the de facto embargo did nothing to reduce the violence in the region and, some scholars have argued, rendered the region more volatile.[120] In a study published in 2016, Professor Dominic Parker and Bryan Vadheim embarked upon an empirical study of violence in the DRC since the passage of Dodd-Frank.[121] The study found the probability of violence against civilians, post-Dodd-Frank, increased significantly.[122] The study concluded that Dodd-Frank caused increases in violence against civilians because it generated incentives for militia to loot: "Instead of reducing violence, the evidence indicates the [Dodd-Frank] policy increased the likelihood that armed groups looted civilians and committed violence against them."[123]

Another study by Professor Parker, published in 2016, addressed the secondary effect of the de facto economic sanction imposed by Dodd-Frank on the DRC.[124] In that study, the authors concluded that the impact of Dodd-Frank upon villages near the mines that U.S. companies boycotted was that

---

116. *Id.*

117. Parker & Vadheim, *supra* note 14, at 11.

118. *Id.*

119. *Id.* Parker and Vadheim point out that gold is relatively easy to smelt and, therefore, easy to comingle with gold from different mines, making tracing a difficult endeavor.

120. Laura Seay, *Congo Conflict Minerals Bill Hurts the Miners It Hopes to Help*, CHRISTIAN SCI. MONITOR (July 18, 2011), https://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0718/Congo-conflict-minerals-bill-hurts-the-miners-it-hopes-to-help ("[C]utting off demand for Congolese minerals on international markets does absolutely nothing to stop violence against civilians and only makes life for many civilians worse by leaving them with no viable means of financially supporting themselves or their families.").

121. Parker & Vadheim, *supra* note 14, at 1.

122. *Id.* at 41.

123. *Id.* at 41, 44.

124. Dominic P. Parker et al., *Unintended Consequences of Sanctions for Human Rights: Conflict Minerals and Infant Mortality*, 59 J.L. & ECON. 731, 731 (2016).

infant deaths increased by 143%.[125] That is, the infant mortality rate skyrocketed as a result of these communities losing their source of revenue from the mines.[126] The study suggested that the loss of income streams is one reason for the uptick in infant mortality and so too is the likely disruption to maternal health facilities and care.[127] Finally, the authors concluded that Dodd-Frank might have actually increased the armed conflict, which has obvious ramifications upon infant mortality.[128]

A *New York Times* op-ed published prior to the Parker study included similar comments from someone who had first-hand knowledge of the effects of Section 1502 on the people of the DRC:

> The pastor at one church told me that women were giving birth at home because they couldn't afford the $20 or so for the maternity clinic. Children are dropping out of school because parents can't pay the fees [without the few dollars a day they once had working at the mines]. Remote mining towns are virtually cut off from the outside world because the planes that once provisioned them no longer land.[129]

The empirical studies and stories from those in the DRC paint the picture that Section 1502 has not reduced violence in the country and, instead, has had other deleterious effects in the region. Moreover, the mineral trade seems to be alive and well, given the unilateral action by only the United States.[130] Thus, the metrics for success as defined in the provision as the reduction of violence in the DRC show a resounding failure of the law. Whether there have been normative shifts in behavior is a broader metric that must be considered and is analyzed below.

B. Effect on U.S. Corporate Awareness and Compliance

One of the few quantitative measurements of the effectiveness of Section 1502 is the number of companies who actually filed Form SDs. While a number of companies performed due diligence on their supply chains, the overwhelming discovery, by both the Government Accountability Office ("GAO") and companies themselves, was that tracing conflict minerals is a near-impossible task.[131]

---

125. *Id.*

126. *Id.* at 733.

127. *Id.*

128. *Id.*

129. Aronson, *supra* note 95; *see also* Brandon Bailey, *Gunmen Still Control Metals Mined for Modern Gadgets*, ASSOCIATED PRESS (Oct. 25, 2016), https://apnews.com/17c21d0416a54acfbd2b6b842b68858d.

130. *See* Seay, *supra* note 120.

131. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-561, SEC CONFLICT MINERALS RULE: INITIAL DISCLOSURES INDICATE MOST COMPANIES WERE UNABLE TO DETERMINE THE SOURCE OF THEIR CONFLICT MINERALS 18 (2015).

