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Murky Materiality & Scattered Standards: In Favor of a More Uniform System of SST Disclosure Requirements

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MURKY MATERIALITY & SCATTERED STANDARDS: IN FAVOR OF A MORE UNIFORM SYSTEM OF SST DISCLOSURE REQUIREMENTS

Megan Ganley*

The Securities and Exchange Commission (SEC) requires corporations to disclose their business in or with state sponsors of terrorism (SSTs). The SEC solicits these disclosures with varying standards arising under several different mechanisms. These mechanisms include the requirements of the materiality standard, the provisions of Regulation S-K, targeted inquiry in individually issued comment letters, and affirmative requirements mandated under specific legislation. Each of these mechanisms requires disclosure of slightly different information regarding SSTs with varying degrees of exactitude.

This Note examines the SEC's current SST disclosure framework, considering the benefits, as well as the criticisms, of these disclosure mandates. This Note concludes that, although SST disclosure mandates are important, the mechanisms in place result in inconsistent disclosure that renders the entire framework ineffective. This Note argues that a more consistent SST disclosure standard is needed and proposes the addition of a new line item to Regulation S-K mandating that companies disclose all of their business in or with SSTs.

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INTRODUCTION

Few concepts seem as unrelated as Barbie Dolls and terrorism. Nevertheless, when a news article reported that shops in Iran were selling Barbies, the Securities and Exchange Commission (SEC) wrote to Mattel, the manufacturer of Barbies, due to Iran's status as a state sponsor of terrorism (SST).¹ The SEC requested that Mattel provide an update on its

1. See Comment Letter from Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, to Linda Cvrkel, Effie Simpson, & Jennifer Hardy, Mattel, Inc. 1-2 (Apr. 30, 2012), <https://www.sec.gov/Archives/edgar/data/63276/000119312512196514/filename1.htm> [<https://perma.cc/2WKT-LPQ6>].

contacts with Iran, as the company's prior disclosures did not include statements regarding the country.² In response, Mattel replied that, although the company was aware of a series of press articles reporting that Iranian police had closed down stores selling Barbies, any sale in Iran was "contrary to Mattel corporate policy," and the dolls were either counterfeit or sold unlawfully by a third party.³ This correspondence exemplifies SST disclosure efforts by the SEC.

The SEC is a government agency that was founded at the height of the Great Depression⁴ with a mission to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."⁵ The SEC regulates financial markets⁶ by enforcing the federal securities laws—laws rooted in a mandatory disclosure regime.⁷ Under this disclosure regime, companies are generally required to disclose information that is material.⁸

SEC disclosure requirements occasionally extend beyond exclusively financial information and into nonfinancial activities.⁹ Sometimes, nonfinancial information is considered material because of its inherent financial impact;¹⁰ other times, targeted regulatory requirements mandate disclosure of nonfinancial information through legislation and other mechanisms.¹¹ This Note focuses on just one type of information that must be disclosed: activities in or with nations designated as SSTs.¹² These

2. *Id.*

3. *Id.*

4. *What We Do*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/what-we-do> [<https://perma.cc/CKC2-NFCV>] (last visited Oct. 29, 2021).

5. See Robert Hills et al., *State Sponsors of Terrorism Disclosure and SEC Financial Reporting Oversight 6* (Sept. 8, 2021) (unpublished manuscript) [hereinafter Hills et al., *State Sponsors of Terrorism Disclosure*], <https://ssrn.com/abstract=3592694> [<https://perma.cc/P64R-2W2B>].

6. Robert Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, COLUMBIA BLUE SKY BLOG (May 19, 2020) [hereinafter Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*], <https://clsbluesky.law.columbia.edu/2020/05/19/does-state-sponsor-of-terrorism-disclosure-limit-sec-financial-reporting-oversight/> [<https://perma.cc/S9CK-KCRF>].

7. See Allen Ferrell, *Mandatory Disclosure and Stock Returns: Evidence from the Over-the-Counter Market*, 36 J. LEGAL STUD. 213, 213–14 (2007); see also Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1640 (2019).

8. See Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87, 98–99 (2014) ("The mandatory disclosure obligation under U.S. federal securities law is circumscribed by the principle of materiality. Under this principle, a company must only disclose a given piece of information if there is a substantial likelihood that a reasonable investor would deem it significant in the 'total mix' of available information—i.e., what an ordinary, rational investor would consider important information in an arm's length securities transaction."); *infra* Part I.B.1 (discussing the materiality standard in greater depth).

9. See Park, *supra* note 8, at 98.

10. See *infra* Part II.B.1.

11. See Park, *supra* note 8, at 98, 102–03; *infra* Part I.B.4.

12. Although the list has fluctuated over the years, it presently includes North Korea, Iran, Syria, and Cuba. Compare Bureau of Counterterrorism, *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, <https://www.state.gov/state-sponsors-of-terrorism/> [

disclosures are in part required pursuant to specific legislation,¹³ but they are largely solicited under the general framework of the materiality requirement and Regulation S-K.¹⁴ The aforementioned letter issued by the SEC to Mattel regarding Barbie sales is a typical example of the SEC's efforts to solicit SST disclosures through targeted inquiry via comment letters.¹⁵

This Note analyzes the methods the SEC currently uses to generate SST disclosures and considers whether these methods function effectively to provide necessary information to the investors who benefit from corporate disclosure requirements.¹⁶ Part I discusses the SST designation process before describing the four principal mechanisms the SEC uses to solicit SST disclosures. Part II then assesses whether current SST disclosure practices are beneficial, worthwhile, and effective. Finally, Part III proposes an addition to Regulation S-K that seeks to enhance the uniformity of information that companies must disclose regarding their interactions in or with SSTs.

I. SETTING THE STAGE: SST DESIGNATION AND SEC REGULATION

As mentioned above, companies doing business with SSTs are regulated by a host of disclosure requirements.¹⁷ Before considering mechanisms of soliciting SST disclosures, it is useful to survey the legal landscape explaining how and why countries become designated as SSTs. Part I.A examines the current SST designation protocol and identifies the countries designated as SSTs. Part I.B explores the various SST disclosure requirements that apply to corporations doing business with these countries.

A. Defining and Designating SSTs

A country's designation as an SST is important to the SEC because the designation triggers SST disclosure requirements for companies.¹⁸ However,

C5V3] (last visited Oct. 29, 2021), with Memorandum from Davis Polk & Wardwell LLP, Preparing Your 2017 Form 20-F (Dec. 14, 2017), https://www.davispolk.com/sites/default/files/2017-12-14_preparing_your_2017_form_20-f.pdf [<https://perma.cc/T3KA-3MSY>] (demonstrating the changing designations over time).

13. See *infra* Part I.B.4 (discussing disclosure requirements under the ITRA).

14. See *infra* Part I.B.1 (discussing SST disclosure requirements under the materiality standard).

15. See *supra* note 1; Part I.B.3.

16. Although this Note considers a variety of positions, including those of reporting companies and the SEC, the default perspective is that of investors, as investors represent the cohort to which SST disclosures are directed.

17. See *supra* text accompanying note 14.

18. A point of clarification: "state sponsor of terrorism" is not the sole terrorism designation in use. The term "foreign terrorist organization" designates organizations engaging in terrorist activities or retaining the capability and intent to engage in terrorist activities, and other designations have also been employed throughout history. Bureau of Counterterrorism, *Terrorist Designations and State Sponsors of Terrorism*, U.S. DEP'T OF STATE, <https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/> [<https://perma.cc/ZXU6-S7F5>] (last visited Oct. 29, 2021). The scope of this Note is

the SEC does not make these determinations; the authority to formally designate a country as an SST resides with the U.S. secretary of state.¹⁹ Part I.A.1 below discusses more thoroughly the criteria for designating a country as a sponsor of terrorism. Part I.A.2 then discusses the four countries currently designated as SSTs and the rationale for their respective designations.

1. The Legal Framework of SST Designation

The U.S. secretary of state designates a country as an SST if that country repeatedly provides support for international acts of terrorism.²⁰ The designation remains until it is rescinded by the U.S. Department of State.²¹ The secretary of state's legal authority to make the SST determination derives from three laws: the Export Administration Act of 1979,²² the Arms Export Control Act,²³ and the Foreign Assistance Act of 1961.²⁴

Section 6(j) of the Export Administration Act grants the secretary of state the authority to designate a country as an SST if that country has "repeatedly provided support for acts of international terrorism," including by allowing any part of the country's territory to be used as a sanctuary for terrorists.²⁵ Section 40 of the Arms Control Act similarly grants the secretary of state the authority to determine that the government of a country has repeatedly provided support for acts of international terrorism.²⁶ Lastly, like § 40 of the Arms Control Act, § 620A of the Foreign Assistance Act recognizes the secretary's authority to determine that a country's government has repeatedly provided support for acts of international terrorism.²⁷ Taken together, these

exclusively limited to SSTs. These differences are only raised to mitigate confusion by distinguishing SSTs from other terrorist-related designations.

19. See *infra* Part I.A.2.

20. See Bureau of Counterterrorism, *supra* note 12. The underlying definitions of a "terrorist act" and "terrorism" are complex; indeed, the search for a definition of terrorism has been compared to the "quest for the Holy Grail." See Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249 (2004) (citing Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 119 (1996)). Still, the "vast majority" of proposed definitions incorporate the notion of "violence" and "political purpose or motivation." *Id.* at 251.

21. See U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2016, at 303 (2017) [hereinafter COUNTRY REPORTS 2016].

22. Pub. L. No. 96-72, 93 Stat. 503 (codified as amended in scattered sections of the U.S.C.); 50 U.S.C. § 4605(j).

23. Pub. L. No. 96-28, 82 Stat. 1320 (1968) (codified as amended in scattered sections of 22 U.S.C.); 22 U.S.C. § 2780.

24. Pub. L. No. 87-194, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.); 22 U.S.C. § 2371; see also Bureau of Counterterrorism, *supra* note 12 (discussing the interplay of the three laws).

25. 50 U.S.C. § 4605(j). Interestingly, this act was repealed, but determinations made under its provisions are continued by § 1768 of the Exports Controls Act of 2018. See DIANNE E. RENNACK, CONG. RSCH. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM—LEGISLATIVE PARAMETERS: IN BRIEF 3 (2021).

26. 22 U.S.C. § 2780(d).

