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REIMAGINING CORPORATE ACCOUNTABILITY:
MOVING BEYOND HUMAN RIGHTS DUE
DILIGENCE*

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The global movement towards the adoption of human rights due diligence laws is gaining momentum. Starting in France, moving to Germany, and now at the European Union level, lawmakers are heeding the call to mandate that companies conduct human rights due diligence throughout their global operations. The situation in the United States is very different: although ESG (environmental, social, and governance) has received increasing national attention, there is currently no law that mandates corporate human rights due diligence.

Recognizing this disparity and acknowledging the specific context for ESG-related issues in the United States, we consider how the United States could provide clarity and direction to corporate America and global leadership on business and human rights. Our assessment reveals that while due diligence models have rapidly become the global standard for increasing corporate human rights accountability, there is concern that the legislative frameworks being adopted in Europe fail to live up to their promise.

We assess a bold and novel legislative proposition for the United States: a human rights due diligence law that is patterned after the influential anti-bribery statute, the Foreign Corrupt Practices Act. The proposal—which

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we coin as the due diligence + model—provides a unique response to corporate human rights abuses by combining an outright prohibition on certain serious human rights violations with due diligence and record-keeping obligations. We offer a first-of-its-kind analysis that provides crucial insight to lawmakers in the United States and around the world as they seek to craft new regulatory regimes for corporate accountability.

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INTRODUCTION: A TALE OF TWO SCANDALS

On September 27, 2018, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced the settlement of charges for violating the Foreign

Corrupt Practices Act (FCPA) against a Brazilian company.¹ The resulting settlement for \$850 million is one of the highest settlements in the history of FCPA enforcement.²

Just four months earlier, there was another corporate scandal in Brazil: several fishermen were threatened and intimidated by oil and gas companies.³ The corporate campaign was allegedly in retaliation⁴ for the fishermen's ongoing protests of business and environmental practices in the area that had previously (according to the protests' leader) led to "a number of threats to his life."⁵

1. Press Release, U.S. Dep't of Just., *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More than \$850 Million for FCPA Violations* (Sept. 27, 2018), <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>.

2. Richard Cassin, *Petrobras Reaches 1.78 Billion FCPA Resolution*, THE FCPA BLOG (Sept. 27, 2018), <https://fcpablog.com/2018/09/27/petrobras-reaches-178-billion-fcpa-resolution/> (noting that "Based on \$1.78 billion in total penalties and disgorgement assessed against Petrobras in the DOJ's NPA and the SEC's administrative order, this is the biggest FCPA enforcement action.").

3. *Alexandre Anderson Associação dos Homens do Mar – AHOMAR*, BUS. & HUM. RTS. RES. CTR. (May 21, 2018), <https://www.business-humanrights.org/en/latest-news/alexandre-anderson-associa%C3%A7%C3%A3o-dos-homens-do-mar-ahomar/>.

4. *Id.*

5. *See Case History: Alexandre Anderson*, FRONT LINE DEFENDERS, <https://www.frontlinedefenders.org/en/case/case-history-alexandre-anderson>. This is not the first time that Mr. Anderson—the protest's leader—has allegedly been attacked by Petrobras. For instance, in 2013 Mr. Anderson's home and office were ransacked, leading Mr. Anderson to flee the area and Brazilian civil society groups to write open letters to the National Programme for the Protection of Human Rights Defenders. *See id.* As with many allegations of this sort, however, the human rights defenders could not directly link the intimidation directly to the companies. The Business and Human Rights Resource Centre notes: "It is not clear that the threats are related to or coming from the company or its employees." *See supra* note 3. This is not surprising in the business and human rights space. Human rights defenders frequently claim that corporations use intermediaries and private security to engage in intimidation and harassment techniques, making it difficult to mount campaigns against the companies directly. *See, e.g.*, INST. FOR HUM. RTS. AND BUS. ET AL., *HUMAN RIGHTS DEFENDERS AND BUSINESS: SEARCHING FOR COMMON GROUND* 40 (Occasional Paper Series, Paper 4, Dec. 2015), <https://www.ihrb.org/pdf/2015-12-Human-Rights-Defenders-and-Business.pdf> (discussing corporations' use of private security contractors in connection with the mining of "blood diamonds"). Other forms of intimidation come from the government itself, often time with the alleged support of the companies. *Id.* at 10 (discussing cases of human rights abuses at the hands of the state

Taken on their own, neither of these scandals are unusual. Accusations of such corporate misconduct are unfortunately routine. What makes these two scandals particularly significant is that they both involve the same company: Petrobras, a Brazilian oil and gas company. These tales are striking for another reason as well. In the instance where Petrobras was found to have bribed Brazilian politicians, there was a clear pathway to corporate accountability in the United States: The Foreign Corrupt Practices Act.⁶ As a result, the United States' full enforcement powers could come to bear on the company when it acted corruptly. In contrast, there was no means of holding Petrobras accountable under U.S. law for the human rights abuses alleged by the fishermen. The United States has no commensurate framework to hold U.S. (and U.S.-listed) corporations accountable for their human rights abuses overseas.⁷

The interaction with Petrobras and the fishermen is just one example of corporate scandals⁸ that take place in the ab-

and stating that “[i]n one case, a company provided tools that enabled the state to violate human rights.”).

6. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. Because Petrobras' shares are traded on the U.S. securities markets, they are subject to liability under the FCPA (a U.S. law that prohibits any corporation that trades on the U.S. securities markets from bribing foreign officials). Even though Petrobras is a foreign company, its shares are traded on the New York Stock Exchange as American Depositary Receipts (ADRs). As such, they are subject to the same securities' regulatory framework as U.S. companies that have registered their shares with the SEC and that are trading on U.S. exchanges.

7. While the Alien Tort Statute may be one avenue, it is much reduced as a pathway for corporate accountability. See 28 U.S.C. §1350; Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519 (2021); Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, in CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS 351 (Ekaterina Aristova & Uglješa Grušić eds., 2022).

8. There are many other examples of corporations involved in the harassment of human rights defenders. See, e.g., *Silencing the Critics: How Big Polluters Try to Paralyse Environmental and Human Rights Advocacy Through Courts*, BUS. & HUM. RTS. RES. CTR. (Sep. 30, 2019), <https://www.business-humanrights.org/en/from-us/briefings/silencing-the-critics-how-big-polluters-try-to-paralyse-environmental-and-human-rights-advocacy-through-the-courts/> (stating that, “[s]ince 2015, [the Centre] has tracked 1,852 killings, beatings, threats and other forms of intimidation against indigenous and

sence of a comprehensive framework to ensure that corporations engage with human rights issues from the inside out.⁹ In response to this and other pressures,¹⁰ movements are underway—particularly in Europe—to enact laws that hold corporations accountable under a mandatory human rights due dili-

community leaders, . . . and civil society groups focused on business-related issues. Increasingly, companies turn to the courts to bring lawsuits against such defenders with the aim of silencing or intimidating them and stopping their work.”). One of the most documented ways that businesses intimidate human rights defenders is using Strategic Lawsuits Against Public Participation (SLAPP) lawsuits, which are intended to silence human rights defenders who speak out against businesses’ negative human rights impacts. For a discussion of the ethics behind SLAPP lawsuits, see Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 716 (2003). Similarly, accusations of corporations being corrupt are routine. For instance, in 2020 there was a record \$2.78 billion in fines levied against corporations by the SEC and DOJ. See JONES DAY, WHITE PAPER: FCPA 2020 YEAR IN REVIEW 1 (2021), <https://www.jonesday.com/en/insights/2021/01/fcpa-2020-year-in-review>. From 2016 through 2020, these two agencies have brought a total of 78 cases against businesses for violations of the FCPA. *Id.* at 2.

9. Examples of U.S. corporate human rights failings abound. For instance, the Australian Strategic Policy Institute published a report documenting U.S. brands including Amazon, Gap, Nike, Abercrombie & Fitch, Calvin Klein, Carter’s, L.L. Bean, Polo Ralph Lauren, and Victoria’s Secret as directly or indirectly benefiting from forced Uyghur labor, as part of the Chinese government-sponsored oppression of the Uyghur people. See AUSTRALIAN STRATEGIC POL’Y INST., REPORT NO. 26/2020, UYGHURS FOR SALE (2020), <https://www.aspi.org.au/report/uyghurs-sale>. Similarly, Facebook was used as a tool in the Myanmar government’s campaign of ethnic cleansing against the Rohingya Muslim minority. See, e.g., Dan Milmo, *Rohingya Sue Facebook for £150bn over Myanmar Genocide*, THE GUARDIAN, Dec. 6, 2021, <https://www.theguardian.com/technology/2021/dec/06/rohingya-sue-facebook-myanmar-genocide-us-uk-legal-action-social-media-violence>.

10. Specifically, the U.N. Human Rights Council’s adoption of the Guiding Principles on Business and Human Rights—a soft law initiative that was widely lauded as a pivotal moment for the business and human rights agenda. John Ruggie (Special Representative of the Secretary-General), *Guiding Principles of Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *UNGPs*]. Since the adoption of the Guiding Principles, scholars have spent a significant amount of time analyzing their benefits and limitations. See, e.g., Linda Reif, *The UN Guiding Principles on Business and Human Rights and Networked Governance: Improving the Role of Human Rights Ombudsman Institutions as National Remedies*, 17 OXFORD UNIV. HUM. RTS L. REV. 603 (2017); Björn Fasterling & G. Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 J. BUS. ETHICS 799 (2013).

gence (mHRDD) framework. Starting in France,¹¹ before moving to the Netherlands,¹² Germany,¹³ and Norway,¹⁴ and at the European Union level,¹⁵ lawmakers are accepting the need to create a system that requires companies to conduct human rights due diligence throughout their global operations.

The situation in the United States is very different. There is no legislative framework ensuring that U.S. companies respect human rights throughout their global operations.¹⁶

11. Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre [Law 2017-399 of March 27, 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter *Loi de Vigilance*].

12. Wet Zorgplicht Kinderarbeid 24 Oktober 2019 [Child Labor Duty of Care Act], Stb. 2019, 401 (2019) (Neth.) [hereinafter *Dutch Child Labor Due Diligence Law*]. This is likely to be superseded by a human rights due diligence law that is not focused solely on the issue of child labor. See OECD Watch (@OECDwatch), TWITTER (Dec. 3, 2021, 4:11 AM), <https://twitter.com/OECDwatch/status/1466696684214304781>.

13. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021. BGBl. I at 2959 (Ger.). Official English translation at https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 [hereinafter *Act on Corporate Due Diligence Obligations in Supply Chains*]. See Markus Krajewski, Kristel Tonstad & Franziska Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550 (2021).

14. Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold, 18. Juni 2021. [hereinafter *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions*]. Unofficial English translation at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=the%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent>.

15. *Commissioner Reynders Announces EU Corporate Due Diligence Legislation*, Eur. Coalition for Corp. Just., Apr. 30, 2020, <https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation>. In March 2021, the European Parliament adopted a report which includes the text of a proposed Directive. *Report of the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, at 79 (Feb. 11, 2021), https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf.

16. There are a number of legislative proposals, mainly for disclosure laws, but none has been adopted yet. See MICHAEL R. LITTENBERG, EMILY J. OLDSHUE, ANNE-MARIE L. BELIVEAU & NELLIE V. BINDER, *ROPES AND GRAY, ESG LEGISLATION: TEN BILLS FOR PUBLIC COMPANIES TO WATCH IN 2021*

While some limited legislative efforts have been made within a disclosure paradigm, these laws fall short of the mHRDD standard in many ways. Specifically, their reliance on a disclosure-based framework means that they lack the rigor that many attribute to the mHRDD framework.¹⁷ As such, the mHRDD framework would appear, at least at first glance, to be the logical next step for the United States to adopt in preventing corporate human rights violations and thereby fulfilling its international human rights obligations.¹⁸ Indeed, the mHRDD framework seems largely to have been accepted as the gold standard for advancing the corporate responsibility to respect human rights.¹⁹

(2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/11/ESG-Legislation-Ten-Bills-for-Public-Companies-to-Watch-in-2021>.

17. While disclosure was initially viewed as a low-cost point of entry for businesses to assess their human rights impacts, scholars quickly realized that disclosure, by itself, wasn't enough. See Barnali Choudhury, *Social Disclosure*, 13 BERKLEY BUS. L.J. 183 (2016) (arguing that disclosure regimes have a limited place as a supplementary form of enforcement as long as they are narrow and specific); Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530 (2017) [hereinafter Martin, *Hiding in the Light*] (arguing that disclosure laws can be counter-productive to the business and human rights regime).

18. The business and human rights agenda has emerged as a multi-faceted approach to minimizing negative human rights impacts that corporations can have on affected communities and individuals. We return to this framework in more detail in Part I, *infra*. For additional context on the BHR agenda, the Three Pillar Framework, and the UNGPs, see generally Jena Martin, 'The End of the Beginning?': A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) (written as Jena Martin Amerson) [hereinafter Martin, *End of the Beginning*] (discussing the context surrounding the nascence of the UN's business and human rights agenda).

19. See *infra* Part III, for a discussion of the emergence of the mHRDD frameworks in jurisdictions around the world. In addition, many commentators have welcomed the advent of mHRDD frameworks as a significant advancement of the BHR agenda. See, e.g., Eric DeBrabendere & Marys Hazelzet, *Corporate Responsibility and Human Rights: Navigating Between International, Domestic and Self-Regulation*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT 221 (Yannick Radi ed., 2018); Jaako Salminen & Mikko Rajavuori, *Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis*, 26 MAASTRICHT J. EUR. & COMP. L. 602, 605 (2019); Kevin Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNAT'L LEGAL THEORY 364, 371 (2014); Sarianna Lundan & Peter Muchlinski, *Human Rights Due Diligence in Global Value Chains*, in NEW POLICY CHALLENGES FOR EUROPEAN MULTATIONALS 181, 186 (Rob Van

Unfortunately, it isn't enough. Although human rights due diligence is arguably an advancement over some of the more laissez-faire disclosure frameworks, by having corporate accountability solely be determined by corporate *actions* rather than corporate *outcomes*, this framework also runs the risk of becoming ineffective.²⁰

One potential avenue, which has so far *not* been discussed in the literature,²¹ is a framework that combines a mandatory human rights due diligence framework with a prohibitive framework—one that focuses on outcomes and, in some instances, acts as an outright ban on the most egregious corporate conduct within the area of human rights. A framework such as this, (which we label here as mandatory human rights due diligence plus—or mHRDD+) combines the best of what the typical mHRDD framework has to offer with the robust regimentation of a prohibitive framework.

This Article advocates for the adoption of a mHRDD+ model in U.S. law. By drawing on examples from other countries where a mHRDD model is being proposed or has been adopted, as well as providing historical examples from U.S. securities laws and regulatory theory, we endorse a bold legislative proposal for the United States that would provide a clear and principled framework on human rights responsibilities for businesses. This approach would enable companies to under-

Tulder, Alain Verbeke & Liviu Voinea eds., 2012); Michael Rawling, *Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment*, 26 *ECON. & LAB. RELS. REV.* 660, 673 (2015). However, some significant critiques of this model have also emerged. See, e.g., Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct*, 14(2) *UTRECHT L. REV.* 22 (2018); Caroline Omari Lichuma, *(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, 81 *HEIDELBERG J. INT'L L.* 497, 500 (2021).

20. See discussion *infra* Part III.

21. See Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 *B.U. L. REV.* 1359 (2021) (discussing the FCPA as a model for enforcement of human rights norms against corporations as an alternative to Alien Tort Statute litigation against corporations rather than as potentially part of a global movement toward the adoption of mHRDD); Irene Pietropaoli et al., *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms*, *BRITISH INST. OF INT'L & COMP. L.* (2020), https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf (a report on introducing a prohibitive framework in the United Kingdom).

stand what is expected of them and to direct their compliance efforts efficiently towards the mHRDD+ standard. In this way, we argue, the United States could assume its rightful place as a champion of business and human rights (BHR),²² akin to the place it has assumed with respect to bribery and corruption, using a structural framework that is already familiar to companies whose securities are traded in the United States.

This Article proceeds in five parts. In Part I, we make the case for the United States fulfilling its obligation (under international human rights law) to protect individuals and communities who have been harmed by businesses. Specifically, in this Part we discuss the impact of the U.N. Guiding Principles on Business and Human Rights (UNGPs or Guiding Principles), arguably the most authoritative statement on the subject, and outline how states' and civil society's responses to the call to action of the UNGPs have led to a groundswell of support that the United States can no longer ignore. Then, in Part II, we turn to what the United States would need to do to meet its obligations under the UNGPs. Specifically, we discuss the disclosure model—the predominant model that has been used in the United States to address BHR issues²³—and which has been developed with spotty implementation and mixed success. In this Part, we also demonstrate why the disclosure model in general falls short and discuss why—despite this—it has been so widely adopted. In Part III, we examine the mandatory human rights due diligence (or mHRDD) model that has been adopted in civil law countries in Europe. Here, we discuss the potential advantages of this model over a basic disclosure framework and analyze why it was met with so much

22. To be sure, not everyone agrees that the United States ever had a rightful place in the BHR framework. For instance, scholars from the global south often argue for a more nuanced non-hegemonic approach to BHR. See, e.g., Lichuma, *supra* note 19. However, based on our arguments developed in Part IV, *infra*, we stand by our assessment.