In its August 2015 report, the GAO assessed whether companies were able to comply with the SEC regulations related to Section 1502.[132] After the SEC promulgated its final regulations in 2012, there was a two-year window in which most companies were able to declare their products "DRC conflict undeterminable" per the regulation.[133] Thus, 2014 was the first year a full audit of Form SDs could be conducted. The GAO found that the 2014 filings were fewer than the SEC had estimated and "provide[d] limited insights regarding country of origin and chain of custody."[134] In total, only 1321 companies filed Form SDs in 2014, which was substantially lower than the SEC's estimate of over 6000 companies that would be affected and required to file.[135] Of those filings, sixty-seven percent of filers were unable to determine the country of origin of the minerals.[136]

The filings for years 2015 and 2016 indicated similar rates of filings and similar inability to locate the source of the minerals by the companies performing due diligence. In 2015, 1281 companies filed Form SDs; in 2016, the number was 1230.[137] The GAO stated that an estimated fifty-five percent of companies reporting in 2016 could not definitively confirm the source of the minerals in their products.[138] As in the two previous years, almost all of the companies that reported could not determine whether the minerals financed or benefited armed groups, as required by Section 1502.[139]

132. *Id.* at 2.

133. Conflict Minerals, 77 Fed. Reg. 56,274, 56,281 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249, 249b).

134. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 131, at 11 (emphasis omitted).

135. *Id.* at 13.

136. *Id.* at 15.

137. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-517R, SEC CONFLICT MINERALS RULE: 2017 REVIEW OF COMPANY DISCLOSURES IN RESPONSE TO THE U.S. SECURITIES AND EXCHANGE COMMISSION RULE 3 (2017). One potential reason for the low return rate on Form SDs could have been that companies were waiting to know what the state of the law would be after the litigation. However, the litigation did not include a stay, so companies were still required to file their forms. The lack of responses shows that the SEC does not have much leeway when dealing with obstinate companies because the filing is only required if companies actually have conflict minerals in their products. That is, Form SD is not a required filing for every public company. The GAO report of 2017 notes, however, that SEC officials posited that the low number of filings could be a result of mergers among companies. *Id.* at 3–4.

138. *Id.* at 7.

139. *Id.*; *see also* Yong H. Kim & Gerald F. Davis, *80% of Companies Don't Know if Their Products Contain Conflict Minerals*, HARV. BUS. REV. (Jan. 4, 2017), https://hbr.org/2017/01/80-of-companies-dont-know-if-their-products-contain-conflict-minerals.

TABLE 1

Year	Number of Filings	Conflict Mineral Reports[140]	Source of Minerals Undeterminable
2014	1321[141]	1020[142]	77%[143]
2015	1281[144]	1013[145]	67%[146]
2016	1230[147]	985[148]	55%[149]
2017	1153[150]	911[151]	63%[152]

On the whole, it seems Section 1502 did not make any major waves in terms of radical corporate response or robust efforts into transparent supply chains, given the small number of companies that undertook the exercise. Nevertheless, the corporate disclosure requirement certainly made many companies learn about the DRC, undertake some effort at supply chain transparency, and work to set up compliance measures for Section 1502. In that sense, corporate awareness seemingly increased, albeit minimally, regarding conflict minerals and the plight of the DRC.

C. Effect on Consumer Awareness

In addition to increased corporate awareness of conflict minerals through the disclosure requirement, the success of Section 1502 rises and falls upon consumer awareness. Because Section 1502 is a "name and shame" bill, the drafters must have assumed that consumers will boycott products and companies that use and trade in conflict minerals. For the provision to have proverbially moved the needle on consumer awareness, we

140. As noted above in Part I, conflict mineral reports are required once a company has performed a reasonable country of origin inquiry and found that the minerals likely originated from the DRC or neighboring country, then the company must undergo additional due diligence and file a conflict mineral report (CMR).

141. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 131, at 11.

142. Schwartz, *supra* note 102, at 144.

143. *Id.* at 156–57.

144. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 137, at 7.

145. DEV. INT'L, DODD-FRANK SECTION 1502—RY2016 FILING EVALUATION 23 (2017).

146. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 137, at 7.