27. *Id.* § 2371(a).

three acts functionally authorize the secretary of state to designate a foreign government as an SST.²⁸

2. Countries Currently Designated as SSTs

There are four countries currently designated as SSTs: Syria, Iran, North Korea, and Cuba.²⁹ Syria has been designated as an SST since 1979, followed by Iran in 1984, North Korea in 2017, and most recently, Cuba in early 2021.³⁰ The secretary of state is statutorily required to provide a report on terrorism to the speaker of the House of Representatives and the U.S. Senate Committee on Foreign Relations each year, discussing the status of terrorism in countries meeting certain criteria.³¹ Therefore, information regarding countries' SST designations is publicly available via annual reports, and further, these reports include detailed information explaining why a country is designated as an SST for that particular year.³² Recent annual reports shed light on the State Department's current evaluations of SSTs.³³

The Department of State designated Syria as an SST in 1979.³⁴ This designation remains today, because the regime of Syrian President Bashar al-Assad continues to provide political and military support to terrorist groups.³⁵ Further, Syria serves as a "hub for foreign terrorist fighters," providing networks for extremism throughout the Middle East.³⁶ The country takes a "permissive attitude" toward terrorist groups such as al-Qaeda and ISIS,³⁷ and repeatedly violated its obligations under the Chemical Weapons Convention.³⁸

The Department of State designated Iran as an SST in 1984, and today, Iran is considered the most prominent country in the SST arena.³⁹ Iran

28. See generally RENNACK, *supra* note 25.

29. Bureau of Counterterrorism, *supra* note 12.

30. *Id.*

31. See 2 U.S.C. § 2656f(a). Since 2004, this report has been published as *Country Reports on Terrorism*. See, e.g., U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2005 (2006). Prior to 2004, the report was published under the name *Patterns of Global Terrorism*. *Id.*

32. See generally 2 U.S.C. § 2656f(a). Statutory language further specifies which activities should be raised and assessed in the report. *Id.*

33. See generally COUNTRY REPORTS 2016, *supra* note 21; U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2017 (2018) [hereinafter COUNTRY REPORTS 2017]; U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2018 (2019) [hereinafter COUNTRY REPORTS 2018]; U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2019 (2020) [hereinafter COUNTRY REPORTS 2019].

34. See COUNTRY REPORTS 2016, *supra* note 21, at 305.

35. See *id.*

36. See *id.*

37. See COUNTRY REPORTS 2017, *supra* note 33, at 219–20.

38. See COUNTRY REPORTS 2016, *supra* note 21, at 306.

39. See *id.* at 304. The 2016 Report labeled Iran "the foremost state sponsor of terrorism," *id.* at 19, 304, while the 2017 and 2018 reports indicated that Iran remained the world's

provides support for Palestinian terrorist groups in Gaza and terrorist groups in Syria, Iraq, and the Middle East at large, and Iran has worked to create instability in the Middle East while cultivating and supporting terrorist groups abroad.⁴⁰ Iran is further responsible for intensifying conflicts in Afghanistan, Bahrain, Iraq, and Lebanon.⁴¹

North Korea was originally designated as an SST in 1988,⁴² but the United States rescinded the designation in October 2008.⁴³ The designation was again reinstated in 2017 because North Korea supported acts of international terrorism and violated United Nations Security Council resolutions.⁴⁴ The 2018 Country Report on Terrorism also cited North Korea's involvement in assassinations on foreign soil for its renewed designation as an SST.⁴⁵

Most recently, the Department of State designated Cuba as an SST on January 12, 2021.⁴⁶ Cuba had been removed from the list in 2015, but it was reinstated due to the Castro regime's support of international terrorism in providing a safe harbor to terrorists.⁴⁷ Additionally, the State Department determined that the Cuban government aids "murderers, bombmakers, and hijackers" and harbors—and refuses to return—wanted fugitives to the United States.⁴⁸

Syria, Iran, North Korea, and Cuba are the four countries currently designated as SSTs,⁴⁹ and corporations doing business in or with these countries are therefore subject to disclosure requirements.

"leading state sponsor of terrorism." COUNTRY REPORTS 2017, *supra* note 33, at 8; COUNTRY REPORTS 2018, *supra* note 33, at 9.

40. COUNTRY REPORTS 2016, *supra* note 21, at 304.

41. COUNTRY REPORTS 2017, *supra* note 33, at 218.

42. *Id.* at 217.

43. *Id.*

44. See COUNTRY REPORTS 2018, *supra* note 33, at 211.

45. See *id.*

46. Bureau of Counterterrorism, *supra* note 12.

47. Michael R. Pompeo, *U.S. Announces Designation of Cuba as a State Sponsor of Terrorism*, U.S. DEP'T OF STATE (Jan. 11, 2021), <https://2017-2021.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism/index.html> [<https://perma.cc/T58D-X87P>].

48. *Id.*

49. Bureau of Counterterrorism, *supra* note 12. Because the State Department reevaluates annually which countries are designated as SSTs, there are several countries formerly designated that have had their designations rescinded. The State Department removed the People's Democratic Republic of Yemen from the list in 1990, although the country was designated an SST since the list's origination in 1979. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, PATTERNS OF GLOBAL TERRORISM 1990, at 32 (1991). Libya, also on the original list, was removed in 2004. Elise Labott, *U.S. to Restore Relations with Libya*, CNN (May 15, 2006, 8:30 PM), <https://www.cnn.com/2006/US/05/15/libya/index.html> [<https://perma.cc/35EU-SDLP>]. The State Department removed Cuba, an SST since 1982, in 2015. See COUNTRY REPORTS 2019, *supra* note 33, at 183–84. Iraq, on the list intermittently since 1979, was removed in 2004. See Donna Miles, *U.S. Removes Iraq from List of State Sponsors of Terrorism*, U.S. DEP'T OF DEFENSE (Oct. 22, 2004), <https://archive.defense.gov/news/newsarticle.aspx?id=25006> [<https://perma.cc/SV5F-PJXZ>]. The Department of State most recently rescinded Sudan's designation as an SST on December 14, 2020, reflecting the country's years of efforts countering terrorist groups and preventing terrorist expansion. See

B. Regulating Interactions with SSTs Through Disclosure

As evidenced above in the designation explanations,⁵⁰ SSTs represent a global threat. As such, federal securities laws provide multiple mechanisms for regulating interactions with these countries. Companies that are subject to the SEC's disclosure requirements, known as "reporting companies,"⁵¹ are those that: (1) sell securities on U.S. exchanges, (2) engage in interstate commerce with 500 or more shareholders and \$10,000,000 or more in assets, or (3) have engaged in registered public offerings.⁵² Companies falling into these categories are required to periodically file disclosures.⁵³

Disclosure of SST-related activities is regulated through multiple methods. This Note examines four principal mechanisms in this disclosure-based regime, working from the least onerous to most onerous standard, in the sense of how exacting each standard is to the companies it obligates.⁵⁴ The discussion begins in Part I.B.1 with a review of the traditional materiality standard to the extent that the materiality standard requires SST disclosure. Part I.B.2 then considers the slightly more specific disclosure requirements under Regulation S-K. Part I.B.3 discusses the heightened, specific disclosure requirements that the SEC solicits via comment letters. Finally, Part I.B.4 discusses disclosure requirements pertaining to Iranian-related activities, which are specifically mandated by legislation and require the most extensive degree of disclosure.

Michael R. Pompeo, *Sudan's State Sponsor of Terrorism Designation Rescinded*, U.S. DEP'T OF STATE, <https://www.state.gov/sudans-state-sponsor-of-terrorism-designation-rescinded/> [<https://perma.cc/VA3C-M8D3>] (last visited Oct. 29, 2021); see also COUNTRY REPORTS 2016, *supra* note 21, at 305. Sudan had been included on the list since 1993 for its part in harboring Osama bin Laden and for its support of militant Palestinian organizations. See Max Bearak & Naba Mohieddin, *U.S. Lifts Sudan's Designation as a State Sponsor of Terrorism*, WASH. POST (Dec. 14, 2020, 9:15 AM), https://www.washingtonpost.com/world/africa/sudan-remove-state-terror-list/2020/12/14/7f119482-3d10-11eb-aad9-8959227280c4_story.html [<https://perma.cc/UU4U-6F5Y>].

50. See *supra* Part I.A.2.

51. See Amy Deen Westbrook, *What's in Your Portfolio?: U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151, 1182 (2010) [hereinafter Westbrook, *What's in Your Portfolio?*].

52. See 15 U.S.C. § 77e (2012); see also Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1182.

53. See Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1182.

54. Importantly, this Note only examines SST regulation through a disclosure lens, although federal securities regulation is certainly not the only way in which SSTs face regulation. When the secretary of state determines that a country has repeatedly provided support for acts of international terrorism, disclosure requirements are triggered; however, the U.S. government may also impose sanctions on that country. See Bureau of Counterterrorism, *supra* note 12. While sanctions are a mechanism of regulation worth mentioning due to their importance in discussions of SST regulation, they will not be addressed further in the Note. The remainder of this Note focuses solely on disclosure related to SSTs under the four principal mechanisms raised in Part I.B.

1. The Mandates of the Materiality Standard

In U.S. securities laws, whether companies must disclose certain business activities depends on whether those business activities are considered “material.”⁵⁵ Two prominent U.S. Supreme Court cases guide the materiality standard.⁵⁶ In *TSC Industries, Inc. v. Northway, Inc.*,⁵⁷ the Court held that information is material if there is a “substantial likelihood that the disclosure . . . would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”⁵⁸ Similarly, in *Basic, Inc. v. Levinson*,⁵⁹ the Court held that the materiality of information depends on a balancing of the probability of the event’s occurrence and the magnitude of the event, given the totality of activities.⁶⁰ The SEC interprets these holdings collectively, explaining that “the Supreme Court has determined information to be material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or if the information would significantly alter the total mix of available information.”⁶¹

The materiality standard in the context of SST disclosure is “the same materiality standard applicable to all other corporate activities.”⁶² Disclosure requirements under the materiality standard depend on what information is meaningful to a reasonable investor.⁶³ Considering this framework in the context of SSTs, “[i]f combating terrorism is a priority . . . , then it may be material to potential U.S. investors that the money they pay for shares in a company may be used to fund operations in a country that sponsors terrorism.”⁶⁴ In determining which interactions should be disclosed in the SST setting, companies generally consider the materiality of their contacts with countries identified as SSTs.⁶⁵ Particularly when a company’s business activities with SSTs constitute a substantial financial portion of its business, disclosure is likely required.⁶⁶

55. Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1153.

56. *See id.* at 1186.

57. 426 U.S. 438 (1976).

58. *Id.* at 449.

59. 485 U.S. 224 (1988).

60. *Id.* at 238.

61. Concept Release on Mechanism to Access Disclosures Relating to Business Activities in or with Countries Designated as State Sponsors of Terrorism, 72 Fed. Reg. 65,862, 65,863 (Nov. 23, 2007) [hereinafter Concept Release on Mechanisms to Access Disclosures]; *see also* Memorandum from Sullivan & Cromwell LLP, SEC Disclosure of Business Related to State Sponsors of Terrorism (Dec. 7, 2007), https://www.sullcrom.com/publication_detail_1180 [<https://perma.cc/97RF-CXQT>].

62. Concept Release on Mechanisms to Access Disclosures, *supra* note 61, at 65,863.

63. *See TSC Indus.*, 426 U.S. at 449.

64. Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1188.

65. *See* Memorandum from Davis Polk & Wardwell LLP, *supra* note 12.

66. *See* Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1153.

SST disclosure requirements mandated by the materiality standard are therefore fairly general⁶⁷ because federal securities laws do not impose any specific requirements to disclose business activities in or with SSTs.⁶⁸ On its face, this standard is not particularly exacting, as it gives companies discretion to make general materiality determinations regarding business in or with SSTs and to disclose such information in the periodic reports they file with the SEC.⁶⁹ For this reason, this Note presents this standard as the least onerous of the SST disclosure mechanisms. Determinations of materiality are more challenging when a company's operations relating to SSTs are "economically slight" compared to the size of the company, as the meaningfulness of a business activity is ultimately about more than just money.⁷⁰ For example, "[i]t is likely that a U.S. investor would want to know if the company in which his retirement savings are invested is helping Iran's nuclear program or electoral repression."⁷¹ Although investors might care about money, they might also have concerns regarding threats to national security, making a given disclosure that is financially slight still material.⁷²

Overall, the materiality standard is not particularly onerous because it grants deference to corporations to determine what must be disclosed. The slightly more exacting standards under Regulation S-K and other catchall provisions solicit SST disclosures with a higher degree of specificity.

2. Requirements of Regulation S-K

The SEC resolved some of the murkiness of the materiality standard by implementing more specific disclosure requirements elsewhere, expressly delineating items that companies must disclose. Between the various

67. See Press Release, U.S. Sec. & Exch. Comm'n, Statement by Securities and Exchange Commission Chairman Christopher Cox Concerning Companies' Activities in Countries Known to Sponsor Terrorism (July 20, 2007), <https://www.sec.gov/news/press/2007/2007-138.htm> [<https://perma.cc/EL3F-E39M>].

68. Memorandum from Sullivan & Cromwell LLP, *supra* note 61; see also Concept Release on Mechanisms to Access Disclosures, *supra* note 61, at 65,863.

69. Generally, investors access disclosures in periodic reports companies file through EDGAR (the "Electronic Data Gathering, Analysis, and Retrieval" database), the system used by companies submitting documents in connection with SEC disclosure requirements. *About EDGAR*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/edgar/about> [<https://perma.cc/2VG6-V3RH>] (last visited Oct. 29, 2021). However, in the past, the SEC has piloted other methods of delivering material SST disclosures to investors—namely, the SEC web tool. See Press Release, *supra* note 67. The tool, which was only in place from June 25, 2007, to July 20, 2007, permitted investors to obtain a list of companies doing business in or with SSTs. See Floyd Norris, *S.E.C. Rethinks Lists Linking Companies and Terrorist States*, N.Y. TIMES (July 21, 2007), <https://www.nytimes.com/2007/07/21/business/21sec.html> [<https://perma.cc/Q2BB-UFDK>]; see also Banks, *Lawmakers Oppose SEC's Disclosure Tool Linking Public Companies to Terrorist Nations*, MONEY MANAGER'S COMPLIANCE GUIDE NEWSL., Sept. 2007, at 8. Companies mentioning an SST in their recent annual reports were incorporated into the results of the web tool. See Press Release, *supra* note 67. The tool represents one way in which the SEC has handled materiality disclosures previously.

70. See Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1180.

71. *Id.* at 1219.

72. See *id.* at 1219–20.

provisions of Regulation S-K and Rule 12b-20 of the Securities Exchange Act of 1934 (“Exchange Act Rule 12b-20”), SEC-regulated companies are governed by additional disclosure requirements that mandate more information than the materiality requirement discussed above.

Regulation S-K provides more specific disclosure mandates via line-item requirements.⁷³ Under Regulation S-K, the SEC requires disclosure of information about a company’s business, securities, financial data, management, and other information, whether or not the information is thought to be important to investors.⁷⁴ Further, Regulation S-K requires companies to disclose specified categories of information in the nonfinancial portions of their periodic reports.⁷⁵

Item 101 requires disclosure regarding the general development of the business, a narrative description of the business, and other categories, including information pertaining to securities, financial data, and management.⁷⁶ Item 101 specifically instructs companies to disclose information about where a company does business, the principal markets for the company’s products, the source of the raw products, and any risks attendant to the business’s foreign operations.⁷⁷ Any one of these categories might implicate SST information, for instance, if raw products derive from an SST or if business with an SST constitutes a risk factor.⁷⁸ Item 103 requires disclosure of any material impending legal proceedings, including proceedings known to be contemplated by government authorities.⁷⁹ Item 303 also requires a discussion from management’s perspective of known trends or events that might materially affect the company’s liquidity or resources.⁸⁰ SST disclosure is required here if business with SSTs affects a company’s legal stability or its liquidity and resources. Item 503(c) “center[s] around behavior that is inherently risky,” which in turn might require disclosure of operations in SSTs if a company’s interactions with SSTs create risk for the company.⁸¹

Other catchall regulations compel disclosure of activities related to SSTs, as well. Exchange Act Rule 12b-20 requires that companies make statements

73. See Amy Deen Westbrook, *Sunlight on Iran: How Reductive Standards of Materiality Excuse Incomplete Disclosure Under the Securities Laws*, 7 HASTINGS BUS. L.J. 13, 21 (2011) [hereinafter Westbrook, *Sunlight on Iran*].

74. Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1183.

75. See Westbrook, *Sunlight on Iran*, *supra* note 73, at 22.

76. See 17 C.F.R. § 229.101(a), (c) (2021); see also Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1184–85; Westbrook, *Sunlight on Iran*, *supra* note 73, at 21.

77. See 17 C.F.R. § 229.101(c)(1); see also Westbrook, *Sunlight on Iran*, *supra* note 73, at 21–22.

78. See Westbrook, *Sunlight on Iran*, *supra* note 73, at 21–22.

79. See 17 C.F.R. § 229.103; see also Westbrook, *Sunlight on Iran*, *supra* note 73, at 22.

80. See Exchange Act Release No. 6211, 52 Fed. Reg. 13,715, 13,717 (Apr. 26, 1987); see also Westbrook, *Sunlight on Iran*, *supra* note 73, at 22.

81. Westbrook, *Sunlight on Iran*, *supra* note 73, at 22–23.

that disclose any material information without being misleading.⁸² This sweeping standard parallels the inclusive nature of the materiality standard as applied to SST activity at large—as the SEC has expressed, stating that “[a]ny such material information not covered by a specific rule or regulation must be disclosed if necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.”⁸³

The requirements of Regulation S-K and Exchange Act Rule 12b-20, like the materiality standard discussed above, do not mandate disclosure specifically for activities in or with SSTs. The provisions described here introduce a slightly more onerous task for reporting companies, requiring disclosure of specifically delineated categories with a higher degree of specificity. In the larger scheme of mechanisms designed to induce SST disclosures, however, these standards are still fairly nonexacting and afford companies discretion in interpreting their applicability.

3. Disclosure by Means of Comment Letter⁸⁴

In addition to SST disclosures required under the materiality standard and those specifically solicited under other provisions, SST disclosures are compelled by a third mechanism: comment letters.⁸⁵ As a general practice, in line with the SEC’s core mission, the Division of Corporation Finance (DCF) regularly reviews filings for disclosures that appear to be deficient or to conflict with SEC regulations.⁸⁶ The DCF then issues comment letters, leading to correspondence between the SEC and companies.⁸⁷ These comment letters serve multiple purposes, as the DCF uses them to request clarification, to ask for revisions or updates to financial reports, and more generally, to deter fraud and increase investors’ ability to access certain information.⁸⁸ Moreover, this form of oversight is a common practice for the SEC in gaining information regarding SST-related activities: as of 2018, 12

82. See 17 C.F.R. § 240.12b-20; see also Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1185.

83. Concept Release on Mechanisms to Access Disclosures, *supra* note 61, at 863.

84. As a technical matter, although some scholars writing on the topic regularly refer to these comment letter responses as “SST disclosures,” one source noted that these correspondences do not really constitute disclosure. See Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1215–16. This is because the SEC does not uniformly issue comment letters, and responses lack consistency and vary in length and detail, rendering comparison difficult. *Id.* Nevertheless, there is a standard format to these inquiries: letters identify a periodic disclosure in question, ask a substantive question, and ask a company to evaluate the materiality of its operations with an SST. *Id.* at 1212. Thus, for the purposes of this Note, because these sources regularly “disclose” information regarding interactions with SSTs and have some consistent elements with one another, these communications will be considered alongside other disclosure-generating mechanisms.

85. See Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

86. See Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 6.

87. *Id.* at 6–7.

88. Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

percent of comment letters issued by the SEC pertained to SST disclosures.⁸⁹ However, the origin of the comment letter process as it relates to SST disclosure is slightly more complex.

The SEC's Office of Global Security Risk (OGSR) was created as a subdivision of the DCF, at the direction of Congress in 2003, to monitor whether companies' filings include disclosure of material information regarding global security risk-related issues.⁹⁰ The House Committee report that instructed the SEC to establish the OGSR expressed the concern that American investors "may be unwittingly investing in companies with ties to countries that sponsor terrorism and countries linked to human rights violations."⁹¹ The report further posited that "a company's association with sponsors of terrorism and human rights abuses, no matter how large or small, can have a material adverse effect on a public company's operations, financial condition, earnings, and stock prices, all of which can negatively affect the value of an investment."⁹²

With an understanding that existing disclosure mechanisms failed to capture some of this information, the legislature established the OGSR to review reports filed by reporting companies to determine whether such companies must disclose additional information about global security risk issues.⁹³ Because the SEC does not mandate specific line-item requirements on companies' interactions with SSTs, the OGSR's duties specifically include both identifying companies that operate in designated SSTs and ensuring that such companies disclose that information to investors.⁹⁴ The OGSR is critical in the realm of soliciting SST disclosures.⁹⁵ After identifying relevant instances of SST interaction, the OGSR further contributes to the comment letter process, providing support to the DCF in enhancing reporting compliance via SST disclosures.⁹⁶

The DCF comment letters arise in two different fashions.⁹⁷ In some instances, the SEC addresses a firm's preexisting disclosures from within their prior financial reports, responding with follow-up questions regarding SST-related information.⁹⁸ This is the most common method by which

89. *Id.*

90. See Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 8.

91. H.R. REP. NO. 108-221, at 151 (2003).

92. *Id.*

93. See David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 350 (2011).

94. See *id.* at 350–51.

95. See generally Memorandum from Davis Polk & Wardwell LLP, *New Law Requires Issuers to Disclose Certain Iran-Related Transactions* (Sept. 5, 2012), https://www.davispolk.com/sites/default/files/files/Publication/5582a18f-bbb4-4a9d-8460-081d04b67cc5/Preview/PublicationAttachment/0bfb3e4b-6b59-42f5-86ad-10493c25f561/090512_Iran_Related.pdf [<https://perma.cc/N3MV-Z7X6>].

96. Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 8.

97. See Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

98. *Id.* For example, in 2012, the SEC issued a comment letter to Logitech International: "We also note the disclosure on page 5 and elsewhere in your form 10-K that you operate in

comment letters are generated, given that existing disclosures are referenced in 80.5 percent of SST comment letters.⁹⁹ In other situations, the DCF issues comment letters independently from financial report disclosures, responding instead to information from other sources.¹⁰⁰ In these instances, comment letters reference an external outlet of information spurring the inquiry; for example, 26.8 percent of SST comment letters referenced a report from the media.¹⁰¹ Although the DCF letters were historically nonpublic, the SEC began posting inquiries and responses on the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) after pushback from both investors and Congress demanding greater transparency.¹⁰² Now, a great deal (but not all) of correspondence is publicly available.¹⁰³

These filings reveal that disclosure by means of comment letter creates a heightened standard of disclosure related to SSTs in the sense that the SEC requests more particularized information from companies as compared to the materiality standard that grants companies deference in determining what information matters for disclosure. While comment letters as a mechanism are not necessarily more onerous (in that their requests might be simple or straightforward), comment letters require disclosure of information to a higher degree of specificity—information not initially released in accordance with the materiality standard.

4. The ITRA and Iran-Related Disclosure Mandates

Unlike the broad discretionary securities disclosure laws, disclosure of Iran-related activities is specifically mandated. On August 10, 2012, President Barack Obama signed the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA).¹⁰⁴ The ITRA augmented preexisting Iran-related

regions including the Middle East and Africa. As you know, Iran, Syria, and Sudan, countries located in those regions, are designated by the U.S. Department of State as state sponsors of terrorism Your Form 10-K does not include disclosure about contacts with those countries.” *Id.* (quoting Comment Letter from Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, to Celia Blye & Jennifer Hardy, Logitech International S.A. (May 30, 2012), <https://www.sec.gov/Archives/edgar/data/1032975/000119312513018890/filename1.htm> [<https://perma.cc/2F7D-8MY5>]).

99. Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 11.

100. Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6; *see, e.g., supra* text accompanying notes 2–3 (discussing the press coverage of Barbies in Iran).

101. Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 12.

102. *See* Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1215; *infra* Parts II.A.1–2 (discussing arguments in favor of SST disclosure due to the need for transparency and investor demand).

103. Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1215.

104. *See* Pub. L. No. 112-158, 126 Stat. 1214 (codified as amended in scattered sections of the U.S.C.); *see also* Memorandum from Sullivan & Cromwell LLP, Exchange Act Requires Issuers to Disclose Iran-Related Activities: Disclosures Required in Reports Due to Be Filed on or After February 6, 2013 (Dec. 5, 2012), <https://www.sullcrom.com/BExchange-Act-Requires-Issuers-to-Disclose-Iran-Related-Activities-BDisclosures-Required-in-Reports-Due-to-Be-Filed-On-or-After-February-6-2013-12-16-2012> [<https://perma.cc/U5YY-8TUU>].

regulations, such as the Iran Sanctions Act of 1996¹⁰⁵ and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.¹⁰⁶ Further, the ITRA created new sanctions specifically for human rights abuses in Iran and Syria.¹⁰⁷

Most importantly for the scope of this Note, § 219(b) of the ITRA imposed new reporting requirements on the Securities Exchange Act of 1934,¹⁰⁸ amending § 13 of the Act by requiring reporting companies to disclose any information relating to their assistance in transferring goods or technologies or providing services that are likely to be used by the Iranian government to commit human rights abuses.¹⁰⁹ The ITRA further mandated that public companies include explanatory disclosures in their periodic reports if they engaged in other specific transactions or activities with Iran.¹¹⁰

The disclosure requirements under the ITRA are significantly more onerous than other SST disclosure requirements. Reporting companies that have “knowingly engaged” in such activities must include pertinent disclosures in their quarterly or annual filings.¹¹¹ Section 219 further requires that companies concurrently make an “IRANNOTICE filing” with the SEC.¹¹² Importantly, and in contrast to the materiality standard described above, there is no de minimis exception to the disclosure requirements under § 219.¹¹³ In other words, there is no materiality threshold for triggering mandatory reporting under § 219 of the ITRA.¹¹⁴ In addition, the ITRA requires that the SEC deliver a report with responsive disclosures to the president.¹¹⁵ Because the disclosure requirements are imposed by the ITRA, the SEC maintains no discretion to decline solicitation of Iran-related disclosure requirements,¹¹⁶ and the president must investigate the activities disclosed in the filings and determine whether to impose sanctions on companies for engaging in violative activities.¹¹⁷

105. 50 U.S.C. § 1701 note.

106. Pub. L. No. 11-195, 124 Stat. 1312 (codified as amended in scattered sections of the U.S.C.); Memorandum from Sullivan & Cromwell LLP, *supra* note 104.

107. *Id.* But see *supra* note 54 (limiting the scope of this Note to disclosure rather than considering the implications of sanctions).

108. See *Compliance and Disclosure Interpretations: Exchange Act Sections*, U.S. SEC. & EXCH. COMM’N (Dec. 4, 2012), <https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm> [<https://perma.cc/8UYV-SXA5>].

109. See Park, *supra* note 8, at 108; see also Noam Noked, *SEC Requirements Under the Iran Threat Reduction and Syria Human Rights Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2012), <https://corpgov.law.harvard.edu/2012/09/10/sec-requirements-under-the-iran-threat-reduction-and-syria-human-rights-act/> [<https://perma.cc/3V7P-6DRX>].

110. See Memorandum from Sullivan & Cromwell LLP, *supra* note 104.

111. See Park, *supra* note 8, at 108–09.

112. See *id.* at 122–23; Memorandum from Davis Polk & Wardwell LLP, *supra* note 12.

113. See Park, *supra* note 8, at 109.

114. See *id.* at 111.

115. See Memorandum Davis Polk & Wardwell LLP, *supra* note 12; see also Memorandum from Sullivan & Cromwell LLP, *supra* note 104.

116. See Memorandum from Davis Polk & Wardwell LLP, *supra* note 95.

117. See Memorandum from Davis Polk & Wardwell LLP, *supra* note 12; Memorandum from Sullivan & Cromwell LLP, *supra* note 104.

Overall, the ITRA is arguably the most thorough and onerous of all the disclosure mechanisms. It expanded existing regulation to solicit mandatory disclosure from companies that had not been specifically mandated, requiring companies to disclose almost all interactions with Iran.¹¹⁸ The ITRA requirements distinguish themselves from the requirements of the materiality standard and Regulation S-K because the ITRA creates specific disclosure requirements, pertaining to business with SSTs, not seen in the aforementioned mechanisms.¹¹⁹ The ITRA disclosure requirements also differ from the comment letter approach, as the ITRA takes a more comprehensive, prescriptive approach, as compared to the more reactive comment letter approach.¹²⁰ While the comment letters issued by the SEC function more responsively, either as a reaction to company's filings or information found on a company's website or in media reports, the disclosure requirements of the ITRA are imposed by the Act itself and do not require the SEC to take affirmative action to obtain information.¹²¹

Considering the ITRA alongside the framework of the other disclosure mechanisms, the SEC requires companies to make a variety of SST-related disclosures. Companies must disclose: information about their interactions with SSTs if those interactions are material,¹²² information falling under specific items in Regulation S-K,¹²³ information (material or not) requested by the SEC in comment letters,¹²⁴ and information about all interactions with Iran.¹²⁵

II. THE DISCLOSURE DEBATE: THE ABILITIES AND LIMITATIONS OF EXISTING SST DISCLOSURE REQUIREMENTS

Part I.B articulated the SEC's four principal disclosure mechanisms for soliciting information pertaining to SSTs: (1) the materiality standard, (2) the provisions of Regulation S-K, (3) inquiry by comment letter, and (4) the requirements of the ITRA. Part II of this Note analyzes these practices and considers whether the SEC's current framework regarding SST disclosure functions altogether as a worthwhile, effective system for regulating interactions with countries designated as SSTs.

Part II.A considers the benefits that SST disclosures provide. Part II.B turns to the critiques of the current system. Lastly, Part II.C considers a perspective that falls between these two poles—the idea that SST disclosure is inherently a beneficial practice but that issues with the present mechanisms used to solicit such disclosures hamper the benefits.

118. Memorandum from Davis Polk & Wardwell LLP, *supra* note 95.

119. *See supra* Parts I.B.1–2.

120. *See supra* Part I.B.3.

121. *See* Memorandum from Davis Polk & Wardwell LLP, *supra* note 95.

122. *See supra* Part I.B.1.

123. *See supra* Part I.B.2.

124. *See supra* Part I.B.3.

125. *See supra* Part I.B.4.

A. Benefits of SST Disclosure

Many individuals and entities favor SST disclosure requirements. Statements from the SEC, the legislature, politicians, and particularly investors, reflect this attitude. This section navigates the primary arguments in favor of SST disclosure. Part II.A.1 considers disclosure as a means of ensuring transparency, Part II.A.2 examines how such disclosure fulfills investor demand, and Part II.A.3 explores how SST disclosure is used to achieve more socially beneficial practices.

1. Creating Transparency Through Information

The first and perhaps most obvious benefit of SST disclosure requirements is that these requirements produce more information, leading to transparency regarding SSTs. The SEC articulated why mandating SST disclosure is desirable from an information-forcing perspective.¹²⁶ Speaking specifically of SSTs, former SEC Chairman Christopher Cox stated: “Our role is to make that information readily accessible to the investing public, and we will continue to work to find better ways to accomplish that objective.”¹²⁷ SST disclosures are therefore praised for their ability to make information more readily available.

Further, this argument arises within the context of U.S. securities laws, which, like all disclosure-based regimes, view transparency as a desirable aim.¹²⁸ Disclosure-based regimes “operate[] on the assumption that better information . . . will help buyers and sellers of securities make better judgments” and, in doing so, lead to more accurate prices.¹²⁹ Requiring SST disclosure aids this process.

Thus, transparency, though a desirable goal in and of itself, is also a means to more desirable ends. Indeed, one of the fundamental “organizing principles” of securities laws in the United States holds that mandatory disclosure of information enables more efficient capital markets, which benefits all investors.¹³⁰ Accurate, transparent disclosure methods enable increased stock price accuracy.¹³¹ Disclosure requirements overall (and SST

126. See Press Release, *supra* note 67.

127. *Id.* Voices advocating for the investing public have similarly called on the SEC to create transparency around SSTs. See, e.g., Comment Letter from Thomas P. DiNapoli, N.Y. State Comptroller, to Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n 1 (Jan. 22, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-23.pdf> [<https://perma.cc/JNV5-ZV4W>] (“I strongly support the SEC’s efforts to increase transparency and access to information about companies’ activities in countries designated by the United States Department of State as Sponsors of Terrorism . . .”).