23. While disclosure is the predominant model for addressing BHR issues within the United States, it is not the only one. For instance, the U.S. Customs and Border Protection has used its authority under the Tariff Act to combat coercive labor practices in supply claims. For an in-depth analysis of their work, see THE HUM. TRAFFICKING LEGAL CTR., IMPORTING FREEDOM: USING THE TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS (2020), https://www.htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf.

acclaim (by government *and* civil society) while ultimately falling short of many of the key goals of the BHR framework. In Part IV, we consider the prohibitive conduct framework—specifically as used in the United States within the context of the FCPA, arguably to great effect. In this Part we also discuss why combining these two frameworks (namely within what we label as a mHRDD+ model) offers many of the advantages of both and should be used as the new gold standard.²⁴ Finally, in Part V, using a model developed by civil society organization International Corporate Accountability Roundtable (ICAR) as a case study, we analyze the strengths and weaknesses of their proposal—a FCPA for Human Rights or FCPA-HR law—and show the value of an mHRDD+ framework for business, government, and civil society in advancing the BHR agenda in the United States.

Assuming that the underlying allegations against Petrobras are true, the timing of these events and the overlapping allegations regarding inappropriate conduct with governmental officials—the bribing of officials in one instance, and negative human rights impacts in response to protests in the other—it seems reasonable to consider that perhaps the same underlying corporate culture that led to the corruption and bribery could also be responsible for negative human rights impacts.²⁵ As such, it also seems reasonable (and appropriate) for us to develop a framework for corporate human rights abuses that is modeled after (among other things) the FCPA. In short, the time for the mHRDD+ standard has come.²⁶

24. See *infra* Part IV for a discussion of the regulatory theory about why this is so.

25. See *infra* Part V for a discussion of the link between corruption and human rights abuses.

26. For a discussion of the role of corporate culture within the context of BHR, see Jena Martin, *What's in a Name? Transnational Corporations as Bystanders under International Law*, 85 ST. JOHN'S L. REV. 39 (2011) (written as Jena Martin Amerson) [hereinafter Martin, *What's in a Name*] (discussing the impact of internal culture on the framework of transnational corporations as bystanders under international law).

I.

THE UNITED STATES FALLS SHORT ON MEETING ITS HUMAN RIGHTS OBLIGATIONS

Examples of U.S. corporate human rights failings abound.²⁷ Particularly in the absence of a comprehensive framework to ensure that corporations engage with human rights issues from the inside out, victims of human rights abuse overseas are left with few options for remedy in the United States.²⁸ In response to this (and similar situations around the world), the United Nations has adopted a human rights due diligence model as the centerpiece of its BHR work. The U.N. Guiding Principles on Business and Human Rights (the UNGPs or Guiding Principles),²⁹ adopted unanimously by the U.N. Human Rights Council in 2011, is the expression of this work and the key international soft law framework on business and human rights.³⁰ The UNGPs are organized into three pillars: the state's duty to protect human rights,³¹ the corporation's responsibility to respect human rights,³² and victims' access to an effective remedy.³³ Each pillar contains foundational principles and operational principles. There is a commentary to each principle. Pillar I, drawing on international human rights law (IHRL), recognizes states as the primary duty bearers for preventing adverse human rights impacts of businesses.³⁴ Under IHRL, states must take positive steps to ensure that the rights of persons within their jurisdiction are protected from activities of non-state actors harmful to human rights, including businesses.³⁵ As the state duty to

27. For examples, see *supra* note 9.

28. See generally Beth Stephens, *Extraterritoriality and Human Rights after Kiobel*, 28 MD. J. INT'L L. 256 (2013) (discussing the extraterritoriality challenges for multinational corporations in particular after the Supreme Court case of *Kiobel*).

29. UNGPs, *supra* note 10.

30. *Id.*

31. *Id.* at 4 (identifying the three pillars on which the "Protect, Respect, and Remedy" framework rests).

32. *Id.*

33. *Id.*

34. *Id.*

35. U.N. Hum. Rts. Comm. (HRC), Gen. Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31]; U.N. Comm. on Econ., Soc. and Cultural Rts.

protect is a standard of conduct, it is up to each state to determine the steps it must take to fulfil its duty to protect.³⁶ Generally, the UNGPs do not contain extraterritorial legal obligations—obligations of the home state (the state where the business is legally located) to prevent and redress activities that happen in the host state (the state where the business is engaged in operations/activities).³⁷ However, within the broader framework of IHRL, the Committee on Economic, Social and Cultural Rights has taken a more expansive approach, stating in a General Comment that there *is* an expectation on states to:

take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.³⁸

The operational principles of Pillar I tell states to encourage, and where appropriate require, business enterprises to communicate how they address their human rights im-

(CESCR), Gen. Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 14, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter General Comment 24]; U.N. Hum. Rts. Council, Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework – Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 8, 13, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) [hereinafter HRC, Operationalizing the Framework].

36. General Comment 31, *supra* note 35, ¶ 13; HRC, Operationalizing the Framework, *supra* note 35, ¶ 14. See Anil Yilmaz Vastardis & Rachel Chambers, *UN Guiding Principle Number 3*, in *THE RESEARCH HANDBOOK ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (Barnali Choudhury, ed., forthcoming 2022) (on file with author).

37. UNGPs, *supra* note 10, ¶ 26 and Commentary.

38. General Comment 24, *supra* note 35, ¶ 30. Note that the United States has not ratified ICESCR. The General Comment explains when states parties may exercise control: “Consistent with the admissible scope of jurisdiction under general international law, states may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration, or principal place of business on their national territory.” *Id.* at ¶ 31.

pacts.³⁹ They also have a catch-all provision telling states to enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.⁴⁰ Their commentary tells states to provide businesses with guidance on human rights due diligence (HRDD), but otherwise they do not compel states to mandate companies to conduct HRDD.⁴¹ The U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (the Working Group)⁴² has issued guidance to help states implement their obligations set out under the UNGPs, specifically with regard to the development of National Action Plans.⁴³ In its guidance, the Working Group has indicated that HRDD should be the foundational principle guiding governments on the issue of business and human rights.⁴⁴

Under Pillar II (the corporation's responsibility to respect human rights), business actors are expected to "operationalize" their responsibility⁴⁵ to respect human rights through re-

39. *UNGPs*, *supra* note 10, ¶ 3(d).

40. U.N., Off. of High Comm'r, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, at Principle 3(a), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter U.N., Implementing the Framework].

41. *Id.* at Principle 3.

42. This Working Group was established by the Human Rights Council in 2011 with a mandate that includes promoting the UNGPs and good practices and lessons learnt on the UNGPs' implementation. U.N. Working Grp. on Bus. and Hum. Rts., U.N. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/special-procedures/wg-business> (last visited Mar. 31, 2022).

43. U.N. WORKING GRP. ON BUS. AND HUM. RTS., GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS (Nov. 2016), https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

44. *Id.* at ii.

45. As the foundational document for the UNGPs – the Three Pillar Framework – makes clear, the responsibility held by corporations is not a legal one under international law. *See* John Ruggie (Special Representative to the UN Human Rights Council), The UN "Protect, Respect, and Remedy" Framework for Business and Human Rights, U.N. Doc. at 2, (Sep. 2010), <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> (stating that "the term 'responsibility' rather than 'duty' is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on corporations").

porting processes and HRDD.⁴⁶ Under the reporting processes, businesses are expected to communicate the steps they take to address human rights impacts by publishing sufficiently detailed information on any impacts and steps taken to prevent, mitigate, and remediate them, in appropriate form and with appropriate frequency.⁴⁷ The concept of HRDD supplements the reporting processes just described. According to the UNGPs, HRDD entails a business identifying whether it has caused or contributed to adverse human rights impacts by integrating and acting upon the findings, tracking responses, and remediating the harm if it has caused or contributed to an adverse impact.⁴⁸

The model for implementing HRDD has been widely accepted⁴⁹ and there are movements underway—particularly in Europe—to place this soft law on a firmer footing. Starting in France,⁵⁰ before moving to the Netherlands,⁵¹ Germany,⁵² Norway,⁵³ and the European Union more broadly,⁵⁴ lawmakers are accepting the need to create a system that requires companies to conduct HRDD throughout their global operations.

The situation in the United States is very different. There is no legislative framework ensuring that U.S. companies re-

46. U.N., Implementing the Framework, *supra* note 40, at Principles 16–24 (these are the “operational principles” in relation to the “corporate responsibility to respect” pillar).

47. *Id.* at Principle 17.

48. *Id.*

49. See, e.g., Off. of High Comm’r, *The Corporate Right to Respect Human Rights: An Interpretive Guide*, at 1, U.N. Doc. HR/PUB/12/02 (2012), https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf (discussing the Guiding Principles and, with it, the human rights due diligence as “the global standard of practice”).

50. Loi de Vigilance, *supra* note 11.

51. Dutch Child Labor Due Diligence Law, *supra* note 12. This is likely to be superseded by a human rights due diligence law that is not focused solely on the issue of child labor. See OECD Watch, *supra* note 12.

52. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13. See Krajewski, Tonstad & Wohltmann, *supra* note 13.

53. Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

54. EUR. COALITION FOR CORP. JUST., *supra* note 15.

spect human rights throughout their global operations,⁵⁵ despite the fact that the United States was a member of the Human Rights Council that adopted⁵⁶ the Guiding Principles.⁵⁷ Domestic follow-up to the UNGPs has been stilted, as demonstrated by a lackluster National Action Plan on Responsible Business Conduct of 2016⁵⁸ and the absence of further legislation.⁵⁹ While some steps have been taken on the subnational level (mainly in the state of California),⁶⁰ most of these

55. There are a number of legislative proposals, mainly for disclosure laws, but none has been adopted yet. See LITTENBERG, OLDSHUE, BELIVEAU & BINDER, *supra* note 16.

56. See List of Past Members of the Human Rights Council, U.N. HUM. RTS. COUN., <https://www.ohchr.org/EN/HRBodies/HRC/Pages/PastMembers.aspx>.

57. U.N., Implementing the Framework, *supra* note 40.

58. U.S. DEP'T OF STATE, RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2016), <https://2009-2017.state.gov/documents/organization/265918.pdf>. The plan was rushed through in the final weeks of the Obama Administration. The Biden Administration has announced a consultation for a new plan. See Anthony J. Blinken, U.S. Sec'y of State, 10th Anniversary of the UN Guiding Principles on Business and Human Rights (June 16, 2021), <https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/>. National Action Plans are frameworks developed by states to help them implement various international obligations. The U.N. Working Group on Business and Human Rights strongly encourages all states to develop, enact and update a national action plan on business and human rights as part of the state responsibility to disseminate and implement the UNGPs, *supra* note 42. See *United States*, NAT'L ACTION PLANS ON BUS. AND HUM. RTS., <https://globalnaps.org/country/usa/> (last visited Apr. 3, 2022); see also INT'L CORP. ACCOUNTABILITY ROUNDTABLE, ASSESSMENT OF THE NATIONAL ACTION PLAN (NAP) ON BUSINESS AND HUMAN RIGHTS OF THE UNITED STATES (2017), <https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-usa.pdf>.

59. Both the relevant laws in force, the California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (2012), and sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), predate the adoption on the UNGPs. For recent federal initiatives, see U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *U.S. Government Efforts to Advance Business and Human Rights in 2020* (Jan. 11, 2021), <https://www.state.gov/u-s-government-efforts-to-advance-business-and-human-rights-in-2020/>. The main actions are Withhold Release Orders under section 307 of the Tariff Act of 1930 preventing import of certain products made with forced labor and government advisories. 19 U.S.C. § 1307 (2016).

60. For instance, the California Transparency in Supply Chains Act, requiring companies to report what (if any) steps they have taken to address trafficking in their efforts. CAL. CIV. CODE § 1714.43 (2012). For a critique

initiatives represent minimal efforts to comply with a state's Pillar I obligations under the UNGPs.⁶¹ The result is that the United States is not providing U.S. and foreign corporations who choose to access U.S. securities markets with clear rules for when they will be held accountable for complicity in human rights violations—nor does the United States have a reputation as a global leader in the fight against serious human rights violations by corporate actors, as it does with respect to the fight against bribery and corruption. In the next part we will examine U.S. law as it currently stands, before showing (in Part III) how European states are taking on a global leadership role in legislating on business and human rights.⁶²

II.

LIMITS OF THE DISCLOSURE MODEL

For those wishing to address the negative human rights impacts of corporations, few options are available within the United States.⁶³ At the subnational level, only California has taken strides to directly regulate business on any facet of extra-territorial human rights abuses.⁶⁴ Specifically, California has passed the Transparency in Supply Chains Act (TSCA), which requires corporations to report on what steps (if any) they have taken to identify and address forced labor and human

regarding the disclosure-based model, see *infra* Part II. See also Martin, *Hiding in the Light*, *supra* note 17.

61. *Id.* at 566–78.

62. Despite lagging, the opportunity remains for the United States to leapfrog over the European legislative initiatives and build on its strength in combating bribery and corruption to forge a new role. For further discussion on this possibility, see *infra* Part IV.

63. Arguably, the most active government enforcement of a law touching on corporate human rights impacts in recent years has been through the use of Withhold Release Orders which implements section 307 of the Tariff Act of 1930. See THE HUM. TRAFFICKING LEGAL CTR., *supra* note 23, at 3, 26; see also David Hess, *Modern Slavery in Global Supply Chains: Towards a Legislative Solution*, CORNELL INT'L L.J. (forthcoming 2022).

64. On January 7, 2022, a new bill in New York state was presented, initially drafted in October 2021, that would require fashion companies to disclose information on human rights and environmental impacts throughout their supply chains if passed into law. See Fashion Sustainability and Social Accountability Act, Assemb. 8352, 2021–22 Reg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/A8352>.

trafficking within their supply chains.⁶⁵ Although there is some movement on these issues within the state system—for instance the Uniform Law Commission has formed a committee to examine the feasibility of a uniform law that would address coercive labor practices in supply chains⁶⁶—California remains the pioneer in its efforts to regulate businesses in this way. At the federal level, the Dodd–Frank Act required companies to disclose non-financial information that also impacts human rights.⁶⁷ Unfortunately, as the next section will demonstrate, both the California and federal initiatives on this front have been viewed by many as a failed attempt to advance efforts to mitigate negative human rights impacts precisely because of their disclosure-based framework.⁶⁸

A. Overview of the U.S. Disclosure Framework

There are currently only two legal frameworks in the United States that require corporations to disclose human rights impacts: one under California law and two under federal law. In 2010, California became the largest (and, to date, the only) state within the United States to take on the role of corporate involvement with coercive labor practices overseas when it passed the TSCA.⁶⁹

Also in 2010, the U.S. Congress enacted the Dodd–Frank Act. While the law was predominantly enacted in response to the financial crisis of 2008, there were two provisions within the bill that had a direct effect on corporate human rights reporting.⁷⁰ The first, the Conflict Mineral Rule (promulgated

65. CAL. CIV. CODE. § 1714.43.

66. See *Supply Chain Transparency Committee*, UNIFORM LAW COMMISSION (2020), <https://www.uniformlaws.org/committees/community-home?CommunityKey=8b5ff376-8537-41c9-8dfb-928fd271d406> (noting the committee’s charge to “study the need for and feasibility of state legislation dealing with transparency in the context of international supply chains” and determine if “reporting requirements for business with respect to human trafficking, child labor, or substandard production and facility standards is desirable and feasible.”)

67. Dodd–Frank Wall Street Reform and Consumer Protection Act, PUB. L. NO. 111-203, §§ 1502, 1504, 124 Stat. 1376, 2213–18, 2220–22 (2010) (codified as amended in scattered sections of U.S.C.)

68. See Martin, *Hiding in the Light*, *supra* note 17, at 578.

69. CAL. CIV. CODE. § 1714.43.

70. Dodd–Frank Wall Street Reform and Consumer Protection Act, PUB. L. NO. 111-203, §§ 1502, 1504 (2010).

pursuant to § 1502 of Dodd–Frank), was designed to prevent money from conflict minerals⁷¹ from being used to finance human rights violations in the Democratic Republic of the Congo (DRC). The second, the Resource Extraction Payment Rule (brought under § 1504 of the Dodd–Frank Act), was an attempt to “prevent the exploitation of citizens and the enrichment of corrupt government officials in resource-rich states.”⁷²

Both the California⁷³ and the federal framework rely on a *comply or explain* approach to regulate corporate human rights abuses. Under the California law, corporations with global annual revenues in excess of \$100 million that do business in California must *comply* with the law by disclosing on their website any initiatives they undertake to eliminate coercive labor practices in their supply chain.⁷⁴ However, corporations can also satisfy this obligation by *explaining* that they have not taken any initiatives to eliminate trafficking in their supply

71. *Id.* § 1503(e)(4) (identifying columbite-tantalite (coltan), cassiterite, gold, wolframite, or “any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.”) The “derivatives” stated in the statute include “tantalum, tin, tungsten, and gold” which is often described as “3TG” by companies. RESPONSIBLE MINERALS INITIATIVE, *What are conflict minerals?*, <https://www.responsiblemineralsinitiative.org/about/faq/general-questions/what-are-conflict-minerals/>.