147. *Id.*

148. DEV. INT'L, *supra* note 145, at 3.

149. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 137, at 7

150. DEV. INT'L, *supra* note 145, at 3.

151. *Id.*

152. *Id. at* 33; *Conflict Minerals Reporting. A Snapshot of the 2017 SEC Filings*, SOURCE INTELLIGENCE, https://www.sourceintelligence.com/conflict-minerals-reporting-a-snapshot-of-the-2017-sec-filings/ (last visited Oct. 6, 2018).

must look at the buying trends of consumers. While empirical data is scant on this point,[153] another potential measure is simply public awareness and consciousness, which hopefully drives corporate conduct.[154]

This certainly proved true in the early stages of Dodd-Frank. For example, some companies were accused of lobbying to undercut the utility of Section 1502 and were met with backlash. Intel, later heralded for being one of the first movers on supply chain due diligence for conflict minerals, was specifically targeted early on for the way in which it handled its stance on this legislation and was forced to analyze its supply chain.[155] As a result of the litigation related to Section 1502 and promotion by companies who have attempted to comply with the provision, consumer awareness of conflict minerals likely has increased.[156] This has been aided by celebrity activists such as Robin Wright and Ben Affleck, who have been visible in lobbying Congress on the issue of conflict minerals and writing op-eds outlining their views in favor of conflict mineral regulation.[157] Similarly, the Enough Project, headed by John Prendergast, is one of the foremost NGOs tackling conflict mineral issues and often uses celebrities to assist with increasing awareness on conflict minerals.[158]

153. An in-depth empirical survey analyzing the consumer trends since the passage of Section 1502 will be the focus of my future scholarship but the data are not yet available.

154. *See* Monsma & Olson, *supra* note 77, at 184 ("Brand reputation, among other business incentives, drives companies to manage areas that lie beyond regulatory compliance and tangible financial relevance.").

155. For example, Intel initially deleted comments on its Facebook page made by activists that were critical of its stance on the conflict mineral legislation. After reposting the comments, Intel released the following statement:

> For well over a year, we have been engaged in both conversations with NGOs and our own industry focused on creating workable solutions. We have shared with our suppliers our current position on the issue. . . . We also support the objective of US legislation to address this problem.

Press Release, Suzanne Fallender, Dir. of Corp. Resp., Intel, Intel's Statement on Conflict Minerals Issue (May 19, 2010), https://blogs.intel.com/csr/2010/05/intels_statement_on_conflict_m/.

156. *See, e.g.*, Univ. of Sussex, *Industry Collaboration, Consumer Pressure Key to Stopping 'Conflict Minerals' Trade*, SCIENCEDAILY (May 10, 2016), https://www.sciencedaily.com/releases/2016/05/160510124650.htm. An empirical analysis of consumer awareness will be the focus of my future scholarship.

157. Ben Affleck, Editorial, *The Deadliest War*, WASH. POST (Nov. 30, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905964.html; Carol Shih, *Robin Wright's Mission to End Conflict Minerals*, THE LILY (Nov. 16, 2017), https://www.thelily.com/robin-wrights-mission-to-end-conflict-minerals-2/; Robin Wright, *From Dragon Tattoo to Congo: Combatting the Scourge of Violence Against Women*, HUFFINGTON POST (Jan. 10, 2012, 2:22 PM), http://www.huffingtonpost.com/robin/from-dragon-tattoo-to-con_b_1197226.html.

158. *See*, *e.g.*, Ryan Gosling & John Prendergast, *Congo's Conflict Minerals: The Next Blood Diamonds*, HUFFINGTON POST (Apr. 27, 2011), https://www.huffingtonpost.com/ryan-gosling/congos-conflict-minerals-_b_854023.html.

D. *Imitation as the Sincerest Form of Flattery: Similar Legislation in Other Jurisdictions*

Proponents of Section 1502 may argue that, like the promulgation and enforcement of the Foreign Corrupt Practices Act ("FCPA"),[159] which led to the implementation of similar legislation in other countries, Section 1502 set the high standard that other countries are now trying to meet.[160] Indeed, this argument has some validity given that the EU passed its own conflict minerals provision just this year, and one U.S. state enacted similar legislation.