128. See generally Press Release, *supra* note 67.

129. Westbrook, *Sunlight on Iran*, *supra* note 73, at 72.

130. See Ferrell, *supra* note 7, at 213–14.

131. See *id.* at 216.

disclosure practices under this greater umbrella) can be economically beneficial in facilitating more efficient capital markets.¹³²

The desirability of transparency surrounding SSTs has also been echoed in the political sphere. Former Senator Christopher J. Dodd of Connecticut called on the SEC to facilitate shareholders' "access [to] reliable information regarding publicly traded companies' business transactions involving Iran and Sudan."¹³³ The House Committee report that instructed the SEC to establish the OGSR similarly argued for the importance of transparency in SST disclosures because "a company's association with [SSTs] . . . no matter how large or small, can have a material adverse effect on a public company's operations, financial condition, earnings, and stock prices."¹³⁴ These consequences risk negatively impacting the value of an investment, and thus, transparency in providing such information is fundamentally important.¹³⁵ Investors, government officials, and guidance provided in the legal field have all expressed the importance of publicly disclosing information pertaining to business in or with SSTs.¹³⁶ Thus, the notion that SST disclosure is beneficial and should be encouraged as a means of disseminating information to investors pervades various sectors.

Further, transparency that serves to enhance the efficiency of the market leads to more beneficial results, as well.¹³⁷ One perspective in favor of disclosure requirements argues that these requirements lead to improvements in the allocation of capital, as well as reduced costs arising from disparate interests of shareholders and stakeholders.¹³⁸ Evidently, transparency is desirable not only as an inherently honest objective but also insofar as it serves as a means to achieving more efficient markets and more economically beneficial practices. SST disclosure mechanisms are therefore desirable because of their ability to increase transparency in pursuit of these greater goals.

2. Fulfilling Existing Investor Demand

As a general principle, investors expect to know what companies do and how their capital is being used.¹³⁹ For investors to be adequately informed of companies' interactions with SSTs, proponents of regulation argue that the SEC must mandate SST disclosure.

132. See Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 115–16 (2007).

133. Norris, *supra* note 69.

134. H.R. REP. NO. 108-221, at 151 (2003).

135. *Id.* ("[A] company's association with sponsors of terrorism . . . can have a material adverse effect on a public company's operations, financial condition, earnings, and stock prices . . ."); see also Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1196.

136. See Memorandum from Sullivan & Cromwell LLP, *supra* note 61; see also Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1153–54.

137. See Ferrell, *supra* note 7, at 216.

138. See *id.*

139. See Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1217.

The Center for Capital Market Competitiveness, a program of the U.S. Chamber of Commerce, underscored this point in a comment letter to the SEC, recognizing first that “investors have an important interest in ensuring their funds do not support terrorism” and further that investors demand fair and equal access to information.¹⁴⁰ Under this argument, the SEC should require SST disclosure to ensure that investor interests are adequately addressed. The New York State Comptroller Thomas P. DiNapoli similarly echoed, “It is vital for investors . . . to have access to accurate, timely and complete information on companies’ connections to [SSTs] in order to assess the risks posed fully.”¹⁴¹ These sources express the widely held desire from the investing public to have access to information regarding SSTs.¹⁴² Further, the SEC has even noted the exceptional degree of demonstrated public interest in accessing this information.¹⁴³

Therefore, beyond ensuring that information regarding SSTs is transparent, proponents of SST disclosure contend that the disclosure is desirable because it functions to fulfill investor demand. Ample evidence suggests that SST disclosures are indeed important to investors and that, in requiring these disclosures, the SEC fulfills investor demand.

3. Encouraging Socially Beneficial Practices

Although the SEC traditionally regulates in the sphere of financial matters, SEC-promulgated mandates occasionally extend into other spheres.¹⁴⁴ One such example of this is with SST disclosures. Proponents of disclosure requirements that reach beyond financial information argue that broadening the scope of disclosure is desirable, as heightened requirements encourage

140. Comment Letter from Michael J. Ryan, Jr., Exec. Dir. and Senior Vice President, U.S. Chamber Ctr. for Cap. Mkts. Competitiveness, to Nancy M. Morris, Sec’y, U.S. Sec. & Exch. Comm’n 1, 3 (Feb. 4, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-28.pdf> [<https://perma.cc/N3H9-H36V>].

141. Comment Letter from Thomas P. DiNapoli to Christopher Cox, *supra* note 127, at 1; *see also* Comment Letter from Robert “Kinney” Poynter, Exec. Dir., Nat’l Ass’n of State Auditors, Controllers and State Treasurers, et al., to Nancy M. Morris, Sec’y, U.S. Sec. & Exch. Comm’n 1 (Jan. 22, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-22.pdf> [<https://perma.cc/4XA4-EUQU>] (explaining that because investors have an interest in ensuring they are not acting contrary to foreign policy and humanitarian goals, investors seek “the assistance of the SEC . . . in identifying those corporations that, by virtue of their business or business ties in terrorist sponsoring countries, are acting contrary to U.S. foreign policy and humanitarian interests”).

142. *See supra* notes 139–41.

143. *See* Press Release, *supra* note 67. Perhaps the most prominent evidence of investor demand for SST information occurred with the release of the SEC web tool. *See generally supra* note 69. The SEC released a statement detailing this demand: “Since the SEC added to our Internet site a web tool that permits investors to obtain information directly from company disclosure documents about their business interests in countries [designated as SSTs], the site has experienced exceptional traffic.” Press Release, *supra* note 67. In the three weeks the web tool was live, visitors to the site “hit” the material well over 150,000 times. *Id.*

144. *See* Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6; *see also infra* Part II.B.1.

socially beneficial behavior.¹⁴⁵ This is largely because disclosure invites increased public scrutiny that pressures companies to improve their underlying practices.¹⁴⁶ SST disclosure is part of “a more general push to expand disclosure regulation to encourage social change,”¹⁴⁷ furthering the efforts of national security policy through global business regulation.¹⁴⁸

Moreover, proponents of SST disclosure requirements argue that disclosure for social benefit is not a newfangled concept. Although SEC disclosure requirements are based in materiality and the SEC is primarily concerned with financial oversight, public concern regarding noneconomic effects of business means that the SEC occasionally uses mandatory disclosure to advance social goals.¹⁴⁹ Proponents of social disclosure requirements argue that the requirements advance noneconomic policy issues, ranging from the environment to human rights issues, by increasing overall transparency.¹⁵⁰ The SEC has also historically used disclosure mechanisms to address a wide range of policy issues, such as climate change risks and sustainability concerns.¹⁵¹ As another example, the “Specialized Corporate Disclosure” provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁵² require disclosure relating to mine safety and conflict minerals.¹⁵³ SST disclosures are, if anything, less novel than other disclosure requirements for social good: SST disclosures remain largely

145. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Executive Pensions*, 30 J. CORP. L. 823, 854 (2005). Some commentators even argue that the principal purpose of disclosure is not to achieve efficient capital markets, as discussed in Part II.A.1, but rather to reach better practices. Cf. Lucian Arye Bebchuk & Jesse M. Fried, *Stealth Compensation via Retirement Benefits*, 1 BERKELEY BUS. L.J. 291, 320 (2004) (“The main aim of requiring disclosure of executive compensation is not to enable accurate pricing of the firm’s securities. Rather, this disclosure is primarily intended to provide some check on arrangements that are too favorable to executives.”).

146. Cf. Bebchuk & Jackson, *supra* note 145, at 854 (arguing that disclosure pertaining to executive compensation leads to enhanced transparency, exerting pressure on companies to adopt more acceptable practices); Bebchuk & Fried, *supra* note 145, at 320 (explaining that market forces, social dynamics, business press, and popular media exert pressure to adapt socially beneficial practices when undesirable disclosures are made and that directors, concerned about disapproval, comply).

147. Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6. But see Mary Jo White, Former Chair, U.S. Sec. & Exch. Comm’n, Address at the 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture: The Importance of Independence, Fordham L. Sch. (Oct. 3, 2013), <https://www.sec.gov/news/speech/spch100113mjw> [<https://perma.cc/442D-ZSZK>] (“[A]s the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC’s powers of mandatory disclosure to accomplish these goals.”). Part II.B.1 further elaborates on arguments against the SEC furthering policy goals.

148. See Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1153.

149. See Park, *supra* note 8, at 89.

150. See *id.*; see also *supra* Part II.B.1 (discussing the benefits of transparency in a disclosure-based regime).

151. See Lynn, *supra* note 93, at 349–50; see also Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1188.

152. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

153. See Lynn, *supra* note 93, at 327–28.

rooted in notions of materiality and thus align with traditional regulation by the SEC.¹⁵⁴

Therefore, though the core mission of the SEC focuses on financial disclosure, the SEC occasionally modifies its approach, requiring broadened disclosures relating to conduct that is not strictly financial.¹⁵⁵ Supporters of SST disclosure requirements argue that these requirements regulate SSTs in a similar manner, improving the practices of corporations, as the inherent pressure of outside scrutiny compels corporations to align their activities with more socially beneficial practices.¹⁵⁶

B. The Perspectives Against SST Disclosure Requirements

Despite the existence of SST disclosure requirements for several decades, critics still contend that they are ineffective and should not exist in their current form. Part II.B.1 discusses the argument that the SEC is not the proper entity for the regulation of SSTs. Part II.B.2 then examines the shortcomings of the materiality standard. Part II.B.3 turns to the problematic stigmatization resulting from SST disclosure mechanisms.

1. The SEC as the Wrong Regulator

The most sweeping argument against current SST disclosure requirements suggests that existing disclosure mechanisms are inappropriate because the SEC should not involve itself with such regulation.¹⁵⁷ There are two strains of this argument. The first finds that the SEC as an agency is an inappropriate regulator in this sphere.¹⁵⁸ The second argument takes an externally focused approach: rather than positioning the SEC as inherently wrong for the role, this argument suggests other entities are better suited for the task.¹⁵⁹

To begin, some critics argue against SEC-promulgated SST disclosure on the premise that the sphere of terrorism does not properly fall under the SEC's domain.¹⁶⁰ The SEC's mission concerns itself with the regulation of financial reports, the deterrence of fraud, and the facilitation of investor

154. *See id.* at 350. *But see supra* Part I.B.4 (discussing the absence of a de minimis threshold mandating disclosure under the ITRA).

155. *See, e.g.,* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 *GEO. L.J.* 923, 936–37 (2019).

156. *See supra* note 146.

157. *See, e.g.,* Comment Letter from Diana L. Preston, Managing Dir. and Assoc. Gen. Counsel, and David G. Strongin, Managing Dir., Sec. Indus. & Fin. Mkts. Ass'n, to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Jan. 22, 2008) [hereinafter SIFMA Letter], <https://www.sec.gov/comments/s7-27-07/s72707-21.pdf> [<https://perma.cc/5DER-9JWX>]; *see also* Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

158. *See, e.g.,* SIFMA Letter, *supra* note 157; Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

159. *See, e.g.,* SIFMA Letter, *supra* note 157, at 2.