72. Martin, *Hiding in the Light*, *supra* note 17, at 538.

73. At the time it was passed, the TSCA was internationally groundbreaking, and certain countries have adopted laws modeled on it, notably the United Kingdom. *See* Modern Slavery Act 2015, c. 30 (U.K.). There are also proposals for similar laws in Australia, New Zealand, and Canada. *See Modern Slavery Act 2018* (cth) (Austl.); Fighting Against Forced Labour and Child Labour in Supply Chains Act, S-211 (Can. 2021), <https://www.parl.ca/legisinfo/en/bill/44-1/s-211>; ROPES & GRAY, *New Zealand Moves Towards Proposal of Modern Slavery Legislation that Would Create New Compliance Obligations for U.S. Based and Other Multinationals* (May 20, 2022), <https://www.ropesgray.com/en/newsroom/alerts/2022/May/New-Zealand-Moves-Toward-Proposal-of-Modern-Slavery-Legislation-that-Would-Create-New-Compliance>.

74. Companies must disclose what initiatives (if any) they have undertaken within five methodological categories: (1) verifying and evaluating the risk of trafficking in their supply chains; (2) performing audits of suppliers; (3) requiring supplier certification; (4) creating accountability standards and procedures for both employees and contractors; and (5) providing corporate training on slavery and human trafficking. CAL. CIV. CODE. § 1714.43(c)(1)–(5).

chains.⁷⁵ As such, California relies on consumers, investors, and civil society organizations to act on the information disclosed and pressure companies to improve their performance.⁷⁶

Similarly, the two federal laws on this issue also request that companies disclose whether they have engaged in the specific activity mentioned in the regulation: either using conflict minerals in their supply chain (under Rule 1502), or making payments to foreign governments, which has been linked to issues of corruption (under Rule 1504). For instance, the Conflict Mineral Rule⁷⁷ imposes reporting requirements on any reporting⁷⁸ company that used conflict mineral rules as a necessary part of their business model.⁷⁹ The rule also requires that

75. Consumers have no private right of action for violations of the TSCA. Rather, the California Attorney General has exclusive enforcement powers. To date, there have been no actions brought by the Attorney General. It is argued that companies will only start paying attention to the TSCA when agencies start bringing enforcement actions for violations (similar to the FCPA and insider trading laws). See Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHICAGO J. INT'L L. 323, 337–38 (2021).

76. *Id.* at 338.

77. The Trump Administration opposed section 1502 and drafted a proposal to suspend it. Ed Pilkington, *Proposed Trump Executive Order Would Allow US Firms to Sell 'Conflict Minerals'*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations>. Verification and enforcement were stepped down. See RESPONSIBLE SOURCING NETWORK, *MINING THE DISCLOSURES 2019: AN INVESTOR GUIDE TO CONFLICT MINERALS AND COBALT REPORTING IN YEAR SIX* 4, 9 (2019), <https://static1.squarespace.com/static/594cbfa3440243aef3dfalc4/t/5dee7d1b9d16d153cba70a04/1575911082732/MiningtheDisclosures+2019.pdf>. Whether coincidentally or because of these developments, very little verification and enforcement of this law has occurred in practice. Marc Butler, *Why the Conflict Minerals Rule Refuses to Die*, INTELLIGIZE (June 21, 2018), <https://www.intelligize.com/why-the-conflict-minerals-rule-refuses-to-die/>. It does not appear as if the Biden Administration is taking any proactive steps to change the status quo left by the Trump Administration.

78. Reporting companies are any companies that have registered their securities with the SEC, and as such, are required to file periodic reports with the Commission pursuant to sections 1, 13, or 15(d) of the Exchange Act. See Securities Exchange Act of 1934, §§ 12, 13, 15; 15 U.S.C. §§ 781, 78m, 78o.

79. Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249b).

the issuer submit a report, as necessary, that “includes a description of the measures taken by the [issuer] to exercise due diligence on the minerals’ source and chain of custody.”⁸⁰ To that end, the SEC adopted Form SD, a specialized disclosure report form that requires companies to investigate the country of origin of their minerals.⁸¹ If, in turn, a company discovers that any of their necessary products contained conflict minerals that originated in the DRC, it must: (1) employ a due diligence mechanism, specifically with regards to the source and chain of custody of its materials; and (2) file annual reports discussing its mechanisms on both its website and with the SEC.⁸²

Also, as part of the Dodd–Frank Act, the SEC was tasked with developing rules on Resource Extraction Payment to address the resource curse.⁸³ The rules require corporations involved in resource extraction to disclose whether they have made any payments to foreign governments to “further the

80. *Id.*

81. *Id.* at 56,280.

82. *Id.* at 56,310. The Conflict Mineral Disclosure Report, in turn, requires the following items: (a) a description regarding what due diligence measures the company took; (b) a statement regarding the company’s independent audit mechanisms; and (c) a risk mitigation analysis that discussed additional steps the company took to improve its due diligence in this area. *See id.* at 56,363. The required risk mitigation analysis is probably the closest the United States has to an mHRDD law, but it can be distinguished from the European model by the lack of definition of due diligence, which allows corporations to apply a more traditional due diligence model than the human rights due diligence framework.

83. *See* Commissioner Caroline A. Crenshaw, Statement of Resource Extraction, Dec. 16, 2020 (dissenting), n. 7. The term “resource curse” refers to a historical phenomenon whereby many states (and regions) with an abundance of natural resources face significant economic challenges, often at the hands of foreign investors who extract resources from the area without either providing adequate compensation or supporting the community. *See* NATURAL RESOURCE GOVERNANCE INSTITUTE, THE RESOURCE CURSE: THE POLITICAL AND ECONOMIC CHALLENGES OF NATURAL RESOURCE WEALTH (Mar. 2015), https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf. For an academic treatment of the issue within the context of business and human rights, see Nyakundi M. Michieka & Dustin Blankenship, *Avoiding the Resource Curse: Applying the Guiding Principles in Kenya*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 559, 559–73 (Jena Martin & Karen E. Bravo eds., 2016).

commercial development of oil, natural gas, or minerals.”⁸⁴ This particular section of Dodd–Frank was to provide, in the words of one commentator, a “promising strategy to help lift this so-called ‘resource-curse’ [through] natural resource revenue transparency. The idea is simple: force international companies to disclose what they pay—and to whom—and then let local stakeholders and international NGOs make use of this information to hold corrupt leaders accountable.”⁸⁵

Unfortunately, the rule has largely stalled. After a protracted fight in the courts, Congress intervened and repealed the rule using the Congressional Review Act (CRA).⁸⁶ President Trump signed a law repealing the rule on February 14, 2017.⁸⁷ As one of us has previously noted:

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

85. Daniel Firger, *Lifting the Resource Curse: Will Dodd-Frank Do the Trick?*, HUFFPOST, (May 25, 2011), http://www.huffingtonpost.com/daniel-firger/post_945_b_741761.html. According to Firger, “corporations from ExxonMobil on down were caught by surprise when the provision was inserted into Dodd–Frank at the 11th hour.” *Id.* During the comment period for the subsequent proposed rule, current and former U.S. senators stated that “transparency is a critical tool to ensure that citizens in resource rich countries can monitor the economic performance of oil, gas, and mining projects and ensure that revenues, especially if more meager than hoped, are used responsibly.” Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 34–78167, 81 Fed. Reg. 49360, 49362 (July 27, 2016); *see also id.* at 49,372 n.194 (citing Letter from Richard G. Lugar, U.S. Sen. (Ret.), Carl Levin, U.S. Sen. (Ret.), & Christopher J. Dodd, U.S. Sen. (Ret.), to Hon. Mary Jo White, Chair, SEC (Feb. 4, 2016)). In that regard, as we note later, section 1504 shares characteristics of the FCPA (particularly in that it targets payments to foreign governments in a way that requires them to disclose their payments to foreign officials, which as Firger highlights, can be used in the fight against corruption). Firger, *supra* note 85.

86. H.R.J. Res. 124, 115th Cong (2017). *See also* Nicholas Grabar & Sandra L. Flow, *Congress Rolls Back SEC Resource Extraction Payments Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 16, 2017), <https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/>. Under the CRA, Congress is allowed to use a simple majority vote to disapprove of a rule that has not yet become effective. Moreover, any vote under the CRA is not subject to judicial review. *Id.*

87. Pub. L. 115–4. *See also* Roger Yu, *Trump Signs Legislation to Scrap Dodd–Frank Rule on Oil Extraction*, USA TODAY (Feb. 15, 2017, 2:13 PM), <https://www.usatoday.com/story/money/2017/02/14/trump-scraps-dodd-frank-rule-resource-extraction-disclosure/97912600/>. This was the first legislation that President Trump signed into law. *Id.*

[T]he SEC is caught between a rock and hard place. On the one hand, it is still mandated under [the Dodd–Frank Act] to promulgate a rule requiring resource-related corporate payments to be disclosed. On the other hand, [under the CRA] the SEC cannot re-issue an identical or substantially similar rule as the one rejected by Congress. The SEC’s previous action and inaction regarding § 1504 have resulted in legal challenges on everything from the substance, process, and constitutional manner of promulgation.⁸⁸

And, yet, somehow, it seems that the SEC has managed. In December 2020, the SEC adopted a new rule.⁸⁹ It is weak in comparison to the previous rule. Extractive companies covered by the rule will only have to report their aggregate payments at the national or subnational level, rather than on a more detailed per-project basis, as the previous rule had required.⁹⁰ The minimum payment reporting threshold has been raised from \$100,000 to \$150,000, which, according to critics, is too high.⁹¹ Civil society organizations are unlikely to be satisfied with the new rule, hence the prediction that “organizations such as Oxfam and Public Citizen will continue their already sustained push to repeal the new rule or effectively stop it from being implemented.”⁹²

The comply or explain approach has limited effect. For instance, a company can satisfy its obligations under the TSCA by stating that it is taking no action in each of the five categories listed in that Act.⁹³ Moreover, in the case of California, while *the information* must be publicly disclosed, there is no central disclosure system or repository for the *names* of compa-

88. Martin, *Hiding in the Light*, *supra* note 16, at 547 (footnotes omitted).

89. Press Release, SEC, SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020), <https://www.sec.gov/news/press-release/2020-318>.

90. Isa Mirza, *SEC Issues Controversial New Rule on Payment Transparency in the Natural Resource Sector*, JD SUPRA (Dec. 18, 2020), <https://www.jdsupra.com/legalnews/sec-issues-controversial-new-rule-on-93504/>.

91. *Id.*

92. *Id.*

93. See Jena Martin, *Guest Blog: ULC’s Work on Coercive Labor Practices in Supply Chains, Part 2*, BUS. L. PRO. BLOG (Aug. 23, 2020), https://lawprofessors.typepad.com/business_law/2020/08/guest-blog-ulcs-work-on-coercive-labor-practices-in-supply-chains-part-2.html.

nies that would be subject to the Act.⁹⁴ As such, civil society actors and advocates can only guess as to which companies fall within the law's ambit. In addition, while the federal laws require an annual disclosure, under the TSCA this is a one-off event, meaning that once a company has posted its disclosure, it has satisfied the law's requirements.⁹⁵ Consumers and shareholders do not have a private right of action in any of these frameworks. In short, disclosure-based frameworks for corporate engagement in the area of human rights such as the TSCA and Rules 1502 and 1504 tend to represent a minimal amount of engagement from companies and may, in certain instances, be counter-productive to increasing corporate accountability for negative human rights impacts.⁹⁶

Despite these limitations, the disclosure model is the only framework that has been adopted in the United States. There are several potential reasons for this. First, disclosure laws would satisfy the minimal level of state obligations under Pillar 1 of the Guiding Principles.⁹⁷ Similarly, a corporation that has provided disclosure under a comply or explain framework arguably could satisfy their responsibility to respect under Pillar 2 of the UNGPs.⁹⁸ Finally, compared to other forms of regulation, disclosure laws in the United States seem to be favored by corporations; this, in turn, leads to a greater likelihood of political will by lawmakers for their passage.⁹⁹ As we discuss below, the situation in Europe is significantly different.

III.

AN ANALYSIS OF THE HUMAN RIGHTS DUE DILIGENCE MODEL – GEOGRAPHICALLY & SUBSTANTIVELY

Empirical work continues to find no evidence that risk assessment and enhanced due diligence foster peace, even for multinational corporations (MNCs). More often, these are tools for MNCs that allow them to escape legal liability in

94. *Id.*

95. See CAL. CIV. CODE § 1714.43.

96. See Martin, *Hiding in the Light*, *supra* note 17, at 565.

97. See *id.* at 563–64.

98. *Id.* at 564–65.

99. It could be that disclosure laws are largely favored because U.S. companies are already accustomed to the regime under the securities regulation framework. As such, adding one more disclosure, while inconvenient, is far less daunting.

*their home countries while still often operating in ways that undermine peace.*¹⁰⁰

In contrast to the weak, disclosure-based BHR legislative initiatives in the United States, in Europe, there is a gradual movement towards the adoption of HRDD laws,¹⁰¹ indicating a process of translation of this concept from the UNGPs from soft into hard law.¹⁰² HRDD laws are not a homogenous group, however. Although all laws of such kind require companies to undertake HRDD, the HRDD obligations differ in scope and in how companies are held accountable for inadequate HRDD. Some laws, for instance the French law, expressly provide for civil liability when harm eventuates because of a company's failure to conduct adequate HRDD; but, as will be seen, bringing civil liability claims under this law presents a significant challenge to victims.¹⁰³ Other laws, such as the German law discussed below, do not provide for civil liability to a victim of human rights abuse.¹⁰⁴ An international discussion about the different types of HRDD laws and the implications of the different regulatory models is underway.¹⁰⁵ For in-

100. John E. Katsos, *Business, Human Rights and Peace: Linking the Academic Conversation*, 5 BUS. & HUM. RTS. J. 221, 231 (2020). Later, Katsos further elaborates on the inadequacy of due diligence by stating “[a] proactive legal requirement to protect human rights would likely look quite similar to one that promoted peace and would hopefully move companies beyond due diligence standards and the off-loading of legal liability.” *Id.* at 238.

101. Such laws have been proposed, adopted, and entered into force in various European countries. See Jonathan Drimmer et al., *Human Rights Diligence Catching Up to Anti-Corruption*, PAUL HASTINGS LLP (June 1, 2020), <https://www.paulhastings.com/insights/client-alerts/human-rights-diligence-catching-up-to-anti-corruption>. Note that the Dutch law is limited to due diligence on child labor, rather than due diligence for the full range of human rights violations. We focus on the French, German, and Norwegian laws, as well as a legislative proposal at the EU level. See discussion *infra* Part III.

102. Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218, 218–19, 240 (Martina Buscemi et al. eds., 2020).

103. See discussion *infra* Part III.A. and accompanying notes.

104. See discussion *infra* Part III.B. and accompanying notes.

105. See, e.g., Off. of High Comm’r, U.N. Human Rights “Issues Paper” on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies (June 12, 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

stance, the Office of the U.N. High Commissioner for Human Rights (OHCHR) published an “issues paper” on this subject which includes categories of the HRDD regime and guidance for states on framing legal obligations.¹⁰⁶ Absent in this discussion, however, is an analysis of the model we propose, namely the prohibitive model.¹⁰⁷

A. France

France is the first and only country to date that has established a HRDD requirement in law.¹⁰⁸ The French Law on the Corporate Duty of Vigilance, enacted in 2017, compels French companies that meet threshold criteria for size to establish and implement an annual vigilance plan.¹⁰⁹ The plan covers a company’s own activities, the activities of companies the company controls, and the activities of subcontractors and suppliers with whom the company has an established commercial relationship.¹¹⁰ The plan must contain the steps that the company will take to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety, and the environment.¹¹¹ To create the plan, the company must map out and analyze the risks it may present to the enumerated rights and freedoms, and it must put measures in place to mitigate these risks and address negative impacts if they occur. Such measures include an alert mecha-

106. *Id.* at 12–14.

107. *Id.*

108. See Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L.J. 579, 605 (2021) (discussing the law and its requirements for companies); Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429, 437 (2021) (discussing the law’s mandatory vigilance plan requirements). By comparison, the Netherlands has adopted an issue-specific law, the Dutch Child Labor Due Diligence Law of 2019, and Switzerland is expected to enact a limited version of a HRDD law soon. See Hess, *supra* note 63, at 40.

109. The law applies to any company registered in France that has (a) 5,000 or more employees, including employees of its direct or indirect French-registered subsidiaries; or (b) 10,000 or more employees, including employees of its direct or indirect French-registered or foreign subsidiaries. See *Loi de Vigilance*, *supra* note 11.

110. *Id.* art. 1.