1. *The Europeran Union*

One of the biggest "successes" that can be attributed to Section 1502 is the fact that in May 2017, the EU adopted a new import regulation regarding conflict minerals.[161] The EU regulation goes into effect in January 2021[162] and requires all importers of 3TG to conduct due diligence on their supply chains.[163] The EU regulation is broader than Section 1502 in that it is not limited to public companies with end products that contain conflict minerals.[164] Instead, the regulation is situated lower down in the supply chain and applies to all importers of the minerals. In addition, the EU regulation is not directed only at minerals derived from DRC but includes minerals from other conflict-affected or high-risk areas.[165]

In order to comply with the EU Directive, importers of minerals to the EU must follow a five-step process: (1) establish a strong company management system for tracing minerals; (2) identify and assess risks within their supply chains; (3) design and implement a compliance strategy to respond to

159. 15 U.S.C. §§ 78dd-1–78dd-3 (2012).

160. *See* Woody, *supra* note 13, at 1347 (noting that the FCPA served as an example of the United States enacting legislation that other countries eventually adopted in similar form); *see also* Moncel, *supra* note 114, at 231–43 (detailing the literature on unilateral regulatory globalization and the "California Effect" of raising regulatory standards in one jurisdiction to have those standards eventually matched by other jurisdictions).

161. *New E.U. Conflict Minerals Regulation: Implications and Lessons Learnt from the Dodd-Frank Act in the U.S.*, DELOITTE (Jan. 15, 2018), https://www2.deloitte.com/be/en/pages/tax/articles/New-EU-Conflict-minerals-regulation-implications-and-lessons-learnt-from-the-Dodd-Frank-Act-in-the-US.html.

162. Council Regulation 2017/821 of May 17, 2017, Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1, 16 (EU).

163. *Id.* at 5, art. 1.

164. *Id.*

165. *Id.*

the identified risks; (4) engage in an independent third-party audit of the supply chain due diligence; and (5) create an annual report on the supply chain due diligence.[166]

2. *California*

In 2011, California became the first U.S. state to adopt legislation regarding conflict minerals.[167] The California law contains similar language to that of Section 1502 of Dodd-Frank[168] and mandates that a company may not bid or submit a proposal for a contract with a state agency without complying with Section 1502.[169] Importantly, the California legislation is conditioned upon Section 1502; that is, the California law requires that any company that bids for a contract with the state of California must be in compliance with Section 1502. Accordingly, if Section 1502 is repealed, or even not enforced by the SEC, the California provision also is rendered meaningless.

IV. LESSONS FROM THE SECTION 1502 EXPERIMENT: THE SOFTENING OF HARD LAW

As detailed above, Section 1502 can be understood as a hard law failure in many respects but provides important lessons for future legislative efforts in both securities law and public international law. This Part addresses the major lesson of Section 1502: The failure of Section 1502 as hard law sets up the imperative of soft law, or normative shifts, to accomplish the goals set out by the hard law. In other words, the phenomenon of Section 1502 is, in essence, the softening of hard law.

A. *The Dichotomy of Hard and Soft Law*

As described above, hard law is defined as the binding, codified law.[170] Soft law, on the other hand, consists of guiding principles or standards, often manifested in customs or normative behavioral constructs.[171] Soft law is often defined in terms of being the lack of hard law.[172] Soft law "is widely used

---

166. *See* Lone Wandahl Mouyal & Per Vestergaard Pedersen, *New E.U. Regulation on Conflict Minerals*, DLA PIPER (Sept. 13, 2017), https://www.dlapiper.com/en/denmark/insights/publications/2017/09/new-eu-regulation-on-conflict-minerals/.

167. S.B. 861, 2011-2012 Leg., Reg. Sess. (Cal. 2011); *see e.g.*, Laura Heaton, *California Passes First-Ever State Bill on Congo Conflict Minerals*, ENOUGH PROJECT: BLOG (Sept. 12, 2011), https://enoughproject.org/blog/california-passes-first-ever-state-bill-congo-conflict-minerals.

168. S.B. 861 § 1.

169. *Id.* § 2.

170. *See* Shaffer & Pollack, *supra* note 10, at 712–17.

171. *See* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 884 (2009) ("Soft law is nonbinding standards and principles of conduct.").

172. *See, e.g.*, Harri Kalimo & Tim Staal, *"Softness" in International Instruments—The Case of Transnational Corporations*, 41 SYRACUSE J. INT'L L. & COM. 257, 278 (2014) ("Clearly they

as a concept to denote all normative instruments that do not amount to classic 'hard law.'"[173] The literature on hard law and soft law is typically housed within the international relations canon.[174] This is the most logical home for the literature, given the lack of global jurisdiction for any particular hard law; thus, the role of soft law in international regulation is critical.