160. *See generally, e.g.,* Lynn, *supra* note 93; SIFMA Letter, *supra* note 157.

access to information; regulating SST disclosures is outside of its domain.¹⁶¹ Critics claim that in focusing on a political or foreign policy agenda, the SEC acts inconsistently with its traditional role of overseeing the disclosure of material information.¹⁶²

The Securities Industry and Financial Markets Association (SIFMA) expressed this viewpoint via a comment letter directed to the SEC.¹⁶³ SIFMA argued that the SEC's mission is neither foreign policy nor national security matters and that, consequently, disclosure mandated by the SEC pertaining to SSTs is "inherently unrelated to the SEC's primary mission" of administering and enforcing disclosure-based securities laws.¹⁶⁴ A similar letter from the law firm Shearman & Sterling LLP echoed this sentiment, asserting that because the SEC is an independent government agency, it should not use its resources to solicit disclosure pertaining to SSTs beyond those compelled by the materiality standard, as any disclosure beyond materiality does not further the SEC's mission of providing investors material information.¹⁶⁵

Further, a recent empirical study supports the notion that the SEC, in focusing its efforts on SST disclosure, compromises its ability to effectively regulate elsewhere.¹⁶⁶ This study suggests that this pattern occurs in part because the SEC is subject to budget constraints, so shifting efforts toward SST regulation strains the limited resources that might otherwise go toward financial oversight.¹⁶⁷ The study speculates that SST disclosure regulation crowds out financial reporting and increases the risk that accounting errors will be overlooked.¹⁶⁸

A final criticism of the SEC as a regulatory body in the SST space focuses more on institutional concerns. When the SEC begins regulating in spheres with more ambiguous guidance, the argument follows that the SEC risks damaging the integrity of the materiality standard.¹⁶⁹ One critique of

161. See Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

162. See Lynn, *supra* note 93, at 350; cf. Mary Jo White, *supra* note 147 (disagreeing with the policy that uses federal securities laws as a method for nonfinancial regulation).

163. See generally SIFMA Letter, *supra* note 157.

164. *Id.* at 1.

165. See Comment Letter from Abigail Arms, Cap. Mkts. Partner, Shearman & Sterling LLP, to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Feb. 15, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-29.pdf> [<https://perma.cc/U6JJ-LVXN>].

166. See Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6; see also Comment Letter from Paul D. Glenn, Couns., Inv. Adviser Ass'n, to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Jan. 22, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-25.pdf> [<https://perma.cc/8HG9-66TS>] (arguing that "the SEC has limited resources that [are] diverted by [SST] initiative[s]").

167. Hills et al., *Does State Sponsor of Terrorism Disclosure Limit SEC Financial Reporting Oversight?*, *supra* note 6.

168. Hills et al., *State Sponsors of Terrorism Disclosure*, *supra* note 5, at 1–3. Interestingly, because similar effects for comment letters referencing non-SST risk factors were not observed, this issue is a unique result of SST regulation. *Id.* at 4.

169. See SIFMA Letter, *supra* note 157, at 3–4.

SEC-regulated SST disclosure, therefore, argues for preserving the integrity of “the time-honored materiality standard on which our disclosure-based approach to securities registration has long been based.”¹⁷⁰

Parallel to the argument that the SEC is intrinsically an inappropriate regulator in this sphere is the notion that other entities are better suited for the task. Critics of SST regulation argue that the SEC should defer to the Department of State, Department of Defense, Department of Commerce, and Department of Homeland Security or to the Office of Foreign Assets Control on matters of foreign policy.¹⁷¹ This argument is bolstered by the subject matter of SST disclosures: the content necessarily deals with international policy and terrorism. SIFMA expressed the viewpoint that foreign policy and national security matters should be left to other government agencies that might deal more appropriately in such subject matter because the SEC lacks the requisite expertise in this area where other bodies specialize.¹⁷²

Overall, general concerns persist regarding whether the SEC should be concerned with influencing social policy, whether such concerns ultimately take precedence over keeping investors informed, and whether such extraneous focus runs the risk of actually causing harm to the SEC’s other functionalities.¹⁷³ Simply, critics argue that entities other than the SEC can more aptly handle this challenge.

2. Disclosure as an Ineffective Mechanism of SST Regulation

Other criticisms of SST disclosure requirements, rather than denouncing the SEC as the wrong regulator, address issues inherent to the underlying mechanisms. The principal argument against the effectiveness of SST disclosure is premised on the idea that the materiality standard, without further guidance from the SEC on how to apply it, is unsuccessful in soliciting disclosures from companies because of its lack of specificity.¹⁷⁴ One study analyzed the publicly available disclosures of over one hundred companies conducting business within SSTs.¹⁷⁵ The study found that fewer than half of the companies made any disclosures of their activities in relation to the designated countries, and even those that did often withheld information regarding the nature of the business.¹⁷⁶

Some critics of current SST disclosure practices allege that the ambiguous applicability of the materiality standard undermines the SEC’s attempts at

170. *Id.* at 2.

171. *See id.*; *see also* Mary Jo White, *supra* note 147 (arguing in favor of the SEC maintaining its independence rather than bowing to outside forces). White stressed the importance of the SEC standing strong against pressure to invoke its disclosure power to exert influence over companies to change behavior rather than merely to disclose financial information. *Id.*

172. *See* SIFMA Letter, *supra* note 157, at 2.

173. Fisch, *supra* note 155, at 939; *see also supra* note 166.

174. *See* Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1218–19.

175. *See id.* at 1153–54.

176. *Id.* at 1154.

regulation, as companies assert that they need not disclose their interactions with SSTs if such activity is not a substantial part of their global operations.¹⁷⁷ Indeed, reporting companies have expressed the belief that when their activities in or with SSTs are not “financially significant,” they are under no obligation to disclose the activities.¹⁷⁸ The argument follows that disclosure of activities with SSTs is empirically inadequate, as companies subvert the standard when possible.¹⁷⁹ Critics of SST disclosures contend that the underlying materiality standard is not taken seriously and, consequently, that SST disclosure is ineffective.¹⁸⁰

The materiality standard is not the only disclosure mechanism that faces critique as contributing to an ineffective system, however. An additional argument against current requirements condemns the usefulness of comment letters in soliciting disclosures as having counterproductive effects.¹⁸¹ For example, inquiries from the DCF, meant to produce greater transparency, might encourage companies to provide less disclosure in the first place in an attempt to dodge SEC detection for minor issues.¹⁸² The initiative risks producing incomplete disclosure and inadvertently rewarding companies that reveal less information, in contravention of the SEC’s goals.¹⁸³

Critics thus fault the shortcomings of current SST disclosure mechanisms and, in particular, condemn the functionality of the materiality standard and comment letters because they implicate SST disclosures. These theories ultimately support the argument that current SST disclosure practices are problematic, ineffective, and work against the SEC’s goals.¹⁸⁴

3. Unfair Stigmatization of Companies

The above discussion frames the materiality standard and comment letters as creating an ineffective framework of SST disclosure mechanisms. However, critics also assert that SST disclosures stigmatize companies that make such disclosures.¹⁸⁵ Reporting companies subjected to disclosure requirements are inevitably connected to negative language—they are

177. See, e.g., *id.* at 1205; SIFMA Letter, *supra* note 157, at 2–3 (detailing instances in which corporations with stakes in companies with business activities in Sudan did not disclose this information because it was not material to the company). *But see* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 1013 (2019) (“[T]he supposedly clean separation between the financial and the non-financial is an illusion. Even if we stick closely to financial materiality, there is ample research tying environmental, social, and similar aspects of corporate behavior to stock market valuations and firm profitability.”).

178. Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1214.

179. See *id.* at 1153.

180. See, e.g., *id.* at 1218–19; see also SIFMA Letter, *supra* note 157, at 2–3.

181. See *Banks, Lawmakers Oppose SEC’s Disclosure Tool Linking Public Companies to Terrorist Nations*, *supra* note 69.

182. See SIFMA Letter, *supra* note 157, at 2.

183. See *id.*

184. See Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1154.

185. See SIFMA Letter, *supra* note 157, at 2.

compelled to produce filings associating their business operations with terrorism, although they themselves are neither perpetrating nor supporting terrorism.¹⁸⁶ These critiques do not simply assert that companies wish to hide their distasteful conduct from investors; rather, this argument presents the more nuanced notion that SST disclosures do not fairly reflect that the underlying business activities of the companies are legal.¹⁸⁷ The European Commission, the executive branch of the European Union, observed this phenomenon, noting that SEC disclosure practices fail to differentiate companies' interactions with SSTs that are legitimate and legal from those that are more nefarious.¹⁸⁸ Thus, some worry that when authorized activities with SSTs are disclosed alongside unauthorized activities inconsistent with U.S. laws and policies, this muddling of information confuses investors and reduces the overall effectiveness of disclosures.¹⁸⁹ Reporting companies, whose unsavory—though not illegal—disclosures are made available to the public, similarly argue against mandating such filings to protect their own reputations.¹⁹⁰ As a result, companies object to making SST disclosures altogether because they fear alarming investors who wish to avoid investing in companies doing business with SSTs.¹⁹¹

Critics argue, therefore, that mandating SST disclosure practices risks unfairly stigmatizing companies that disclose their activities. These arguments further reveal that reporting companies may resist disclosing their business activities in or with SSTs unless they are obviously required to do so, either because their activities with SSTs are significant or because a particular piece of information is specifically solicited.¹⁹² The drawbacks to disclosure yet again encourage companies to behave in ways that undermine the very purpose of the disclosure requirements.

186. *See id.*

187. *See, e.g.*, SIFMA Letter, *supra* note 157, at 2. This is why the short-lived web tool, discussed in Part I.B.1, earned the nickname the “terrorism blacklist.” *Banks, Lawmakers Oppose SEC’s Disclosure Tool Linking Public Companies to Terrorist Nations*, *supra* note 69. Although, as noted in Part I.B.1, disclosures revealing that companies do not do business in particular SSTs were filtered out of the search, annual reports stating that a company had pulled investments out of the SST warranted inclusion in the web tool’s list. *See* Press Release, *supra* note 67.

188. *See* Comment Letter from David Wright, Deputy Gen. Dir., Eur. Comm’n, to Nancy M. Morris, Sec’y, U.S. Sec. & Exch. Comm’n 2 (May 6, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-30.pdf> [<https://perma.cc/9MWM-Z2YY>]; *see also* Comment Letter from Judith A. Lee & James D. Slear, Couns. for W. Union, to Nancy M. Morris, Sec’y, U.S. Sec. & Exch. Comm’n 3 (Jan. 22, 2008), <https://www.sec.gov/comments/s7-27-07/s72707-26.pdf> [<https://perma.cc/RB7G-23FA>] (“[T]he current practice regarding disclosures of business activities in or with [SSTs] . . . makes no distinction between . . . legitimate business activities that have been specifically licensed by the U.S. Government . . . [and] activities that may be contrary to the interests of the United States or that contribute to terrorism.”).