111. *Id.*

nism and a monitoring scheme to follow up on the plan's implementation.¹¹²

There is civil liability under the law for failure to fulfil the requirements of the duty of vigilance.¹¹³ This is fault-based liability, requiring a causal link between the company's failure to establish or effectively implement a vigilance plan (the breach) and the resulting damage.¹¹⁴ In practice, this is likely difficult to prove when a subsidiary, supplier, or other affiliate is the primary perpetrator of the human rights violation.¹¹⁵ The law also contains an enforcement mechanism, whereby any interested party can seek an injunction from the courts requiring a company to comply with the law, first having served notice to the company of its alleged failure to do so.¹¹⁶

The enforcement mechanism was triggered for the first time in 2019 and has now been used in several instances, with two cases having reached court so far.¹¹⁷ Beyond the role of

112. *Id.*

113. *Id.* art. 2. The law expressly links the specific duty of vigilance to the general tort provisions in Art. L. 1240 C. civ. and Art. L. 1241 C. civ. in the French Civil Code. *Id.*

114. Stéphane Brabant & Elsa Savourey, *Loi sur le devoir de vigilance, pour une approche contextualisée*, Revue Internationale de la Compliance et de l'Éthique des Affaires (2017), translated in BUS. & HUM. RTS. RES. CTR. 3 (2017), <https://media.business-humanrights.org/media/documents/22c06f17a79b040b5170bcd636c79a4d3a3bc74a.pdf>.

115. See Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, UNIV. ZÜRICH OPEN REPOSITORY & ARCHIVE 13 (2020); Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 69 INT'L AND COMP. L. QUARTERLY 789 (2020) (describing the legal separation of parent firms as allowing them to maximize their profits while minimizing their liability).

116. See Loi de Vigilance, *supra* note 11, art. 1.

117. The two cases are against oil company TotalEnergies SE (Total). They allege that Total has failed to adequately undertake the duty of vigilance. See *Total Lawsuit (Re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda> (last visited Apr. 6, 2022); *Total Lawsuit (Re Climate Change, France)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/>. In a recent victory in a procedural battle for the plaintiffs in the Total Uganda case, the French Supreme Court rejected the jurisdiction of the commercial courts in favor of the civil courts. See also Friends of the Earth France, *France's Highest Court Recognizes Jurisdiction of Civil Court in Case Against Oil Giant Total for Crimes in Uganda*, BUS. & HUM. RTS. RES. CTR. (Dec. 16, 2021), <https://>

the court as arbiter of such disputes, there is no state-based enforcement of the French law; for instance, there is no provision for criminal prosecution of companies where serious human rights violations occur, nor is there a provision for state-based oversight of the due diligence via a regulatory body.¹¹⁸ Early studies on the quality of outputs from companies on their fulfilment of the corporate duty of vigilance are critical of these endeavors, suggesting that companies are taking a minimalist approach to fulfilling their obligations under the law.¹¹⁹

B. *Germany & Norway*

In June 2021, the German Federal Parliament approved the draft bill of a Supply Chain Due Diligence Act.¹²⁰ The draft bill obliges large German companies, and foreign companies with administrative headquarters in Germany,¹²¹ to identify and assess human rights and environmental risks and to establish an adequate and effective risk management system to prevent or minimize human rights and environmental violations.¹²² The draft bill will come into force at the beginning of

www.business-humanrights.org/en/latest-news/france-la-cour-de-cassation-rejette-la-compétence-des-tribunaux-de-commerce-dans-laffaire-total-ouganda/.

118. See generally *Loi de Vigilance*, *supra* note 11.

119. ACTIONAID ET AL., *THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES: YEAR 1: COMPANIES MUST DO BETTER 15* (Juliette Renaud et al. eds., 2019).

120. Sebastian Rünz, *Overview of the German Supply Chain Due Diligence Act*, TAYLORWESSING (July 28, 2021), <https://www.taylorwessing.com/en/insights-and-events/insights/2021/07/overview-of-the-german-supply-chain-due-diligence-act#:~:text=After%20long%20and%20tough%20negotiations,force%20on%201%20January%202023>. For the final act as passed, see *Act on Corporate Due Diligence Obligations in Supply Chains*, *supra* note 13.

121. *Act on Corporate Due Diligence Obligations in Supply Chains*, *supra* note 13, art. 1, § 1. The bill's scope includes companies with a central administration, principal place of business, administrative headquarters or statutory seat in Germany, and at least 3,000 employees in Germany. Starting Jan 1, 2024, this will be 1,000 employees. *Id.*

122. *Id.* art. 1, § 4. The Act's provisions are quite detailed. For example, to tackle identified human rights risks, companies are required to develop appropriate procurement strategies and purchasing practices, consider human rights when selecting suppliers, and use "contractual assurances" from suppliers and control mechanisms. *Id.* art. 1, § 6.

2023.¹²³ Companies are only required to conduct due diligence with respect to their own business operations and their direct suppliers' operations.¹²⁴ For indirect suppliers, which frequently play a large role in global supply chains, companies are not required to conduct a risk analysis proactively and systematically, but only on an ad hoc basis, when they gain "substantiated knowledge" of a potential human rights violation.¹²⁵ This restriction, along with the absence of a specific provision for civil liability in cases of human rights violations,¹²⁶ has prompted civil society organizations to describe the initiative as: "Not there yet, but finally at the start."¹²⁷ A Norwegian law, passed around the same time as the German law, does reach indirect suppliers by requiring companies to conduct human rights due diligence throughout their supply chains.¹²⁸ Like the German law, the Norwegian law does not contain any pro-

123. *Id.* art. 5.

124. *See id.* art. 1, §§ 5–7. The Act's obligations apply to a company's own business area and that of direct suppliers; specifically, there is an obligation to conduct a human rights risk analysis, *id.* § 5, an obligation to adopt preventative measures to tackle identified risks, *id.* § 6, and an obligation to take remedial action, *id.* § 7.

125. *Id.* art. 1, § 9 (detailing obligations regarding indirect suppliers).

126. *Id.* art. 1, § 3 ("A violation of the obligations under this Act does not give rise to any liability under civil law. Any liability under civil law arising independently of this Act remains unaffected."). German tort law provides for compensation in cases where a person or company commits a breach of a statute that is intended to protect another person. The new law may well qualify as such a "protective" law and hence give human rights victims a cause of action. Virginia Harper Ho, Gerlinde Berger-Walliser & Rachel Chambers, *Corporate Groups: Toward Corporate Group Accountability*, in *HANDBOOK OF CORPORATE LIABILITY* (Martin Petrin & Christian Witting eds., forthcoming 2022).

127. INITIATIVE LIEFERKETTENGESETZ, NOT THERE YET, BUT FINALLY AT THE START: WHAT THE NEW SUPPLY CHAIN ACT DELIVERS – AND WHAT IT DOESN'T 1 (June 11, 2021), https://corporatejustice.org/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf.

128. *See* Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14. Due diligence obligations apply through the supply chain, which is defined as "any party in the chain of suppliers and sub-contractors that supplies or produces goods, services or other input factors included in an enterprise's delivery of services or production of goods from the raw material stage to a finished product." *Id.* § 3(d).

vision for civil liability.¹²⁹ Both laws include provisions for administrative enforcement. In the case of the German law, these are strong administrative enforcement provisions, but they are vested in the Office for Economic Affairs and Export Control, as supervised by the Ministry for Economic Affairs and Energy.¹³⁰ The enforcement provisions include coercive measures to require a company to take certain due diligence steps,¹³¹ and the ability to levy fines.¹³² Administrative oversight of the Norwegian law will be undertaken by the national consumer protection agency.¹³³

C. *The European Union*

The European Parliament adopted a resolution in March 2021 with recommendations to the European Commission for the adoption of an EU human rights due diligence law.¹³⁴ The European Commission responded with a new legislative proposal, the Directive on Corporate Sustainability Due Diligence, in February 2022.¹³⁵ The proposal would require EU Member States to introduce rules to compel companies¹³⁶ to “conduct human rights and environmental due diligence as laid down

129. *See id.* Companies must report on their adverse impacts and measures taken to address them. *Id.* § 5. Consumers have a right to information on how companies address negative human rights risks and impacts. *Id.* § 6.

130. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13, art. 1, § 19.

131. *Id.* art. 1, § 15.

132. *Id.* art. 1, § 24(2). The highest fine for specific violations is up to two percent of the average annual turnover. *Id.* § 24(3). Repeat offenders can be excluded from being awarded public procurement contracts. *Id.* art. 1, § 22.

133. Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14, § 9.

134. For the text of the recommendations on corporate due diligence and corporate accountability, see European Parliament Resolution of 10 March 2021 with Recommendations to Commission on Corporate Due Diligence and Corporate Accountability, EUR. PARL. DOC. 2020/2129 (INL) (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf. *See also* EUR. COAL. FOR CORP. JUST., *supra* note 15.

135. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022).

136. Companies covered by the duty to do due diligence include all “very large” companies as well as “large” companies in just sectors (textiles, agriculture and extraction of minerals). No small or mid-size enterprises (SMEs) are covered. *Id.* at 14–15, 46–47.

in Articles 5 to 11.”¹³⁷ These obligations extend to a company’s own operations and those of its subsidiaries, and to entities within its value chain with whom the company has “an established business relationship.”¹³⁸ Civil society organizations have criticized the draft law for limiting the due diligence obligation using this “established business relationship” test rather than requiring companies to conduct due diligence throughout their value chain, prioritizing the company’s leverage over the primary perpetrator of the violation rather than prioritizing human rights risks based on their seriousness and the likelihood of the risks materializing.¹³⁹ Civil liability is provided in the proposal: EU Member States must ensure that companies are liable for damages if they failed to comply with the due diligence obligations and as a result of this failure, an adverse impact that should have been identified and prevented, occurred and led to damage.¹⁴⁰ This provision suffers from the same shortcomings that the Loi de Vigilance suffers from—in particular the challenge of overcoming the burden of proof.¹⁴¹ There are further stages in the European Union’s legislative process, however, and this text will likely evolve during the process.

137. *Id.* at 53. The following actions are specified: integrating due diligence into their policies in accordance with Article 5; identifying actual or potential adverse impacts in accordance with Article 6; preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; establishing and maintaining a complaints procedure in accordance with Article 9; monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; and publicly communicating on due diligence in accordance with Article 11. *Id.*

138. *Id.* at 46. This test is akin to the test found in the French Loi de Vigilance, which extends to the activities of subcontractors or suppliers with whom there is an established commercial relationship. *See* Loi de Vigilance, *supra* note 11, art. 1.

139. *See Dangerous Gaps Undermine EU Commission’s New Legislation on Sustainable Supply Chains*, EUR. COAL. ON CORP. JUST. (Feb. 23, 2022), <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>.

140. *See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive*, *supra* note 135, at 65.

141. *See* Bueno & Bright, *supra* note 115, at 803 (describing the difficulty of the plaintiff under the French Duty of Vigilance Law in proving that (i) the company breached its obligation and (ii) the company’s failure caused the damage).

As discussed above, while these mHRDD frameworks are certainly an advancement over disclosure laws, we argue that, for several reasons, mHRDD is still not enough. First, rather than incentivizing corporations to examine the impact of their operations and relationships on the communities with which they engage, a human rights due diligence framework might turn into a navel-gazing exercise that once again has the corporation as the focal point, rather than the impacted individual or the community, or worse, into little more than another form of disclosure.¹⁴² Second, by focusing on internal mechanisms rather than larger societal outcomes, human rights due diligence could become little more than a check-the-box exercise that a company does perfunctorily and superficially in order to avoid liability.¹⁴³ It is to this second point that we turn next.

142. Indeed, one of us has previously argued this exact proposition. See Martin, *Hiding in the Light*, *supra* note 17, at 556–59, 569–70, 577 (discussing how the French law is similar to the other forms of disclosure laws, such as the U.K. Modern Slavery Act, that provide little support for the advancement of the business and human rights agenda).

143. This can be particularly problematic when companies perform their due diligence without any meaningful consultation with affected communities or impacted individuals. See, e.g., WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD (Jena Martin, Karen E. Bravo & Tara Van Ho eds., 2020) (discussing the consequences of corporate activities on affected communities). Recent scholarship largely argues in favor of mHRDD on the basis that it represents a significant improvement on a disclosure-based framework. See, e.g., Holly Cullen, *The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond*, 48 GEO. WASH. INT'L L. REV. 743, 743–44, 780 (2016). We are not, however, the first to draw attention to potential drawbacks of a mHRDD model. See Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELBOURNE J. INT'L L. 221 (2019) (arguing that human rights due diligence fails to lead to genuine and substantial improvements in practice); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 910 (2017) (describing “concerns that an exclusive focus on due diligence processes that are not tethered to the foundational responsibility to respect human rights may encourage ‘tick-box’ exercises that allow businesses to claim that they are compliant with the Guiding Principles”); Surya Deva, *The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface*, 6 BUS. & HUM. RTS. J. 336, 339–41 (2021) (making the point that a state's duties under the UNGPs are not exhausted by adopting mHRDD legislation, and that, vice versa, a company's UNGPs responsibilities are not fulfilled by following mHRDD legislation).

D. HRDD as a Check-the-Box Exercise

Despite what appears to be a promising legislative trend in the civil law countries of Europe away from disclosure laws, the capacity of mHRDD to improve corporate human rights performance is far from a given. Ingrid Landau accurately observes that:

There is a significant risk that these regulatory interventions will result in companies adopting policies and implementing internal compliance structures that exhibit some or all of the formal elements of HRDD—and have the purpose of conveying the appearance of taking action—but ultimately fail to achieve the public goal they are designed to achieve: that is, the reduction or elimination of adverse human rights impacts.¹⁴⁴

Landau argues that certain features of HRDD, as a process-based regulation, increase its susceptibility to become a check-the-box exercise.¹⁴⁵ This susceptibility has also been observed by others, notably the U.N. Working Group on Business and Human Rights.¹⁴⁶

The process-based nature of HRDD is one of its strengths, but it is also one of its weaknesses. A key feature of process-

144. Landau, *supra* note 143, at 222–23.

145. *See id.* at 234–35. Landau terms this “cosmetic compliance.” *Id.* at 223 & n.6, 232, 235–239 (citing Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003)). Other similar formulations of this phenomenon, Landau notes, include superficial compliance, creative compliance, and paper compliance. Landau, *supra* note 143, at 223 n.6; *see also* Robert McCorquodale & Justine Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 NETH. INT’L L.R. 455, 468 (2021) (“[T]he ongoing reliance on social auditing by businesses reflects a very limited vision of HRDD and may result in cosmetic or self-legitimizing compliance-oriented responses”). Note that this argument has also been made in relation to disclosure, in what has been described as companies “decoupling” their disclosure from their operating practices. *See* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 39–40 (2019).

146. Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, transmitted on 16 July 2018 by the Secretary-General Pursuant to Human Rights Council Resolutions 17/4 and 35/7, ¶¶ 25(c), 28, 73(c). U.N. Doc. A/73/163 (July 16, 2018) (identifying the tendency towards “tick the box” approaches to HRDD).

based regulation is that it seeks to require business to internalize public policy goals (i.e., respect for human rights and the environment) into its own internal systems and processes. This can be a strength, capitalizing on a company's inherent capacity to regulate itself and its superior access to company-specific information. However, these processes are subsumed within the firm's own objectives: that is, the production of profit and market share.¹⁴⁷ The two may sometimes, but do not always, coincide. There is always the danger that, where there is significant scope for managerial discretion and insufficient regulatory oversight, commercial objectives will prevail. By way of a simple example, in principle HRDD requires the business to assess, prioritize, and act on risks to rights-holders rather than to the business. In practice, however, the business's commercial objectives may be accorded equal, if not greater, weight in the prioritization process. Risks that are easier, cheaper to manage, or that have the potential to inflict the most reputational damage may be prioritized over those that are deemed the most severe.

There are inherent risks in process-based regulation.¹⁴⁸ In the case of HRDD, the risk of process trumping outcomes would appear particularly significant when there is absence of any liability incentive to undertake the process substantively. As noted above, only French law has a civil liability provision, and plaintiffs will face an uphill task in using that provision to gain access to remedy.¹⁴⁹ Other concerning features of the current crop of mHRDD laws that might lead to process trumping outcomes include a high level of ambiguity about what HRDD requires of them and a lack of any requirement

147. See Julia Black, *Forms and Paradoxes of Principles-Based Regulation*, 3 *CAP. MKTS. L.J.* 425, 444 (2008).

148. See Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 207, 209 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) ("To the extent that law focuses on companies' *internal responsibility processes* rather than *external accountability outcomes*, law runs the risk of becoming a substanceless sham, to the delight of corporate power-mongers who can bend it to their interests. Law might be hollowed out into a focus on process that fails to recognize and protect substantive and procedural rights . . .").