The majority of the literature on hard law and soft law considers the ossification of soft law; that is, soft law that can be turned into hard law through legal codification of standards or norms.[175] For example, an international body such as the Organization for Economic Cooperation and Development ("OECD") or the International Organization of Securities Commissions ("IOSCO") may pass non-binding soft law principles. When the soft law principles set forth by the international organizations are implemented into binding domestic law, soft law is thereby "hardened."[176] One of the clearest examples of this is the anti-bribery efforts put forth by the OECD that have been codified into a number of domestic regulations across the globe.[177] The hard law corollaries promulgated in the wake of the soft law of the OECD guidelines include the FCPA and the U.K. Bribery Act of 2010.[178]

In somewhat of a nuanced difference from the other literature discussing hard law and soft law, in this Article, I employ the dichotomy of hard law versus soft law in the domestic, rather than international, sense. The purpose of this domestic lens is to underscore that the domestic, codified hard law of Section 1502 is toothless and ineffectual, given that it does not include any penalty scheme.[179] As such, the only metric for its success lies in the arena of soft law and normative effects. Thus, as noted above, Section 1502 represents the example of the softening of hard law, a phenomenon that begs exploration and analysis.

---

are not 'hard law'; clearly they are not totally irrelevant, either, so *violà*: soft law it must be." (quoting Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC INT'L 381, 385 (1998))).

173. *Id.*

174. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 445 (2000); Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 744 (2014); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1825 (2002); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 86 (2002).

175. Karmel & Kelly, *supra* note 171, at 884 (describing when the SEC adopted rules set by IOSCO and other international organizations establishing non-binding guidance).

176. *Id.* at 905–28 (listing examples of the hardening of soft law, including international accounting standards pushed into hard domestic law, international anti-bribery standards used as the model for statutes similar to the FCPA, and standards for credit rating agencies).

177. OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 (1998), 2802 U.N.T.S. 225.

178. Bribery Act 2010, c. 23 (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/contents.

179. *See supra* Part II and accompanying notes.

B. *The Imperative of Soft Law Solutions*

As detailed in Part II, the structure of Section 1502 essentially sets it out as a soft law initiative disguised as hard law. There is no penalty for using conflict minerals; the only measure of changing corporate behavior is going to be through the pressure of naming and shaming that arises from consumers, NGOs, or others.[180] In this way, one can argue that the more press that Section 1502 can receive, the more successful it will be, even if that press is about its failure. In other words, the axiom that "all press is good press" is apt in this situation. Increased public consciousness and shifting public and corporate behavior is the best outcome of Section 1502.

Indeed, there already exists a fair amount of soft law related to conflict minerals. As early as 2003, the UN highlighted the illegal exploitation of the DRC and urged foreign buyers of minerals to review their supply chains.[181] Likewise, the OECD has issued guidance for due diligence related to supply chains.[182] The OECD framework for due diligence includes the five-step process that was subsequently adopted by the EU.[183] As definitional soft law, the OECD guidance makes clear that it "is the result of a collaborative initiative among governments, international [organizations], industry and civil society to promote accountability and transparency in the supply chain of minerals from conflict-affected and high-risk areas."[184]

In addition to OECD and UN soft law, in 2008, the Electronic Industry Citizenship Coalition ("EICC"), now referred to as the Responsible Business Alliance ("RBA"), founded the Conflict-Free Smelter Program, which consists of a list of conflict-free smelters and refiners.[185] EICC, which is comprised of electronics companies in the United States, teamed up with the Global e-Sustainability Initiative, its European counterpart, to establish the

180. *See supra* Section II.C.

181. Rep. of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of The Democratic Republic of Congo (2003), transmitted by Letter Dated 23 October 2003 from the Secretary-General to the President of the Security Council, U.N. Doc S/2003/1027 (Oct. 23, 2003); *see also* Chang-hsien Tsai & Yen-nung Wu, *What Conflict Minerals Rules Tell Us About the Legal Transplantation of Corporate Social Responsibility Standards Without the State: From the United Nations to the United States to Taiwan*, 38 NW. J. INT'L L. & BUS. 233, 252 (2018).

182. ORG. FOR ECON. COOPERATION & DEV. [OECD], DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2d ed. 2013), https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf.