189. *See* Comment Letter from Judith A. Lee & James D. Slear to Nancy M. Morris, *supra* note 188, at 4; *supra* notes 187–88.

190. *See* Press Release, *supra* note 67.

191. *See* Westbrook, *What’s in Your Portfolio?*, *supra* note 51, at 1221.

192. *Id.* at 1153.

C. *A Critical Approach Favoring SST Disclosures*

A third approach to analyzing SST disclosure mechanisms strikes a middle ground, recognizing the pitfalls of the current framework while maintaining that SST disclosures are beneficial and necessary. Part II.C.1 discusses the benefits that could be achieved through SST disclosures, if only such disclosures were enhanced. Part II.C.2 discusses the unavoidable costs of SST disclosure that will exist no matter how thorough or sparse disclosure requirements are. Ultimately, this critical perspective contends that, generally, SST disclosure mechanisms are worthwhile but that the current framework requires revision in order to be more effective.

1. (Potential) Benefits of SST Disclosure: What Might Be Possible Under a Reformed Framework

This approach rests on the critique articulated in Part II.B.2: in the absence of clear guidance from the SEC, the materiality standard is ineffective.¹⁹³ Rather than argue against existing SST disclosure as a whole, however, this critically optimistic perspective posits that information about a company's operation in or with SSTs is nevertheless important to investors.¹⁹⁴ Instead of disposing entirely of the current disclosure framework or arguing against SST disclosures as inappropriate or unfair, this approach encourages increased enforcement of SST disclosure by administering disclosure requirements more strictly.¹⁹⁵

The materiality standard is not the only problematic mechanism in soliciting SST disclosures, however. To summarize Part I.B above, SST disclosure requirements are triggered by the materiality standard, the provisions of Regulation S-K, the cherry-picked inquiries of the DCF via comment letters, and further, via a departure from the materiality standard under the more exacting provisions of § 219 of the ITRA. The critical perspective contends that although SST disclosures are desirable, this multifaceted current framework creates a "lack of operational utility," undermining the effectiveness of disclosure efforts with vague, undefined terms that ultimately hamper the value of disclosed information.¹⁹⁶

One commentator proposed the adoption of a broad reading of the materiality standard that would implicate SST disclosures more clearly to clarify the inexactness of these standards.¹⁹⁷ Legislative history supports this argument, as the House Committee report that established the OGSR similarly argued for transparency in SST disclosures under the premise that any business in or with SSTs, "no matter how large or small," can materially

193. *Id.* at 1218–19; *see also* notes 174–84 and accompanying text.

194. *See id.* at 1218.

195. *See id.*

196. Park, *supra* note 8, at 93.

197. Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1189.

affect a company's operations and financial conditions and that, in turn, such information is material to investors.¹⁹⁸

This argument pushes for a shift in the materiality standard to automatically trigger disclosure of SST activities, arguing for a presumption of “materiality per se.”¹⁹⁹ Indeed, the SEC even briefly considered adopting a blanket assumption of materiality in the realm of SSTs.²⁰⁰ In 2001, the SEC's director of the Division of Corporation Finance stated, “We agree that a reasonable investor would likely consider it significant that a foreign company raising capital in the U.S. markets has business relationships with countries, governments or entities with which any U.S. company would be prohibited from dealing because of U.S. economic sanctions.”²⁰¹ Later that same year, the SEC departed from that position, assuring investors that the SEC had no intention to require companies to make heightened disclosures about business related to SSTs, but the argument has survived elsewhere.²⁰² Proponents argue that without significantly amending current disclosure mechanisms, the SEC could simply clarify that information pertaining to business activities in or with SSTs is something reasonable investors care about.²⁰³

A similar alternative to a materiality per se requirement would mandate that companies disclose their SST activities through stricter enforcement of the provisions of Regulation S-K.²⁰⁴ Further, this argument contends that Regulation S-K could be amended to include an explicit SST disclosure requirement, requiring that companies disclose their SST-related activities pursuant to the provisions of Regulation S-K.²⁰⁵ One benefit to this proposal is that it “would not be an onerous requirement—there are simply not that many countries that the United States designates as SSTs.”²⁰⁶ These possibilities together constitute a cautiously optimistic approach to SST disclosure, maintaining that such information is important for investors but offering various remedies to strengthen the effectiveness of the deficient existing framework.

198. H.R. REP. NO. 108-221, at 151 (2003); *see also* Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1196.

199. *See* Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1188, 1193–94.

200. *See* Memorandum from David B.H. Martin, Dir., Div. of Corp. Fin., to Laura Unger, Acting Chairman, U.S. Sec. & Exch. Comm'n (May 8, 2001), in U.S.-CHINA SEC. REV. COMM'N, REPORT TO CONGRESS OF THE U.S.-CHINA SECURITY REVIEW COMMISSION: THE NATIONAL SECURITY IMPLICATIONS OF THE RELATIONSHIP BETWEEN THE UNITED STATES AND CHINA A33, A35 (2002).

201. *Id.*

202. *See* Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1194.

203. *See id.* at 1220 (“No new law or regulation is necessary. All that is required is for the SEC to enforce a reasonable, indeed traditional, understanding of ‘materiality.’”).

204. *See* Amy Deen Westbrook, *The Inadequate Disclosure of Business Conducted in Countries Designated as State Sponsors of Terrorism*, 39 SEC. REG. L.J. 15 (2011).

205. *See* Westbrook, *What's in Your Portfolio?*, *supra* note 51, at 1220.

206. *Id.*

2. Costs of Disclosure: An Inherent Downside of Any SST Disclosure Mechanism

The one commonality between all mechanisms used to solicit disclosures from corporations is that subsequent disclosures can prove costly to the companies. Any discussion of SST disclosure requirements is incomplete without a consideration of costs. Because costs are virtually inevitable no matter the degree of disclosure required, as explained below, this “downside” is examined here, within the critical perspective of Part II.C, which ultimately concludes that SST disclosure requirements are worthwhile even given their drawbacks.

Most commonly, disclosure creates costs through fraud-on-the-market litigation for the implied private right of action under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.²⁰⁷ When corporations address known risk factors in their public filings, including environmental, social, and human rights issues (or, as is pertinent here, interactions with SSTs), their statements risk creating the basis for claims of actionable deception, essentially opening companies to the possibility of litigation for their statements.²⁰⁸ Thus, as far as corporations are concerned, SST disclosures give rise to fraud liability for SST-related statements based on the accuracy of the information contained in such statements. When corporations make any statements, even soft or immaterial ones, they create a risk of fraud claims for these statements that would not otherwise exist.²⁰⁹ These risks are heightened in instances when corporations disclose in response to increased investor interest—as is often the case with SST disclosures—or when the corporations’ statements are repeated over time.²¹⁰ Any type of elevated SST disclosure requirement therefore risks liability for securities fraud claims, where, without the initial disclosure, there would be no such liability.²¹¹ Disclosure thus necessarily implicates unintended costs for companies.²¹²

Although disclosure may give rise to additional costs because of the ensuing fraud liability, the alternate course of action—nondisclosure—does not necessarily eliminate costs imposed on companies.²¹³ This is the flipside to the materiality requirements discussed above. Omissions liability—the liability that arises from the failure to disclose material information—will prove costly in many circumstances, so that nondisclosure in the sphere of

207. *See* Langevoort, *supra* note 177, at 970, 980–81 (“A fraud-on-the-market lawsuit allows for recovery of damages on behalf of investors who bought or sold publicly traded securities in an efficient marketplace at a price distorted by fraud on the part of the issuer or its management.”).

208. *See id.* at 1014.

209. *See id.*

210. *See id.*

211. *See id.* at 980–81, 1014.

212. *See id.* at 1015.

213. *See id.*

questionable materiality is not an adequate method of avoiding costs either.²¹⁴

In addition, the costs associated with disclosure lead to the assumption that the threat of litigation causes less-than-optimal disclosure from companies, “fearing the consequences if they make statements or projections that turn out badly.”²¹⁵ Corporations may be hesitant to make disclosures that might inflate expectations or generate future litigation.²¹⁶

Besides the costs associated with the risk of litigation created by disclosure requirements, there are a slew of other associated costs.²¹⁷ Real costs include those associated with collecting information and weeding out that which is immaterial.²¹⁸ Further, in instances of disclosure that is speculative, premature, or immaterial, such disclosure might lead to costly speculation and overreaction by investors to the detriment of the company.²¹⁹

Overall, the optimal level of disclosure is not always obvious—any level of compromise in either direction is a trade-off between the benefits inherent to disclosure and the costs associated with both the solicitation of disclosure and the resulting risk of fraud liability. The discussion of disclosure costs does not represent a clear-cut argument for or against SST disclosure requirements. Instead, cost consideration functions as a necessary drawback in considering securities disclosure requirements of any level.

While Part II.A considered the benefits of SST disclosure requirements and Part II.B examined the drawbacks and criticisms, Part II.C here explores

214. See generally JAY B. SYKES, CONG. RSCH SERV., LSB10008, UPDATE: WHEN SILENCE ISN'T GOLDEN: OMISSIONS LIABILITY UNDER SECURITIES LAW 2 (2017) (explaining that a company's failure to disclose will generally be considered “misleading” if the company has an affirmative duty to disclose when a defendant has a fiduciary relationship with the plaintiff, where a statute or omission obliges a defendant to speak and, most applicably here, where an omission renders an affirmative statement misleading). Further, for a plaintiff to state an adequate claim under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, a plaintiff must show that the defendant: (1) made a material omission, (2) with scienter, (3) in connection with purchase or sale of securities, (4) that plaintiff relied on that omission, and (5) that the omission caused plaintiff economic loss. *Id.* (citing 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (2021)). If such a showing can be made, nondisclosure may also prove costly to companies.

215. Langevoort, *supra* note 177, at 1013.

216. See *id.* at 980.

217. See *id.* at 975. But see Ferrell, *supra* note 132, at 85 (explaining the traditional counterargument that “[i]n a world in which a firm has private information about the quality of its product and disclosure is costless, firms will voluntarily publicly disclose their private information as a signal of their products' quality”); Bebhuk & Jackson, *supra* note 145, at 853 (noting that even if disclosure requirements imparted some real costs on companies, “[corporations] generally already have low-cost access to the information . . . [and] [u]ndoubtedly, firms can obtain this information at lower cost than can shareholders or researchers”).

218. See Langevoort, *supra* note 177, at 975. But see Alex Edmans et al., *The Real Costs of Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 6, 2013), <https://corp.gov.law.harvard.edu/2013/11/06/the-real-costs-of-disclosure/> [<https://perma.cc/VZJ7-RH4S>] (“[T]here may be costs of producing information. However, firms already produce copious information for internal or tax purposes.”).