149. See discussion *supra* Part III.A. and accompanying notes.

for companies to be transparent about how they go about the process.¹⁵⁰

Underlying these concerns is a fear that the process (HRDD) will become an end in itself, rather than the intended end (the implementation of corporate responsibility to respect human rights). For this reason, Landau calls for greater attention to be paid by lawmakers and civil society to crafting regulatory interventions that seek to influence the *quality* of HRDD undertaken, rather than simply its *quantity*.¹⁵¹ It is to this call, and in particular to the observation that HRDD can become detached from the standard or outcome of respect for human rights, that our argument for a prohibitive model responds. This has prompted us to consider a prohibitive model for the United States, namely one that builds off the highly successful model of the FCPA, a law designed to combat bribery and corruption.¹⁵² In this next Part, we will analyze the elements of the prohibitive model within the FCPA framework as well as within a proposed framework currently being developed in the United Kingdom.

IV.

THE PROHIBITIVE MODEL AS THE WAY FORWARD FOR THE UNITED STATES

We are currently putting excessive trust in processes over tangible outcomes. The current obsession with (mandatory) human rights due diligence, or the focus on effectiveness of remedy mechanisms rather than on effective remedies illustrates this well. However, as outcomes are equally important

150. Landau, *supra* note 143, at 235–39; *see also* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 *BUS. & HUM. RTS. J.* 241, 249 (describing Landau’s concerns of ambiguity and transparency with regard to HRDD requirements). Norway’s law is a positive development with regard to transparency, as consumers have a right to information on how companies address negative human rights risks and impacts. *See* Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

151. Landau, *supra* note 143, at 223, 243.

152. *See* FCPA, 15 U.S.C. §§ 78dd-1, *et seq.* For a discussion on the effectiveness of the FCPA, *see* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 *V.A. L. REV.* 1611, 1677 (2017) (discussing the national and international framework that developed to help make the FCPA effective).

*for rights and rightsholders, businesses should have an obligation of result too.*¹⁵³

Unlike process-based models that focus the standard for liability based on the corporate actions, a prohibitive model would establish liability based on corporate outcomes (good intentions and best efforts notwithstanding). In the United States, by far the most successful prohibitive model for addressing corporate behavior around larger societal impacts such as bribery and corruption has been the FCPA. As such, examining the FCPA and its structure can provide a useful starting point for how a prohibitive model can be applied in the BHR context.

A. *The FCPA: A Working Prohibitive Model*

The United States' current lackluster stance on BHR-related issues is ironic given that, in earlier decades, the U.S. regulatory apparatus led the way in recognizing the connection between corporate activities and larger societal impacts. For instance, in 1971, the SEC promulgated rules requiring companies to consider both environmental and civil rights impacts in their disclosure obligations.¹⁵⁴ However, the FCPA remains one of the most enduring legislative legacies of that time.

The FCPA was enacted by Congress in 1977 to address corporate bribery and government corruption. Part of the motivation behind the FCPA came when a Congressional report disclosed that over 400 U.S. companies, including 117 Fortune 500 companies, had made "questionable or illegal payments" to foreign officials, politicians, and political parties.¹⁵⁵ The law makes it a crime for companies to pay bribes to foreign officials in order to either obtain or retain the company's business.¹⁵⁶ This portion of the Act is enforced by the DOJ.¹⁵⁷ In addition, the FCPA has accounting provisions that require cor-

153. Surya Deva, *A Just Recovery for Whom? And How to Achieve It?* BUS. & HUM. RTS. RES. CTR. (Jan. 8, 2021), <https://www.business-humanrights.org/en/blog/a-just-recovery-for-whom-and-how-to-achieve-it/>.

154. Martin, *Hiding in the Light*, *supra* note 17, at 537.

155. See H.R. REP. NO. 95-640, at 1 (1977).

156. FCPA, 15 U.S.C. § 78dd-1(a)(1).

157. Since the SEC does not have criminal authority, any portion of the Act which constitutes a criminal violation would be prosecuted by the Department of Justice. See *The Foreign Corrupt Practices Act: An Overview*, Jones

porations to keep accurate books and records.¹⁵⁸ This portion of the law is generally enforced by the SEC.¹⁵⁹ Each is discussed below. An examination of the FCPA, and the way that it addresses corruption, shows the merits of being able to use those issues not strictly related to financials as a way of maintaining investor protection,¹⁶⁰ as well as achieving the broader social goals envisaged by the law.

The FCPA amended several portions of the Securities Exchange Act of 1934. First, under Section 13(b)(2)(A) of the Exchange Act, the FCPA provides that corporations must maintain accurate books and records.¹⁶¹ This particular section is one of strict liability—corporations can be held liable if the corporation's books are inaccurate even if the lapse did not occur as a result of the company's negligence or intentional conduct.¹⁶² In addition, there is no materiality requirement to Section 13(b)(2)(A): the slightest infraction can lead

Day Publ'ns (Jan. 2010), <https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview>.

158. See *Spotlight on Foreign Corrupt Practices Act*, U.S. SEC (Feb. 2, 2017), <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml#:~:text=the%20FCPA%20also%20requires%20issuers,in%20accordance%20with%20management's%20authorization>.

159. Although, in particularly egregious cases of inaccurate books and records, cases have been referred to the DOJ for criminal prosecution. See e.g., DEPARTMENT OF JUSTICE, A Resource Guide to the U.S. Foreign Corrupt Practices Act 2 10.49 (2nd ed. 2020) (discussing the criminal case of *United States v. Ericsson* related to a books and records violation).

160. Indeed, when it was first introduced, one of the main oppositions of the FCPA came from the business lobby who contended that managing issues like corruption was outside of the corporation's mandates. See, e.g., Ellen Gutterman, *Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act*, 11 FOREIGN POL'Y ANALYSIS 109, 115 (2015) (“[Businesses] . . . argued that its prohibition of ‘questionable’ payments in foreign jurisdictions represented an unacceptable effort to impose American morality on other states”) (citation omitted). In addition, corporations stated that not being able to use bribery would make them less competitive vis-à-vis other companies that were not under the regulatory ambit of the SEC. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 510 (2011) (“U.S. companies subject to the FCPA complained that they were put at a competitive disadvantage against non-U.S. companies in seeking business abroad because non-U.S. companies could pay off local authorities to obtain business.”) (footnote omitted).

161. Securities Exchange Act of 1934 § 13(b)(2)(A), 15 U.S.C. § 78m.

162. See *id.*

to liability.¹⁶³ Finally, there is no private right of action with the FCPA.¹⁶⁴ Rather, enforcement cases can only be brought either by the SEC or the DOJ.¹⁶⁵ Part of the impetus for enacting the books and records portion of the FCPA was a concern that “the siphoning of such vast amounts of corporate funds demonstrated that these corporations lacked financial accountability.”¹⁶⁶

While the books and records provisions of the FCPA have a very low entry to liability, the SEC has considered a company’s action in responding to the violations. For instance, in *the Matter of Oil States International Inc.*, the SEC took into consideration the fact that the company self-reported its inaccuracies to the Commission.¹⁶⁷ According to the SEC’s release on the matter, “[i]n determining to accept [Oil State’s offer of settlement] the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.”¹⁶⁸ As a result, the company was not required to pay a monetary penalty.¹⁶⁹ In contrast, in *the Matter of Walmart, Inc.*, Walmart agreed to pay \$144 million for

163. *See id.*

164. FCPA, 15 U.S.C. §§ 78dd-1, et seq. *See The Law of Wind: A Guide to Business and Legal Issues*, Stoel Rives LLP, <https://www.stoel.com/legal-insights/special-reports/the-law-of-wind/sections/foreign-corrupt-practices-act#:~:text=the%20FCPA%20does%20not%20contain,individuals%20for%20bribing%20foreign%20officials> (last visited Apr. 17, 2022) (“The FCPA does not contain a private right of action. In other words, under the FCPA, only the U.S. government may sue entities and individuals for bribing foreign officials.”).

165. *See The Law of Wind*, *supra* note 164. Although both the SEC and the DOJ have enforcement purview over the FCPA, the SEC could arguably be considered the first line of enforcement (given that the agency is allowed to proceed under civil, rather than criminal authority, which would in turn allow them to take advantage of the lower burden of proof to bring more cases).

166. Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1086 (1979); *see also Foreign Corrupt Practices Act*, DEP’T OF JUST. (Feb. 3, 2017), <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (stating that the books and records provisions were designed to be used “in tandem” with the corruption portion of the law).

167. *See Oil States Int’l, Inc.*, Current Report (Form 8-K) (Apr. 27, 2006).

168. *Oil States Int’l, Inc.*, Exchange Act Release No. 53,732, 87 SEC Docket 2588 (Apr. 27, 2006)

169. *Id.*

its role in an ongoing bribery scheme in Mexico and Brazil.¹⁷⁰ According to the SEC order, Walmart was made aware of issues that raised the specter of corruption but did nothing to alleviate the situation.¹⁷¹

In addition to the books and records provisions, the key provisions relating to corruption under the FCPA are part of Section 13(b)(2)(B) of the Exchange Act. The statute provides, in part, that:

It shall be unlawful for any issuer . . . to make use of . . . any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay . . . or offer, gift, promise to give, or authorization of the giving of anything of value to— (1) any foreign official for purposes of— (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government . . . in order to assist such issuer in obtaining or retaining business¹⁷²

Not all payments to a government or government official would violate the FCPA. For instance, the statute specifically provides an exception for any payment when “the purpose . . . is to expedite or secure the performance of a ‘routine governmental action.’”¹⁷³ In addition, the FCPA provides for two affirmative defenses: (1) if the corporation can show that the payments are legal under the law of the host country; and (2) if a corporation can show that the payments were “directly re-

170. See Press Release, SEC, Walmart Charged with FCPA Violations (June 20, 2019), <https://www.sec.gov/news/press-release/2019-102>.

171. See Walmart Inc., Exchange Act Release No. 86,159 (June 20, 2019). Investigative journalists for The New York Times went further, alleging a vast cover up of Mexican Bribery. See David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 21, 2012), <https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

172. FCPA, 15 U.S.C. § 78dd-1.

173. *Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials*, SEC OFF. INV. EDUC. & ADVOC. 2 (2011), <https://www.sec.gov/investor/alerts/fcpa.pdf>.

lated to” a “reasonable and bona fide expenditure.”¹⁷⁴ When originally enacted, the FCPA’s anti-bribery provisions were primarily uni-directional, in that they only applied to U.S. firms that were conducting business overseas and certain foreign issuers of securities.¹⁷⁵ However, the 1998 amendments to the Act make it illegal for any foreign corporation to “act in furtherance of such a corrupt payment to take place within the territory of the United States,”¹⁷⁶ in essence making the bribery provisions apply bilaterally.

After its initial passage in 1977, the FCPA was used relatively minimally until the early 2000s.¹⁷⁷ The corporate lobby’s early resistance to the FCPA has waned.¹⁷⁸ Moreover, while bribery is now seen as something that is directly related to issues that a reasonable investor might consider, this has not always been the case.¹⁷⁹

One of the things that makes the FCPA unique among the U.S. securities regulatory framework is that, unlike the vast majority of the securities laws that the SEC enforces, the FCPA does not specifically employ a disclosure-based regime to regulate corporate behavior.¹⁸⁰ Instead, it prohibits the actual be-

174. See FCPA, 15 U.S.C. § 78dd-1.

175. See DEP’T OF JUST., *supra* note 166.

176. *Id.*

177. While we agree with one commentator that the statute was in fact used (and not, as many have argued, dormant for those two decades), it is clear that the statute’s increased substantially in the early 2000s. For a look at the dormancy debate, see Mike Koehler, *The Fallacy That the FCPA Was “Dormant” for Decades*, FCPA PROFESSOR (Aug. 1, 2018, 12:02 AM), <https://fcpaprofessor.com/fallacy-fcpa-dormat-decades/>.

178. See, e.g., Conniel Malek, *Six Reasons Why Corporations Like (and Want) the Foreign Corrupt Practices Act Even If They Won’t Admit It*, BUS. & HUM. RTS. RES. CTR. (Jun. 13, 2017), <https://www.business-humanrights.org/en/blog/six-reasons-why-corporations-like-and-want-the-foreign-corrupt-practices-act-even-if-they-wont-admit-it/>.

179. See Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1368 (2014) (stating that anti-bribery law is not generally thought of in relation to the broader movement to hold corporations accountable for human rights violations).

180. For a discussion of the SEC’s disclosure-based framework (and its many shortcomings), see Jena Martin, *Changing the Rules of the Game: Beyond a Disclosure Framework for Securities Regulation*, 118 W. VA. L. REV. 59 (2015) [hereinafter Martin, *Changing the Rules*].

havior itself.¹⁸¹ This is in direct contrast to how Congress typically empowers the SEC to regulate.¹⁸² As one of us has noted:

The model that the Commission uses to serve [its] mandate can by and large be framed as a laissez-faire approach to regulation. Rather than directly intervene in the corporate governance of a company, the SEC primarily uses a disclosure paradigm to protect American investors. The disclosure model rests on the premise that “an educated investor is a protected investor.” As such, the SEC model requires companies to provide investors with a substantial amount of information regarding its financial operations and financial well-being in the hope that investors will use that information to make sound choices for their investments.¹⁸³

By using a different model—to wit, a substantive prohibition model—the FCPA diverges from the disclosure-based paradigm and offers more comprehensive oversight of issuers related to bribery. This has two advantages. First, it allows the United States to take a more affirmative stance on the issue of bribery. Second, it places a much more stringent burden on a corporation to actively ferret out corruption within its organizational structure.¹⁸⁴

Thus, the FCPA provides the SEC with a powerful tool to combat bribery in a much more effective way than a mere dis-

181. See 15 U.S.C. §§ 78dd-1, et seq.

182. See Martin, *Changing the Rules*, *supra* note 180, at 60.

183. *Id.* at 60–61 (footnotes omitted).

184. As one of the earliest commentaries on the FCPA noted:

The legislative history is replete with the reasons why bribery had to be prevented rather than merely punished: bribery is inherently invidious; bribery is harmful to the free enterprise system because it enables corporations to obtain business on a basis other than the quality of their goods and services; and bribery is harmful to the nation because it undermines United States foreign relations . . . The Act reflects Congress’s condemnation of bribery by imposing both civil and criminal penalties . . . These penalties demand that the business community conform to a certain standard of conduct. As such, the Act’s purpose is to deter bribery, not to compensate those injured by the prohibited payments.

Siegel, *supra* note 166, at 1113–14 (footnotes omitted).

closure-based regime,¹⁸⁵ while also creating a mechanism that promotes human-rights related norms abroad. As will be seen in Part IV, U.S. civil society advocates for a similar approach for mandatory HRDD laws.

B. *Using the Prohibitive Model for Business and Human Rights*

While prohibitive models have been used to prevent bribery and corruption, there is currently no enacted prohibitive model to address BHR impacts head on. However, there is work currently being undertaken in the United Kingdom that is attempting to change that: a legislative proposal for a U.K. corporate duty to prevent adverse human rights and environmental impacts that was put forward by U.K. civil society organizations in 2019.¹⁸⁶ This is an example of a prohibitive model, in contrast to the process-oriented laws and legislative proposals from continental Europe. It may be the closest legislative cousin to a proposed prohibitive model for the United States.¹⁸⁷ The U.K. proposal contains specific provisions for liability for failure to prevent adverse human rights and environmental impacts, in addition to a requirement that companies conduct HRDD. The provisions include:

- Commercial and other organizations must develop and implement reasonable and appropriate due diligence procedures to identify, prevent, and mitigate adverse human rights and environmental impacts.¹⁸⁸
- Commercial and other organizations shall be liable for harm, loss, and damage arising from their failure to prevent adverse human rights and environmental impacts from their domestic and international opera-

185. For criticisms of a disclosure-based regime to combat human rights issues, see Martin, *Hiding in the Light*, *supra* note 17.

186. *Proposed UK Corporate Duty to Prevent Adverse Human Rights and Environmental Impacts*, CORP. JUST. COAL. (March 2020), https://corporate-responsibility.org/wp-content/uploads/2020/04/Duty-to-prevent_principal-elements_FINAL.pdf [hereinafter *Proposed UK Corporate Duty*].

187. For a proposed law for Canada, see *The Corporate Respect for Human Rights and the Environment Abroad Act*, CAN. NETWORK ON CORP. ACCOUNTABILITY 9–11, <https://cnca-rcrce.ca/site/wp-content/uploads/2021/05/The-Corporate-Respect-for-Human-Rights-and-the-Environment-Abroad-Act-May-31-2021.pdf>, which contains a private right of action against companies that fail to avoid, prevent, and address human rights violations.

188. *Proposed UK Corporate Duty*, *supra* note 186.

tions, products, and services including in their supply and value chains.¹⁸⁹

- It shall be a defense from liability for damage or loss, unless otherwise specified, for commercial and other organizations to prove that they acted with due care to prevent human rights and environmental impacts.¹⁹⁰

The failure to prevent offense is subject to criminal penalty if the human rights and environmental violations are “serious” and otherwise subject to a civil penalty.¹⁹¹ The due care defense may be substantiated by demonstrating that the company is in compliance with the human rights due diligence obligation.¹⁹² The failure to prevent model mirrors an offense from the U.K. Bribery Act 2010,¹⁹³ with obvious parallels to legislative proposal for the United States which will be discussed in the next part. However, it differs from the U.S. proposal in several ways, most significantly in its inclusion of a private right of action.¹⁹⁴ Whether this ambitious legislative proposal will be politically palatable remains to be seen.