183. *Id.*; *see supra* note 166 and accompanying text.

184. OECD, *supra* note 182, at 12.

185. *See generally* RESPONSIBLE BUS. ALL., http://www.responsiblebusiness.org/ (last visited Jan. 13, 2019). The Conflict Free Smelter Program is now referred to as the Responsible Minerals Initiative ("RMI").

audited database of conflict-free smelters.[186] The EICC is an example of industry regulating itself. The members of the EICC have to include in their codes of conduct that they will refrain from using conflict minerals.[187] Interestingly, this initiative predates Section 1502 and is an example of trade associations and private actors regulating themselves in order to create transparency in their international supply chains.

C. Potential Pitfalls of Soft Law Solutions

The potential weaknesses associated with only using soft law to sanction certain behavior are the same weaknesses attributed to a toothless hard law. That is, there is a lack of accountability of those regulated when there are no enforcement mechanisms in place, nor any penalty associated with continuing the sanctioned behavior.[188] Moreover, there can be a significant issue with the legitimacy of soft law, which goes hand in hand with the lack of accountability and transparency within companies.[189] Professors Roberta Karmel and Claire Kelly detail the issues surrounding legitimacy of soft law measures and stated, "In addition to normative considerations, legitimacy matters because it affects compliance."[190]

Nevertheless, the pitfalls associated with soft law are definitional; meaning, the very fact that soft law is comprised of non-binding principles and guidelines underscores its limitations. However, the strides made by soft law in the realm of conflict minerals and supply chain transparency likely will be the legacy of Section 1502.

---

186. *Id.*; *see* Leah Butler, *Responsible Minerals Initiative*, RESPONSIBLE BUS. ALL., http://www.responsiblebusiness.org/initiatives/rmi/ (last visited Oct. 8, 2018) ("More than 360 companies from seven different industries participate in the RMI . . . .").

187. The codes of conduct suggestions from the RBA include the following language:

> Participants shall have a policy to reasonably assure that the tantalum, tin, tungsten and gold in the products they manufacture does not directly or indirectly finance or benefit armed groups that are perpetrators of serious human rights abuses in the [DRC] or an adjoining country. Participants shall exercise due diligence on the source and chain of custody of these minerals and make their due diligence measures available to customers upon customer request.

RESPONSIBLE BUS. ALL., RESPONSIBLE BUSINESS ALLIANCE CODE OF CONDUCT 11 (2018), http://www.responsiblebusiness.org/media/docs/RBACodeofConduct6.0_English.pdf.

188. *See* Irène Leibbrand, Conflict Minerals in the Global Capitalist World: Chances for Challenging Initiatives 1 (Oct. 31, 2016) (unpublished M.A. thesis, Leiden University) (on file with author) ("[T]he problem of accountability is not easy to solve. The problem is complex and multifaceted, comes in many forms, and yet has massive outcomes. A more political, more translocal and a more historically sensitive perspective than has hitherto generally been taken will help to promote progress in research and action. The difficulty is that we should be looking at the larger picture and underlying processes at the same time . . . ." (quoting MAYKE KAAG & ANNELIES ZOOMERS, THE GLOBAL LAND GRAB: BEYOND THE HYPE 215 (2014))).

189. *See* Karmel & Kelly, *supra* note 171, at 930–35 (explaining the legitimacy problem associated with soft law measures).

190. *Id.* at 931.

V. CONCLUSION

Section 1502 as hard law is deeply flawed and, thereby, a legislative failure. Nevertheless, when seen as soft law, or simply a measure to enact normative changes in corporate and consumer behavior, there may be positive takeaways from this conflict minerals experiment.

Although the jury may still be out on whether there will be a significant ripple effect from Section 1502 that will move the needle towards reduction of the conflict mineral trade, and optimistically a reduction of violence in the DRC, it is nevertheless worth considering how to leverage broadly the lessons of Section 1502. There likely will be more written about the failure of Section 1502 than any success that can be attributed to the provision, but I contend that the success of Section 1502 may exist because of its failure. That is, public awareness of Section 1502 and, by extension, of the crisis in DRC hopefully will continue to motivate consumers, corporations, legislators, and others to fashion more effective solutions in the form of corporate social responsibility guidelines or otherwise. This lesson suggests that there can be normative and societal benefits even in the wake of a hard law failure.