189. *Id.* The U.K. civil society organizations have good reason to advocate for a “failure to prevent” offense. The failure to prevent offense is modeled on section 7 of the UK Bribery Act, which is a strict liability offense, meaning that prosecutors do not have to establish the mens rea of the company. *See* Bribery Act 2010, c.23 (U.K.), <https://www.legislation.gov.uk/ukpga/2010/23/crossheading/failure-of-commercial-organisations-to-prevent-bribery>. This is significant in the U.K., where the test for attributing mens rea to a corporation (“the directing mind and will”) is difficult to prove, in contrast to the U.S. test for attributing liability to companies (repondeat superior). UK LAW COMMISSION, CORPORATE CRIMINAL LIABILITY (Jun. 9, 2021) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/06/Corporate-Criminal-Liability-Discussion-Paper.pdf> 2 and 38. For an example of a strict liability offense for a corporation in the U.K., see LINKLATERS, *Ten years of the Bribery Act – A success?* (Jul. 2, 2021), <https://www.linklaters.com/en-us/insights/blogs/businesscrimelinks/2021/july/the-rule-of-ten/ten-years-of-the-bribery-act-a-success>.

190. *Proposed UK Corporate Duty*, *supra* note 186, para. 6.

191. *Id.*, paras. 4, 7.

192. *Id.*, para. 6.

193. Bribery Act 2010, c.23, s.7 (2); *see also* Pietropaoli et al., *supra* note 21 (advocating a failure to prevent approach for corporate human rights harms).

194. *Proposed UK Corporate Duty*, *supra* note 186, para. 5.

V.

MANDATORY HUMAN RIGHTS DUE DILIGENCE+ IN ACTION:
FCPA-HR

In Part I, we examined what the United States would need to do to meet its obligations under the UNGPs in a way that it is currently failing to do. Here, using a model developed by the International Corporate Accountability Roundtable (ICAR)¹⁹⁵ as a proposed case study, we demonstrate how the United States could rise to the challenges created by both a disclosure and an mHRDD model, and we show the value of an mHRDD+ framework.

There are a number of reasons why an mHRDD+ model is valuable. First, companies would benefit from increased legal certainty, allowing them to draft contracts with suppliers and organize their relationship with subsidiaries according to regulatory requirements. Economics professors Joseph E. Stiglitz and Geoffrey M. Heal, in an amicus brief to the Supreme Court in 2020, reported that the FCPA “created an international environment that is more attractive for U.S. firms.”¹⁹⁶ They affirm that the Act “led to an economic and political environment in which bribery was discouraged both by host countries and other source countries.”¹⁹⁷ U.S. corporations benefited from a more conducive business environment internationally and enjoyed a “reputational premium” because they were known to engage in more responsible practices.¹⁹⁸ As civil society organization EarthRights International observes, the same logic could apply to human rights abuses.¹⁹⁹

195. *See supra* Part IV(A).

196. Brief for Oxfam America & Joseph E. Stiglitz et al. as Amici Curiae Supporting Respondents, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (No. 19-416), at 25.

197. *Id.*

198. *Id.*

199. EARTHRIGHTS INT’L, CANCEL CORPORATE ABUSE: HOW THE UNITED STATES CAN LEAD ON BUSINESS AND HUMAN RIGHTS 19 (2020), <https://earthrights.org/wp-content/uploads/EarthRights-How-the-US-can-lead-on-business-human-rights-2020.pdf>. The European Round Table of Industrialists recently issued a joint statement which includes the argument that harmonized EU due diligence laws would boost the EU and its businesses’ competitiveness. European Round Table of Industrialists, *Ensuring Harmonisation and Consistency Across Due Diligence Frameworks*, ERT (Dec. 16, 2021), <https://ert.eu/wp-content/uploads/2021/12/Statement-harmonisation-of-due-diligence-frameworks.pdf>.

Second, on a wider scale, adopting an mHRDD law would give the United States a tool for inducing other states to pressure companies under their influence to do the same. Congress originally enacted the FCPA in 1977 specifically to promote democratic values across the world through international business, i.e., with what can be argued to be human rights-related aims in addition to the specific aim of combatting corruption.²⁰⁰

It worked.

Since Congress originally enacted the FCPA in 1977, the United States has built a reputation as a global leader in the fight against bribery and corruption.²⁰¹ Having enacted the FCPA, the United States pushed for international consensus and multilateral agreement on criminalizing extraterritorial acts of bribery and corruption, which later came in the form of the UN Convention against Corruption.²⁰² Translating that expertise to the human rights context would enable the United States to rejoin the global leadership on business and human rights. International consensus would level-up the playing field for responsible business conduct, thus strengthening the international democratic order as expressed in norms such as the UNGPs, and the OECD Guidelines for Multinational Enterprises,²⁰³ and—over time—improving the investment environment overseas for U.S. corporations.

200. See Spalding, *supra* note 179, at 1371–75 (“Though Congress then used the language of democracy rather than of human rights, the meaning is essentially the same.”). Whether democratic values are human rights values is debatable. See, e.g., Yoshimi Matsuda et al., *Democratic Values and Mutual Perception of Human Rights in Four Pacific Rim Nations*, 25 INT’L J. INTERCULTURAL RELS. 405, 418 (2001) (discussing the results of the authors’ study which indicated that there is no correlation between democratic orientation and human rights values).

201. See, e.g., Beverley Earle, *The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won’t Work, Try the Money Argument*, 14 PENN ST. INT’L L. REV. 207, 207 (1996) (discussing the United States as the “lone” voice in the fight against bribery through the 1990s).

202. See David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WIS. L. REV. 641 (2017); Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS 162 (Surya Deva & David Bilchitz eds., 2013).

203. See EARTHRIGHTS INT’L, *supra* note 199, at 20.

As seen in Part I, the United States has not enacted legislation to fulfill its state duty to protect under Pillar 1 of the UNGPs. It is this gap that the FCPA-HR seeks to fill. There is a clear difference between an outcome-based assessment of a prohibitive model (like the FCPA and the FCPA-HR represent) and a process-oriented human rights due diligence model (such as is at the heart of most European legislation). In our view, the key consideration in favor of the former and against the latter is that any new laws do not create another box-checking exercise. Such an exercise would take us back down the dead-end route of disclosure laws. Rather, the combination of judicially enforceable liability for human rights violations and the maintenance of books and records documenting HRDD processes undertaken and their outcomes, are, in our submission, requirements for prevention and deterrence of human rights violations.²⁰⁴ We address the question of compensation (i.e., private right of action) in Part IV.D.2 below. First, we turn to the FCPA-HR.

A. *An Examination of the FCPA-HR*

ICAR was founded in 2010 to coordinate the joint advocacy and campaigns on corporate accountability of its member organizations, including Amnesty International, Human Rights Watch, the American Federation of Labor and Congress of Industrial Organizations, Global Witness, EarthRights International and others.²⁰⁵ One of ICAR's areas of work is enacting legal safeguards to prevent corporate human rights abuses. The legislative proposal for a FCPA-HR is part of this work.²⁰⁶

The concept for using the FCPA as a model for holding corporations accountable for human rights violations has been circulating in human rights and academic circles for several

204. See INT'L FED'N FOR HUM. RTS., A MATTER OF JUSTICE: HOW EUROPEAN LEGISLATION CAN MAKE A DIFFERENCE 40 (2020), https://www.fidh.org/IMG/pdf/loi_vigi763angweb.pdf.

205. *Our Work*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, <https://icar.ngo/our-work-overview/>.

206. See *Preventing Corporate Human Rights Abuses*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, <https://icar.ngo/preventing-corporate-human-rights-abuses/> (discussing an FCPA for human rights).

years,²⁰⁷ partly in reaction to Supreme Court decisions greatly limiting the possibility for victims to use the Alien Tort Statute to seek remedy for corporate human rights violations.²⁰⁸ As the latest Alien Tort Statute case made its way to the Supreme Court in 2020,²⁰⁹ ICAR decided to officially draft the FCPA-HR in collaboration with its members and partners. The core hope for this model is that time-tested corporate compliance and government enforcement under the FCPA will be successfully replicated in the FCPA-HR to prevent human rights abuses in the operations of multinational companies and hold those companies accountable when abuses occur.

The FCPA-HR covers the same classes of entities as the FCPA regarding their bribery prohibitions:²¹⁰ (1) “issuers” (including publicly traded companies); (2) “domestic concerns” (including U.S. nationals and residents); and (3) “other people,” including non-U.S. nationals who work to advance a bribery scheme or serious human rights violations while in U.S. territory.²¹¹ Thus U.S. and foreign corporations who choose to access U.S. securities markets are captured. Additionally, ancillary individuals to any of the covered entities may be held liable, including officers, directors, employees, agents,

207. See, e.g., Verdier & Stephan, *supra* note 21. The authors argue that a new statute modeled on the FCPA is a better approach to redress and prevention of serious human rights violations by corporate actors than the Alien Tort Statute and criminal prosecutions—or lack thereof to date. A key argument in favor of this approach is that “it brings the enforcement of U.S. human rights policy within the institutional arrangements normally used to develop and apply U.S. foreign relations, namely executive implementation of legislative mandates.” *Id.* at 1404. See also, e.g., Pierre-Hugues Verdier & Paul B. Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE BLOG (May 7, 2018), <https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights>; Malek, *supra* note 178.

208. Chambers, *supra* note 7, at 535–40 (describing the rise and fall of the Alien Tort Statute); Chambers & Martin, *supra* note 7.

209. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021); see also Desirée LeClercq, *Nestlé United States, Inc. v. Doe*, 141 S. Ct. 1931(2021), 115 AM. J. INT’L L. 694 (2021) (discussing the case).

210. ICAR, *A bill to amend the Securities Exchange Act of 1934 to prohibit corporate violations of human rights throughout their supply chains and enforce reporting mechanisms* (Aug. 12, 2020) (app. A) [hereinafter FCPA-HR]; see also Verdier & Stephan, *supra* note 21, at 1396–97 (justifying an approach to who is covered in a FCPA for human rights that mirrors the approach taken in the FCPA, on grounds of its compliance with public international law).

211. FCPA, 15 U.S.C. §§ 78dd-1, et seq.

and even stockholders acting on behalf of an entity.²¹² Finally, the FCPA-HR (like the original FCPA) provides both civil and criminal liability.²¹³

The FCPA's bribery provisions prohibit the covered businesses and individuals from bribing foreign officials for a corrupt purpose in the course of business.²¹⁴ The FCPA-HR, on the other hand, prohibits the knowing commission of a violation of human rights for a business purpose by all covered businesses and individuals.²¹⁵ Furthering a "business purpose" means obtaining, retaining, maintaining, or otherwise securing an advantage for an entity's financial, territorial, or other gain.²¹⁶ In contrast to the FCPA, which *created* the crime of foreign bribery, the FCPA-HR takes *existing* U.S. crimes and provides a new means of enforcement and implementation of a system to prevent these crimes from happening.²¹⁷

Under the draft text of the FCPA-HR, there is a prohibition against any issuer or covered person to:

knowingly or recklessly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation; or

knowingly benefit from the commission, be it an act of omission, of a violation of human rights by a supplier in its supply chain, where the entity knew or should have known its supplier has committed such violation. For the purposes of this section, it is not necessary to establish that the entity enjoyed a monetary benefit.²¹⁸

212. *Id.*

213. FCPA-HR, *supra* note 210.

214. FCPA, 15 U.S.C. §§ 78dd-1, et seq.

215. FCPA-HR, *supra* note 210.

216. *Id.* §2(i).

217. *Id.*

218. The FCPA-HR model combines both a failure to prevent model (as outlined in section 3(b) of the proposed law), similar to that of the FCPA, and a human rights due diligence model (as outlined in section 4 of the proposed law), which specifically includes a human rights due diligence model in its measure of its "accurate books and records" standard. In that

Thus, the bill sanctions not only any illegal acts of covered persons but also any knowing benefit as a result of a relationship within the issuer's supply chain that has come about as a result of a violation of human rights.²¹⁹ As such, the bill effectively prohibits not just corporate conduct but also violations that could arise within the context of corporate relationships. In that regard, it is very much aligned with the UNGPs' stance regarding the corporate responsibility to respect human rights.²²⁰ The bill, in turn, defines violations of human rights that relate to currently enacted federal crimes including murder, kidnapping, "federal crimes related to forced labor and trafficking," and "federal crimes related to sexual abuse or sexual exploitation."²²¹ By limiting itself to certain human rights violations, the bill is not aligned with the UNGPs.²²²

In addition to the outright prohibition of human rights violations found in Section 3, the FCPA-HR also has a reporting requirement found in Section 4 of the bill. Every reporting issuer shall keep accurate books and records that "fairly reflect the procedures with which the issuer uses or plans to use to meet the due diligence requirements [of the Act]."²²³ The due diligence measures also require multi-stakeholder involvement at all levels of corporate operations including with affiliates, subsidiaries, or parent companies.²²⁴ In that sense, it goes be-

sense, it deviates from the FCPA, which includes the former but not the latter. FCPA-HR, *supra* note 210, § 3(b)(2).

219. To that end, the Act helps with a corporation's Pillar 2 responsibilities under the UNGPs specifically as it relates to relationships with the corporation. *Id.* § 4(b).

220. In fact, the UNGPs arguably go further than the language of the statute. Specifically, UNGP 13 states that corporations should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts.*" UNGPs, *supra* note 10, at 14 (emphasis added). For a discussion regarding the interplay between corporate relationships and the UNGPs, see Jena Martin, "The End of the Beginning?: A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a By-stander Perspective," 17 *FORDHAM J. CORP. & FIN. L.* 871 (2012) (written as Jena Martin Amerson).

221. FCPA-HR, *supra* note 210, § 2(h). Note that the approach of targeting certain human rights violations that are already serious criminal offenses was also proposed by Verdier & Stephan, *supra* note 21, at 1399.

222. See *infra* Part V(D)(1) for our discussion.

223. FCPA-HR, *supra* note 210, § 4(b)(2).

224. *Id.*

yond the original law's accurate books and records to provide an underlying framework of due diligence that is more in line with the current global trends regarding the most effective way to combat human rights violations in supply chains.²²⁵ The due diligence measures that an issuer must undertake include: analysis of human rights risks throughout the supply chain, proactive measures to mitigate or prevent such violations, monitoring of the effectiveness of the program, and collection of records and reports of human rights violations.²²⁶

B. *Advantages of the FCPA-HR Model*

As currently drafted, the FCPA-HR bill operates under a similar framework to the original FCPA, in that it “first, prohibits companies from violating human rights in their course of business, and second, requires companies to institute a due diligence system to prevent any such violations from occurring, and make regular reports regarding their compliance and success.”²²⁷ In that sense, while the underlying content of what is prohibited is different, the framework will be familiar to those who work on FCPA cases. In addition, the link between corruption and gross human rights violations²²⁸ provides some cover for those who would say that the new law is inappropriate as a regulatory objective of the SEC (an argument we address in Part V.D.4. *infra*).

The FCPA-HR also aligns with the FCPA in that it does not rely heavily on a disclosure-based framework. Instead, corporations are subject to an outright ban, not only on their involvement in any activity that leads to the enumerated serious

225. Specifically, the UNGPs provide that the concept of “human rights due diligence” and “human rights risk assessment” should not simply consider the risks of the underlying activity to the corporation but also to the affected community or impacted individual. *UNGPs, supra* note 10 (Principle 15). For a discussion of the HRDD and its placement within the trend of corporate legislation in supply chains, see Jena Martin, *Guest Blog: ULC's Work on Coercive Labor Practices in Supply Chains, Part 5*, BUS. L. PROF. BLOG (Sept. 13, 2020), https://lawprofessors.typepad.com/business_law/2020/09/guest-blog-ulcs-work-on-coercive-labor-practices-in-supply-chains-part-5.html.

226. FCPA-HR, *supra* note 210, § 4(b)(2).

227. ICAR, *The Foreign Corrupt Practices Act (FCPA) v. The Foreign Corrupt Practices Act for Human Rights (FCPA-HR) How do they Compare?* (Aug. 12, 2020) (on file with authors).

228. The link is discussed in Part V(C) *infra*.

human rights violations but also on receiving a knowing benefit from any relationship that came as a result of such a human rights violation. Further, the FCPA-HR follows both the standing and the threshold of liability model of the traditional FCPA in that the prohibition requires knowing conduct on the part of the covered person while the books and records violations has a strict liability standard.

However, in many ways, the FCPA-HR goes far beyond the original purview of the FCPA to situate itself firmly within the current business and human rights debate. The combination of prevention through the books and records provisions, coupled with the legally enforced prohibition, means that this proposal is more effective than the HRDD model.²²⁹ In fact, the complementary frameworks outlined, including (1) a penalty for engaging in the wrongful conduct set out in the law, and (2) a human rights due diligence standard (as encompassed through the books and records section of the law), provide lawmakers with much more regulatory oversight than each of the individual components would have on its own.

A concern that has been raised about the due diligence model is that companies that have complied with the technical requirements of the law may be granted some form of safe harbor from liability, even if human rights violations were subsequently found, so long as they had met their due diligence obligations.²³⁰ The FCPA-HR on the other hand *penalizes* companies where the enumerated human rights violations are found, regardless of the level of due diligence that they had undertaken to ensure that there were no adverse human rights impacts in their global operations.²³¹ It could also allow com-

229. Wim Huisman, *Corporations, Human Rights and Compliance*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin Van Rooij & D. Daniel Sokol eds., 2021) 989, 1006 (arguing for states to take five steps to provide a “smart” regulatory mix in the business and human rights field including HRDD as one step and “sanctioning corporations’ involvement in human rights abuses” as another).

230. RACHEL CHAMBERS, SOPHIE KEMP & KATHERINE TYLER, REPORT OF RESEARCH INTO HOW A REGULATOR COULD MONITOR AND ENFORCE A PROPOSED UK HUMAN RIGHTS DUE DILIGENCE LAW, 20 (2020), <https://media.business-humanrights.org/media/documents/Researchreport11.pdf>; OLIVIER DE SCHUTTER, TOWARDS MANDATORY DILIGENCE IN GLOBAL SUPPLY CHAINS 48–52 (2015), https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf.

231. FCPA-HR, *supra* note 210.

panies opportunities to improve on their practices. While the SEC would have no specific requirement to do so, past practice by the SEC in the realm of the FCPA suggests that, if a company cooperated with the investigation and undertook some form of due diligence, the SEC would likely recommend a less severe penalty.²³²

The ability of regulators to give companies the opportunity to improve on their practices is recognized in regulatory theory as valuable. When taking enforcement action under the FCPA, through deferred prosecution agreements, the DOJ and SEC reach settlement agreements with corporations who run afoul of the FCPA without having to indict them, in return for the company's compliance with certain conditions. These conditions can include the company improving its practices. Hannah Harris and Justine Nolan propose that experimental governance features should be explored with modern slavery regulation, and in particular, penalty defaults.²³³ Their conclusions can be applied more broadly to human rights regulation under discussion here. The experimental governance literature uses the term "penalty defaults" to refer to a regulatory penalty that motivates regulated actors to engage and innovate.²³⁴ The SEC's approach to the FCPA enforcement through deferred prosecution agreements is endorsed by Harris and Nolan as a model of penalty defaults²³⁵ and—if transposed to FCPA-HR—would enhance this regulatory model for BHR.

Both the due diligence and the prohibition models represent a sea change in implementing human rights outcomes into a corporation's operations. Both require substantive engagement by the company around potential human rights abuses within their operations, in stark contrast to the procedural requirements that characterize the current dominant

232. *See, e.g.*, Oil States Int'l, Inc., Exchange Act Release No. 53,732, 87 SEC Docket 2588 (Apr. 27, 2006) (the SEC recommended a lower sanction and only issued a cease-and-desist proceeding, in part, due to the company's actions).

233. Hannah Harris & Justine Nolan, *Learning from Experience: Comparing Legal Approaches to Foreign Bribery and Modern Slavery*, 4 CARDOZO INT'L & COMPAR. L. REV. 603, 638–44 (2021).

234. *Id.* at 639.

235. *Id.*

model: disclosure.²³⁶ But, for the reasons outlined in this section, the FCPA-HR is a significant step forward.²³⁷ It is also sound for policy reasons to pair human rights and corruption legislation, as the next Part explores.

C. *The Link Between Corruption and Human Rights Violations*

Modeling the FCPA-HR on the FCPA is intuitively sound given the commonality between the different forms of corporate misconduct that the two statutes target. The link between corruption and human rights violations is widely acknowledged.²³⁸ In the international policy sphere, U.N. agencies have long connected the two issues, documenting corruption's direct and indirect effects on human rights. For example, when there is corruption in a criminal justice system, there are direct effects on the right to a fair trial and indirect effects including contributing to an environment where related human rights abuses can occur with impunity and facilitating abuses linked to detention and treatment of suspects.²³⁹ Similarly, the resource curse, in which countries that are supplied with the most abundant natural resources are often plagued by corruption and human rights violations, is also widely documented.²⁴⁰

A recent report by the U.N. Working Group on Business and Human Rights makes the link between business, human rights, and anti-corruption agendas, and encourages states to do the same.²⁴¹ The Working Group advises states to enact leg-

236. See, e.g., Hess, *supra* note 63.

237. See discussion of deficiencies of mHRDD as a check-the-box exercise, *supra* Part III(D)

238. Hess, *supra* note 202; Ramasastry, *supra* note 202, at 163.

239. *Corruption, Human Rights and the Human Rights-Based Approach*, ANTI-CORRUPTION RSCH. CTR., <https://www.u4.no/topics/human-rights/basics>. The website lists a number of examples of corruption's impact on human rights. Taking the argument one step further, Spalding, *supra* note 179, at 1402, argues that "freedom from corruption can, and should, be understood as a foundational human right."

240. Nyakundi Michieka & Dustin Blankenship, *Avoiding the Resource Curse: Applying the Guiding Principles in Kenya*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* 559–73 (Jena Martin & Karen E. Bravo eds., 2016).

241. See Connecting the Business and Human Rights and the Anti-Corruption Agendas, Rep. of the Working Grp. on the Issue of Hum. Rts. & Transnat'l Corps. & Other Bus. Enters. on Its Forty-Fourth Session, 15 June–3 July

isolation requiring companies to conduct both human rights and anti-corruption due diligence across their supply chains.²⁴² “In places where corruption is rife, companies need to consider human rights and anti-corruption measures as linked, for example, in situations where officials expected bribes to approve inspections, human rights abuses were also likely.”²⁴³ The report later urges “businesses to identify synergies between human rights and anti-corruption compliance to meet their responsibility to respect human rights in a systematic and structured way.”²⁴⁴

In the United States, the pairing of anti-corruption measures and human rights measures has already taken place, albeit to a limited extent. As discussed in Part II.A. *supra*, Sections 1502 and 1504 of Dodd–Frank pair human rights disclosure, due diligence measures, and anti-corruption measures. Both apply to the extractive sector only, with Section 1502 being limited geographically to the Democratic Republic of Congo and surrounding countries, and rights-wise, to those rights violated through the sourcing of conflict minerals.

More recently, corruption and human rights violations have been addressed as part of a global sanctions regime against those who perpetrate corruption and serious human rights violations. The Global Magnitsky Human Rights Accountability Act allows the U.S. government to sanction perpetrators of certain gross human rights abuses against individuals who have taken on the role of whistleblowers or human rights defenders.²⁴⁵ This Act also allows the U.S. government to sanction perpetrators of serious acts of corruption outside of the country. In both instances, sanctions include denying such perpetrators visas to enter the United States and freezing their U.S.-based property and interests in property.²⁴⁶ Importantly,

2020, U.N. Doc. A/HRC/44/43 (June 17 2020) [hereinafter Rep. of the Working Grp.]; *see also* BUS. AT OECD & THE INT’L ORG. OF EMPLOYERS, CONNECTING THE ANTI-CORRUPTION AND HUMAN RIGHTS AGENDAS: A GUIDE FOR BUSINESS AND EMPLOYERS’ ORGANIZATIONS (Sept. 2020).

242. Rep. of the Working Grp., *supra* note 241, at ¶ 46.

243. *Id.* ¶ 48.

244. *Id.* ¶ 50.

245. Global Magnitsky Human Rights Accountability Act, S. 284, 114th Cong. (2016).

246. It has been questioned whether significant acts of corruption belong in the context of a human rights sanctions regime or are perhaps better addressed by other means. *See* Nienke van der Have, *The Proposed EU Human*

however, those targeted with sanctions are individuals, not corporations. Thus, although these examples demonstrate some legislative pairing of anticorruption and human rights measures, the overall legislative picture in the United States for the prevention of and liability for corporate human rights impacts remains unpromising, in contrast to the picture for corporate liability for bribery and corruption. It is this gap that the FCPA-HR would fill.

D. *Critiquing the FCPA-HR*

Despite these important considerations in favor of the FCPA-HR, the model does have certain drawbacks. We acknowledge and discuss these here, offering recommendations for improvements to the draft law where relevant.

1. *Limited number of human rights violations covered*

The focus on a limited number of enumerated human rights violations that are already crimes for enforcement is not in step with the basic notion that all human rights are interconnected and interdependent. As a result, several human rights violations that are frequently associated with business operations are not addressed by the draft law.

The interconnectedness and interdependence of human rights is reflected in the UNGPs and other enacted HRDD laws, such as the French Law on the Corporate Duty of Vigilance,²⁴⁷ German,²⁴⁸ and Norwegian.²⁴⁹ In its policy paper on the enactment of mHRDD laws, the OHCHR affirms that “[t]here are strong arguments to be made in [favor] of general human rights regimes, covering all internationally recognized human rights, based on the universality, interrelatedness

Rights Sanctions Regime: A First Appreciation, 30 SEC. & HUM. RTS. 56, 68 (2020).

247. Loi de Vigilance, *supra* note 11, art. 1, provides that the plan should “identify risks and prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons, and on the environment.”

248. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13.

249. Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

and indivisibility of human rights.”²⁵⁰ The challenge, of course, is that the FCPA-HR is a criminal statute and human rights and criminal offenses are not synonymous. The difficulty with extending the reach of the FCPA-HR to all human rights is in defining an offense in relation to each human right with sufficient precision that it could form the basis of a criminal charge. This is particularly true where the right is subject to progressive fulfilment (e.g., the right to education) or is limited by certain restrictions (e.g., the right to freedom of speech). That said, many human rights violations (especially “serious” or “gross” human rights violations²⁵¹) will amount to criminal offenses.

Under the FCPA-HR, corporate human rights violations will not be prosecuted if they do not fall within the statutory specification of the enumerated human rights violations, namely: murder, kidnapping, “federal crimes related to forced labor and trafficking,” “federal crimes related to sexual abuse or sexual exploitation,” torture or “severe mental pain or suffering,” war crimes, and damage to religious real property.²⁵² A major omission from this list of offenses is bodily harm. The equivalent U.K. draft law includes the offenses of grievous bodily harm, wounding with intent, and endangering life by damaging property.²⁵³ In addition, there are other serious human rights violations that are not actionable under the FCPA-HR. For example, it would not be possible to prosecute a mining company that poisons the local water supply, violating people in the local community’s rights to health and clean water, among other rights, because the conduct likely does not fall within FCPA-HR’s definition of a human rights violation.

250. UN Human Rights “Issues Paper” on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies, *supra* note 105, at 16.

251. This has been discussed at the international level. See TAKHMINA KARIMOVA, GENEVA ACAD., WHAT AMOUNTS TO “A SERIOUS VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW”? AN ANALYSIS OF PRACTICE AND EXPERT OPINION FOR THE PURPOSES OF THE 2013 ARMS TRADE TREATY (2014).

252. FCPA-HR, *supra* note 210, § 2.

253. TRADCRAFT EXCH. & CRIM. JUST. COAL., RESPONSE TO THE U.K. LAW COMMISSION CONSULTATION ON CORPORATE CRIMINAL LIABILITY 14 (2021) (on file with the authors).

2. *No private right of action*

To victims of corporate human rights abuses, receiving adequate remedy often proves elusive.²⁵⁴ The UNGPs' third pillar explores the need for states and companies to provide access to remedy,²⁵⁵ and discusses three avenues for remedy: state-based judicial mechanisms, state-based non-judicial mechanisms, and non-state grievance mechanisms.²⁵⁶ The FCPA-HR creates neither the first nor second, nor does it oblige companies to conduct the third.²⁵⁷

Under Pillar 3 of the UNGPs, states must provide access to judicial remedy for human rights violations at the hands of corporate actors. While that obligation does not extend to extraterritorial violations,²⁵⁸ the UNGPs do encourage states to provide access to remedy in such cases where local remedy in the host state is not feasible.²⁵⁹ As noted above, in recent years, the Supreme Court has greatly limited the possibility to claim remedy under the Alien Tort Statute,²⁶⁰ referring to Congress to provide a legal basis for such cases.²⁶¹ The FCPA-HR would not fill this gap.

Neither the FCPA nor the FCPA-HR allows for a private right of action. However, unlike in corruption cases,²⁶² business and human rights cases usually have clearly identifiable victims in need of redress. When the FCPA was first enacted, some commentators argued that there should be at least some private right of action granted under the implication doctrine

254. See Rep. of the U.N. High Comm'r for Hum. Rts., U.N. Hum. Rts. Council on its Thirty-Second Session, A/HRC/32/19 (May 10, 2016).

255. Pillar 3 has sometimes been called the "forgotten pillar," See, e.g., Sarah Mcgrath, *Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses*, INST. FOR HUM. RTS. & BUS. (Dec. 15, 2015), <https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and>.

256. UNGPs, *supra* note 10, at 28–31.

257. See FCPA-HR, *supra* note 210.

258. UNGPs, *supra* note 10, at 26.

259. *Id.*

260. See *supra* Part IV(A).

261. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018).

262. There can be direct or indirect victims of corruption, but society as a whole is also a victim. See Open-Ended Intergovernmental Working Grp. on Asset Recovery, Good Practices in Identifying the Victims of Corruption and Parameters for Their Compensation ¶ 12, U.N. Doc. CAC/COSP/WG.2/2016/CRP.1 (Aug. 4, 2016).

for a portion of the law.²⁶³ Where private rights of action have been explicitly permitted in securities regulatory action, commentators argue that such rights of actions provide a robust complementary enforcement schema that eases the burden of otherwise overtaxed federal agencies.²⁶⁴

The mHRDD laws enacted in European countries vary in terms of whether they provide a civil claim for victims of human rights violations,²⁶⁵ but they all require companies to establish grievance mechanisms and provide remedy in situations where the business is connected to human rights violations.²⁶⁶ Under the German law, the regulator can give specific orders to companies directly, without having to go to court.²⁶⁷ These orders could very well include that a company provide adequate remedy.²⁶⁸ The Norwegian Law seems to provide for that possibility as well.²⁶⁹

The FCPA-HR lacks similar provisions. It does, however, provide injunctive relief if the Attorney General or the SEC bring a civil action.²⁷⁰ This could become relevant, for instance to prevent food and beverage companies from displacing communities in order to clear the land for plantations such as palm oil. The FCPA-HR also provides that a court may grant “any equitable relief, including the disgorgement of ill-gotten gains, that may be appropriate or necessary for the benefit of victims.”²⁷¹ It is also possible that, as part of a criminal

263. See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 216 (1994).

264. See Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 789 (2001) (arguing that a regulatory system that includes “private plaintiffs” and “self-regulatory organizations” can “work fairly well.”); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 964–65 (2019).

265. See the discussion *supra* Part III.

266. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13, §§ 7–8; Loi de Vigilance, *supra* note 11, art. 1.

267. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13.

268. *Id.* § 15(3).

269. Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

270. FCPA-HR, *supra* note 210, § 3(b)(1). Footnote 10 in the FCPA-HR, *supra* note 214, at fn.10, clarifies that this does not apply to issuers.

271. FCPA-HR, *supra* note 210, § 3(d).

sentencing under the FCPA-HR, companies could be ordered to provide compensation to victims.²⁷²

3. *Encourages Cutting and Running*

The FCPA-HR could encourage “cutting and running,”²⁷³ thereby undermining the UNGPs’ approach to put outcomes for people in the center of business decisions. The UNGPs ask for a shift in how companies approach human rights issues—away from considering risks to the company and towards thinking about risks to people. This concept becomes particularly relevant when a company is connected to human rights violations, either through its supply chain or because it is active in conflict areas. To avoid reputational risk to companies in such situations, the obvious step is to cancel the business relationships or withdraw from the area. That way, the company cuts the connection and association to the human rights violations by other parties. However, not only does this behavior fail to address or improve the human rights situation, but it can even worsen the situation. The UNGPs clearly state that disengagement is a last resort and is appropriate only where the company cannot use or build leverage to mitigate or prevent the human rights impacts.²⁷⁴

Harm also occurs through hasty disengagement from conflict areas. For example, if a company cancels a supplier contract because of forced labor in the supplier’s production facilities, that supplier might then lay off these workers, who will be stranded in a foreign country without employment.²⁷⁵ After the February 1, 2021, military coup in Myanmar, a Norwegian

272. Verdier & Stephan, *supra* note 21, at 1408.

273. By “cutting and running,” we mean exiting a business relationship with an entity found to be involved in human rights harms, to avoid the risk of financial or other sanctions. See Joseph Wilde-Ramsing, *Telenor’s Exit from Myanmar - A Cautionary Tale for the Just Transition*, INST. HUM. RTS. & BUS. (Sept. 26, 2021), <https://www.ihrb.org/focus-areas/just-transitions/telenor-exit-from-myanmar-a-cautionary-tale-for-the-just-transition>.

274. See *United Nations Guiding Principle 19*, NAT’L ACTION PLANS ON BUS. & HUM. RTS. (last visited Mar. 28, 2022), <https://globalnaps.org/ungp/guiding-principle-19/>.

275. Unintended negative consequences of company disengagement are also relevant in the use of Withhold Release Orders to block products produced (in part) by forced labor. See Allie Brudney, *Using the Master’s Tool to Dismantle the Master’s House: 307 Petitions as Human Rights Tool*, CORP. ACCOUNTABILITY LAB, (Aug. 31, 2020), <https://corpaccountabilitylab.org/cal->

telecom company withdrew from the area and sold off its Myanmar business to a company that has been linked to allegations of corruption and terrorist financing, human rights violations, and ties to the Myanmar military.²⁷⁶ Civil society organizations now contend that the company puts human rights at risk through this hasty disengagement.²⁷⁷

By prohibiting that a company “knowingly benefits from a violation” of a direct or indirect supplier, where the company “knew or should have known” of the violations, the FCPA-HR increases the risks to companies if they are connected to human rights violations in the supply chain. If a company discovers, for example, forced labor in its supply chain, it might be afraid to now “knowingly benefit” if it continues the supplier relationship. This shifts the focus away from the risks to people. A response focusing on the human rights implications would likely attempt to first remediate the situation by using the leverage that the company has over its suppliers. An important role of the regulator (i.e., the SEC), would be to advise companies against cutting and running through techniques such as official guidance on the statute.

4. *The role and readiness of regulators*

Although the U.S. securities market is currently dominated by quantitative and algorithmic based trading (that rarely, if ever, looks at the fundamentals of the company from an investment perspective),²⁷⁸ having the SEC actively engage in its regulatory function vis-à-vis human rights would serve as an important signaling device to the market that could lead institutional investors to adopt human rights indicators as part of their formulas that decide which companies to invest in. Another advantage of the SEC taking a more overt lens in examining corporate human rights issues is that it would also help

blog/2020/8/28/using-the-masters-tools-to-dismantle-the-masters-house-307-petitions-as-a-human-rights-tool.

276. See *Irrawaddy Towers Asset Holdings PTE.*, FMO (Dec. 15, 2015), <https://www.fmo.nl/project-detail/45082>.

277. See Complaint, *Ctr. for Rsch. on Multinational Corps. v. Telenor ASA* (Nor. Nat'l Contact Point 2021), https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/07/Telenor-OECD-GLs-complaint-1.pdf.

278. See Martin, *Changing the Rules*, *supra* note 180.

the United States satisfy its obligations under Principle 8 of the UNGPs related to policy coherence.²⁷⁹

Nonetheless, one could challenge the SEC as the proper agency for this regulatory function specifically because it has no current institutional expertise in human rights-related securities regulation.²⁸⁰ As such, the agency would need to devote resources to training and hiring staff with the requisite level of expertise to tackle these issues. While, assuredly, the SEC could eventually obtain the necessary knowledge base to undertake meaningful investigations, at the present stage the SEC is generally focused on financial-based misconduct rather than a broader, non-financial mandate.²⁸¹ In that regard, even if the proposed FCPA-HR law were to be enacted, it may take years, if not decades, for the SEC to vigorously enforce the law. Civil society organizations, in advocating for a new FCPA-HR, would either immediately need to dedicate resources to ensuring that regulators can hit the ground running²⁸² with meaningful enforcement or they must be content with playing the

279. Jena Martin, *UN Guiding Principle Number 8*, in *THE RESEARCH HANDBOOK ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS*, (Barnali Choudhury ed., forthcoming 2022) (on file with authors).

280. See Chambers & Vastardis, *supra* note 75 (proposing a model for a sui generis regulator to oversee and enforce human rights disclosure and due diligence laws).

281. The appropriateness of the SEC as a regulator on corporate human rights impacts is debated. For instance, with regard to Dodd–Frank § 1502, the ability of the SEC to be a “humanitarian watchdog” has been questioned, due to the organization’s lack of specialist knowledge. See Karen E. Woody, *Conflict Minerals Legislation: The SEC’s New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315 (2012). Note that the SEC’s role in enforcement of the FCPA is not without challenge. See Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC’s Mission*, 73 *OHIO STATE L.J.* 1093 (2012). Woody distinguishes between the FCPA and § 1502, arguing that the FCPA regulates issues that directly relate to a company’s bottom line, and malfeasance involving its employees, while § 1052 does not directly relate to the bottom line and involves people who are “not linked” to the corporation. See Woody, *supra*, at 1343. We disagree. Companies are linked to (and may well contribute to) human rights impacts that occur through the procurement of conflict minerals. A company’s bottom line is increasingly involved when human rights impacts occur—e.g., through reputational damage, or as a result of litigation against the company.

282. U.K. civil society organizations, for instance, have commissioned research on the role of a regulator in overseeing and enforcing the proposed U.K. failure to prevent law, see Pietropaoli et al, *supra* note 21, which exam-

long game and hoping for a more gradual inculcation of the statute into the existing legal and regulatory framework.

CONCLUSION

There is a growing international movement regarding the adoption of a mHRDD framework. However, as with any framework, the momentum towards being proactive in BHR issues may come at a cost of thoughtful reflection regarding whether the current action is, in fact, the best one. Although the United States has an historical framework that the world has used to combat bribery and corruption through the FCPA, its failure to take on the issues of corporate accountability for human rights abuses head on has now placed it firmly behind the curve vis-à-vis its UNGP Pillar 1 obligations. Now, however, the United States has the chance to change that. Having policymakers and legislators meaningfully engage with ICAR's proposal would provide the United States with the opportunity to thoughtfully consider the role that the state should play in holding corporations accountable. We believe that the mHRDD+ model (as exemplified by the ICAR model) is an important step towards that re-engagement.

The diversity of domestic legislative initiatives on HRDD raises an important subject for future scholarship, namely whether an international treaty would create regulatory convergence in this field which is currently lacking. Under the current draft of a proposed BHR treaty,²⁸³ all corporations are required to undertake HRDD.²⁸⁴ In addition, the current draft contains an offense of failure to prevent another person (or legal entity) from “causing or contributing to a human rights

ines best regulatory practice across fields such as competition law in curbing corporate misconduct. *See Proposed UK Corporate Duty*, *supra* note 186.

283. In 2014, the United Nations Human Rights Council adopted a resolution to establish an open-ended intergovernmental working group (OEIGWG) to elaborate on a treaty. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). At the time of writing, the current version of the draft treaty is the Third Revised Draft. U.N. Human Rights Council, OEIGWG Chairmanship Third Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTrans-Corp/Session6/LBI3rdDRAFT.pdf>.

284. *Id.*

abuse.”²⁸⁵ Thus, elements of the enacted and proposed European laws and the proposed FCPA-HR are present.

The ratification of the proposed treaty remains a somewhat distant prospect, however; and, for this reason, despite the need for regulatory convergence, we advocate for the adoption of the FCPA-HR. We believe that modeling human rights violation prevention and remedy on the FCPA would significantly improve the legal architecture for business and human rights in the United States. The combination of the substantive prohibition and the books and records due diligence—HRDD+—would be an enormous step forward from the current paradigm of disclosure laws. Of course, like any legislative initiative, in order for this to truly be effective, the framework would have to be developed to prevent pro forma compliance programs designed to ward off liability without materially altering corporate behavior.²⁸⁶ We recommend that this concern be at the front and center of advocates’ and lawmakers’ minds and that lessons be drawn from successes and failures in other areas of corporate compliance to reduce the likelihood of this occurring.

We hope policymakers heed our call.

285. *Id.* at art. 8.6.

286. For instance, the anti-corruption landscape is not immune from this behavior. *See, e.g.*, Verdier & Stephan, *supra* note 21, at 1403 (citing the Siemens corruption case).

APPENDIX A

Proposed Law of FCPA-HR²⁸⁷

A Bill to Amend the Securities Exchange Act of 1934 to Prohibit Corporate Violations of Human Rights Throughout their Supply Chains and Enforce Reporting Mechanisms.

SECTION 1. SHORT TITLE

This Act may be cited as XXX.

SECTION 2. DEFINITIONS

In this Act—

(a) COMMISSION.—The term “Commission” refers to the Securities and Exchange Commission as established by Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. § 78d).

(b) DOMESTIC CONCERN.—The term “domestic concern” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, incorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof, as also defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(1).

(c) ENTITY.—The term “entity” includes “issuers,” “domestic concerns,” and other persons as defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, § 78dd-2(h)(1), and § 78dd-3(f)(1) respectively.

(d) ISSUER.—The term “issuer” includes any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to 15 U.S.C. § 78l or which is required to file reports under 15 U.S.C. § 78o(d), or for any person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, as referenced in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a).

287. See FCPA-HR, *supra* note 210.

(e) **KNOWING.**—

(1) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(A) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(B) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(2) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(f) **SUPPLY CHAIN.** —The term "supply chain" means, for an entity—

(1) any recruiters of workforce labor, and suppliers of products, component parts, raw materials, and services used by the entity in manufacturing any products of the entity, even if the relationship with such recruiter or supplier is informal; and

(2) other entities that receive products or services from the entity, other than for personal use.

(g) **VIOLATION.**—The term "violation," when used in the context of human rights, means an entity's act or omission which has an adverse impact on the enjoyment of human rights.

(h) **VIOLATION(S) OF HUMAN RIGHTS**—The term "violation of human rights" or "violations of human rights" includes actions, which, if committed, ordered, or financially, materially, or technologically supported, as well as a failure to take any action, within the special maritime and territorial jurisdiction of the United States, would meet the definition of:

(1) Homicide, as defined in 18 U.S.C. § 1111 et seq.;

(2) Kidnapping, as defined in 18 U.S.C. § 1201 et seq.;

(3) Federal crimes related to forced labor and trafficking, including peonage, as defined in 18 U.S.C. § 1581; involuntary servitude, as defined in 18 U.S.C. § 1584; forced labor, as defined in 18 U.S.C. § 1589; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, as defined in 18 U.S.C. § 1590; sex trafficking of children or by force, fraud, or coercion, as defined in 18 U.S.C. § 1591; unlawful conduct with respect to documents, as defined in 18 U.S.C. § 1592;

benefiting financially from peonage, slavery, and trafficking in persons, as defined in 18 U.S.C. § 1593A; attempting to or conspiring to commit any crime in this definition, as defined in 18 U.S.C. § 1594;

(4) Federal crimes related to sexual abuse or sexual exploitation, including sexual abuse, as defined in 18 U.S.C. § 2241 et seq.; sexual exploitation and other abuse of children, as defined in 18 U.S.C. § 2251 et seq.; transportation for illegal sexual activity and related crimes, as defined in 18 U.S.C. § 2421 et seq.;

(5) “Torture” and/or “severe mental pain or suffering” as defined in 18 U.S.C. § 2340 et seq.;

(6) War crimes, as defined in 18 U.S.C. § 2441 et seq.; or

(7) Damage to Religious Real Property, as defined in 18 U.S.C. § 247.

(i) BUSINESS PURPOSE —The term “business purpose” includes actions or omissions to obtain, retain, maintain, or otherwise secure an interest and/or advantage for an entity’s financial, territorial, or other gain.

SECTION 3. PROHIBITED BUSINESS PRACTICES BY ENTITIES

(a) PROHIBITIONS. —It shall be unlawful for any entity, or for any officer, director, employee, or agent of such entity, any stockholder thereof, or participant within an entity’s supply chain acting on behalf of such entity to—

(1) make use of, assist, aid and abet, or conspire with one making use of the mails or any means or instrumentality of interstate commerce in furtherance of a business purpose that directly or indirectly causes a violation of human rights;

(2) knowingly or recklessly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation; or

(3) knowingly benefit from the commission, be it an act or omission, of a violation of human rights by a participant within its supply chain, where the entity knew or should have known its supplier has committed such violation. For the purposes of this section, it is not necessary to establish that the entity enjoyed a monetary benefit.

(4) **ALTERNATIVE JURISDICTION:** It shall also be unlawful for any entity or United States person to knowingly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation, irrespective of whether such issuer or person makes use of the mails or any means of instrumentality of interstate commerce in furtherance of such violation.

(b) **INJUNCTIVE RELIEF.—**

(1) Whenever it shall appear that any domestic concern or person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of Section 3(b), the Attorney General or the Commission may, in their respective discretions, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General or the Commission, is necessary and proper to enforce this section, the Attorney General, their designee, or the Commission are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General or the Commission deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, and may be requested from any foreign jurisdiction, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General or the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General, their designee, or

the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General or the Commission may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(c) **PENALTIES.**—

(1) **Administrative fines.** Any entity that violates Section 3(b) shall receive a monetary fine.

(2) **Civil liability.** Any entity, and/or any natural person that is an officer, director, employee, or agent of an entity, or stockholder acting on behalf of such entity, who violates Section 3(b) shall be subject to a civil penalty imposed in an action brought by the Attorney General or the Commission.

(3) **Criminal liability.** Any natural person that is an officer, director, employee, or agent of an entity, or stockholder acting on behalf of such entity, who willfully violates Section 3(b) shall be fined, imprisoned, or both.

(4) Whenever a monetary penalty is imposed under Section 3(d) upon any natural person that is an officer, director, employee, agent, or stockholder of an entity, such fine may not be paid, directly or indirectly, by such entity.

(5) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in this subsection.

(d) **EQUITABLE RELIEF.** In any action or proceeding brought or instituted by the Department of Justice or the Commission under any provision of the securities laws, the Department of Justice Commission may seek, and any Federal court may grant, any equitable relief, including the disgorgement of ill-gotten gains, that may be appropriate or necessary for the benefit of the victims. Equitable relief may be sought contemporaneously with other remedies, including injunction and civil and/or criminal penalties.

(e) **SUSPENSION AND DEBARMENT.** Any entity who violates this Section shall be subject to suspension and debarment as specified in subpart 9.4 of Title 48 of the Code of Federal Regulations (or any successor regulation).

SECTION 4. REPORTING REQUIREMENTS

(A) REPORTS BY ISSUER OF SECURITY, CONTENT.—

(1) Every issuer of a security registered pursuant to Section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(A) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included or filed pursuant to Subsection XX of this Chapter;

(B) all relationships to suppliers, producers, purchasers, and all other upstream and downstream business partners, to the extent not otherwise disclosed in the report; and

(C) certified private sector audits that may be required for high risk sectors and entities operating in high risk areas, as required by Section XXX of this Chapter. Such a certified audit shall constitute a critical component of due diligence.

(2) Unreliable Determination. If a report required to be submitted by a person under subparagraph XX relies on a determination of an independent private sector audit, as described under subparagraph XX or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph XX.

(B) FORM OF REPORT; BOOKS, RECORDS, AND DUE DILIGENCE; DIRECTIVES.—

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the methods to be followed in the preparation of reports, and specify content to provide, but in the case of the reports of any entity whose methods of disclosure are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to

the extent that the Commission determines that the public interest or the protection of investors so require).

(2) Every issuer which is required to file reports pursuant to this Section shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the procedures with which the issuer uses or plans to use to meet the due diligence requirements of [the following subsection], as well as the due diligence measures taken.

(B) devise and maintain a system, in association with relevant stakeholders, and where appropriate, within multi-stakeholder initiatives within affiliate, subsidiary, or parent levels, that is sufficient to provide reasonable assurances that the entity is not engaging via act or omission in the violation of human rights, and that shall include the following measures:

i. Risk analysis. Procedures to regularly and continually identify, analyze, and rank the risks of violations of human rights throughout the entity's supply chain, considering factors including—

1. Country and/or region-specific risks;
2. Sector-specific risks;
3. The severity of the potential or actual impact;
4. The likelihood that such an impact would occur;
5. How directly the entity is contributing to such violations, and

6. The actual and economic leverage the entity can exert on the actor directly causing such violations.

ii. Preventative measures. Action to mitigate risks and/or prevent violations of human rights throughout the entity's supply chain, including a policy regarding human rights, business, and the supply chain, which shall be communicated to employees and business partners;

iii. Monitoring. A method to monitor ongoing, recent, or imminent adverse impacts or violations of human rights throughout the entity's supply chain, as well as the effectiveness of the risk analysis process and preventative measures; and

iv. Collection of records and reports. Processes to collect all records and reports of ongoing, recent, or imminent violations of human rights throughout the entity's supply chain, which must in turn include the entity's response to the record or report, or explanation for lack of response.

(3) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of Subsection 4(b)(2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of human rights due diligence consistent with Subsection 4(b)(2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be presumed to have complied with the requirements of Subsection 4(b)(2).

(4) Definitions. For the purpose of this subsection, the terms "reasonable assurances" and "reasonable detail" mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs," as defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78m(b)(7).

(C) PENALTIES

(1) Willful violations; false and misleading statements.

Any person who willfully violates any provision of Section 4, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Section, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o(d), or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be served a monetary fine, or imprisoned, or both; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if they prove that they had no knowledge of such rule or regulation.

(2) Failure to file information, documents, or reports.

Any issuer which fails to file information, documents, or reports required to be filed under Section (4)(B)(2) shall forfeit to the United States a monetary sum, specified by the investigating agency, for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (C)(1) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.