219. See Langevoort, *supra* note 177, at 975.

the more nuanced argument, weighing the inevitable implications of any imperfect standard, while ultimately concluding that the most prominent downside of the current framework is that it is too weak. While this approach is undoubtedly critical of current SST disclosure requirements, it argues for the continuation and reinforcement of the existing framework rather than for abandoning such disclosure mechanisms altogether.

III. ESTABLISHING A UNIFORM STANDARD: ENACTING AN SST-SPECIFIC REGULATION S-K PROVISION

This Note proposes that the SEC add a more precise provision under Regulation S-K that mandates disclosure of all SST-related activities.²²⁰ The guiding premise of this resolution is that investors care about—and indeed demand—SST disclosures.²²¹ This resolution accepts that transparency through SST disclosure is inherently beneficial in advancing compelling interests.²²² However, current SST disclosure requirements need greater exactitude to be more effective.²²³ This proposal continues the existing benefits associated with SST disclosure addressed in Part II.A, while eliminating many of the issues raised in Part II.B. Further, although this proposed solution does not resolve all underlying SST disclosure issues, such as the notion that SST disclosures should not be regulated by the SEC in the first place,²²⁴ it does remediate the somewhat ineffective nature of the current requirements.²²⁵

Part III.A formulates the guidelines of a more effective proposal for standardizing SST disclosure requirements based on the overarching pitfalls of the current disjointed requirements. Part III.B analyzes the strengths of a more uniform standard under Regulation S-K. Part III.C considers the possible weaknesses inherent in this proposal.

A. Developing an Effective Regulation S-K Provision

The critical issue plaguing SST disclosure standards in their current form is that there are so many different mechanisms used to solicit disclosures from corporations, and consequently, the utility of SST disclosure is difficult to assess.²²⁶ First, there is no clear standard for what SST activities must be disclosed.²²⁷ Second, there is no singular disclosure mechanism lending

220. *See supra* Part I.B.2 (discussing the existing requirements of Regulation S-K).

221. *See supra* Part II.A.2.

222. *See supra* Part II.A.1.

223. *See supra* Part II.C.1.

224. *See supra* Part II.B.1.

225. *See supra* Part II.B.2.

226. *See supra* Parts I.B.1–4 (discussing the materiality standard, specific provisions in Regulation S-K, targeted disclosure by means of comment letters, and the ITRA).

227. *See supra* Parts I.B.1–4 (discussing the varying disclosure requirements under each of the four mechanisms).

consistency to the disclosures that are solicited.²²⁸ Together, these issues muddy any existing clarity regarding SST disclosure requirements, leading to patchy disclosure standards that lack uniformity.

The various channels and standards for disclosure mechanisms cause significant discrepancies in the resulting SST disclosures: the traditional materiality standard requires corporations to disclose only information that would be considered important to reasonable investors,²²⁹ a standard that affords some deference to the interpretations of the corporations themselves.²³⁰ Regulation S-K takes a slightly more exacting approach, mandating particular (yet still notably broad) line-item disclosure requirements.²³¹ The comment letter method solicits disclosures in a significantly different manner, with the DCF affirmatively requesting information on highly specific matters, without notable concern for materiality.²³² Lastly, disclosures solicited via legislation under the ITRA differ from the aforementioned methods in that the legislation only applies to Iran but makes no exception for de minimis information, thus rejecting the materiality standard.²³³ The only thing that is clear is that the many standards require inconsistent information with different degrees of deference to corporations' own determinations.

There is understandable ambiguity regarding disclosures in this sphere: Are activities with SSTs inherently meaningful to investors and thus material?²³⁴ Or, do the various arguments by corporations—that certain SST-related activities are unimportant²³⁵ or that these disclosures, when compelled, unfairly “blacklist” corporations—defeat a presumption of materiality?²³⁶ These questions give rise to the second principal issue plaguing the effectiveness of current SST disclosures: because there is no overarching governance between the various standards, these standards fail to produce a uniform set of disclosures.²³⁷ If a singular mechanism governing SST disclosure (for instance, if disclosure was only solicited via comment letters) existed, the authority governing the disclosure could quickly resolve these discrepancies (or more likely, discrepancies would not exist in the first place).

228. *See supra* Parts I.B.1–4 (explaining that there are four principle disclosure mechanisms in this space).

229. *See supra* notes 57–60 and accompanying text (defining the materiality standard that has evolved under judicial decisions and SEC interpretation).

230. *See supra* Part II.B.2 (explaining that many corporations determine their own interactions with SSTs to be immaterial).

231. *See supra* Part I.B.2.

232. *See supra* Part I.B.3; *e.g., supra* text accompanying notes 97–100.

233. *See supra* Part I.B.4.

234. *See, e.g., supra* text accompanying note 134.

235. *See supra* note 177 and accompanying text.

236. *See, e.g., supra* note 187.

237. *See supra* Part II.C (discussing the potential for SST disclosures to be effective, if not for the current lack of clarity surrounding existing requirements).

Therefore, this Note proposes that Regulation S-K adopt a new item requiring disclosure of all of a corporation's dealings with SSTs. This proposal unifies the competing standards so that investors have access to clear, consolidated SST disclosures if investors choose to seek out this information. Moreover, a Regulation S-K line-item requirement would ensure not only that the information is readily available but that all corporations are held to the same SST disclosure standard. In this sense, the proposed Regulation S-K item incorporates the "no de minimis exception" aspect of the ITRA,²³⁸ requiring sweeping disclosure requirements in the SST sphere.

B. Primary Strengths of the Proposed Solution

This Regulation S-K addition achieves multiple benefits in SST disclosure practices. Part III.B.1 examines how the creation of a more specific requirement—overriding the deferential standard of materiality—eliminates confusion, increases exactitude, and leads to a more coherent set of SST disclosures from corporations. Part III.B.2 explains how this Regulation S-K requirement would effectively carry on, and in certain instances advance, the current benefits arising from SST disclosure practices.

1. Avoiding Conflicting Interpretations of Materiality

This proposal resolves existing conflicts in the SST disclosure debate by reconciling, or at least circumventing, the disparate understandings of "materiality" as the term applies to SSTs. As described in this Note, while some argue that interactions with SSTs, due to their inherent ties to terrorism, are material to all investors, others contend that there are instances where a corporation's interactions with SSTs are of little importance.²³⁹ This Note's proposal requires disclosure of all business dealings with SSTs, eliminating conflicting interpretations of materiality that produce inconsistent interpretations. Importantly, however, this proposal does not purport to label all SST interactions material. Such a suggestion would likely receive backlash from critics who have already asserted that, for various reasons, many interactions with SSTs are immaterial.²⁴⁰ Further, an attempt to continue to solicit SST disclosures under the guise of materiality would inevitably fall short of capturing all important information, just as materiality-based disclosures currently do.²⁴¹

238. See *supra* notes 113–14 and accompanying text.

239. Compare H.R. REP. NO. 108-221, at 151 (2003) (taking the position that all interactions with SSTs matter to investors), with SIFMA Letter, *supra* note 157, at 3 (describing situations in which SST interactions would be immaterial). See also *supra* text accompanying notes 134, 177.

240. See *supra* Part II.B.2.

241. See *supra* Part II.B.2.

This solution also avoids the adoption of a “materiality per se” approach, which would necessarily deem all SST interactions as material.²⁴² Materiality per se is a slippery argument in and of itself: the notion as applied to SSTs argues that all interactions with SSTs will matter to investors. This idea is inherently incorrect, and adopting such an approach would gloss over the underpinnings of the materiality standard.²⁴³ Inevitably, some dealing with SSTs will be so monetarily small or relationally removed from a corporation’s business that those dealings will not matter to a reasonable investor. To apply a sweeping label of “materiality” to these dealings would be fundamentally wrong and would mangle traditional understandings of materiality.

Adopting a line-item requirement in Regulation S-K that mandates the disclosure of all SST-related business is, therefore, beneficial because it avoids the materiality standard altogether. Moreover, in rejecting a materiality per se approach, a Regulation S-K line item avoids undermining existing understandings of materiality in securities law. This enhances the consistency of the existing inconsistent disclosure standards because much of the current debate concerns how to appropriately determine materiality when it comes to terrorism-adjacent activities. After all, the aim of this Note is to propose a remedy that creates more effective and coherent regulations in the SST-disclosure space. The necessary first step is to depart from materiality, a standard that yields inconsistent disclosure in a space rife with varying views on the importance of the implications of terrorism.

2. Continuing Benefits Afforded by SST Disclosure

The heightened specificity of a new line-item requirement in Regulation S-K will also enhance the quality and quantity of SST disclosures by compelling corporations to reveal more information. In turn, an addition to Regulation S-K allows for the continued benefits associated with SST disclosure expressed in Part II.B—namely, ensuring transparency that benefits the investors the disclosures serve,²⁴⁴ fulfilling demonstrated investor demand for such information,²⁴⁵ and contributing to socially beneficial practices achieved via the public scrutiny that accompanies disclosure.²⁴⁶

To begin, SST disclosure requirements benefit the market through their information-forcing capabilities.²⁴⁷ This notion aligns with Former Chairman Cox’s strongly held view that the SEC’s role is to make

242. *See supra* note 199 and accompanying text.

243. *See supra* text accompanying notes 169–70 (discussing arguments in favor of preserving the “integrity” of the standard).

244. *See supra* Part II.A.1.

245. *See supra* Part II.A.2.

246. *See supra* Part II.A.3.

247. *See supra* note 126 and accompanying text.

information more readily available for the investing public.²⁴⁸ A clearer, more exacting, and more consistent disclosure requirement functions to further these goals by ensuring that corporations provide pertinent information to the investing public as part of their regular disclosures.²⁴⁹ The ultimate proposal of this Note increases transparency, which is a key feature of a disclosure-based regime.²⁵⁰ Transparency is even more desirable, given the existing evidence of investor demand for SST disclosures.²⁵¹ Not only does a more precise standard for SST disclosures standardize the subsequent disclosures, it also increases transparency, benefitting both investors²⁵² and the efficiency of the market as a whole.²⁵³

A comprehensive Regulation S-K requirement resolves many of the critiques described above,²⁵⁴ enacting a clearer standard that increases exactitude.²⁵⁵ In turn, this proposal eliminates much of the ineffectiveness caused by inconsistent and unclear practices and ensures that the benefits associated with SST disclosures continue in the future.

C. Possible Weaknesses of This Proposed Solution

Despite the benefits of a Regulation S-K addition requiring disclosure of all business in or with SSTs, this proposal will necessarily face criticism. Critics who are diametrically opposed to the SEC overseeing disclosures that are not traditionally financial in nature will denounce this solution as it maintains the status quo—the SEC continues as the principal regulator of SST disclosures.²⁵⁶ This criticism is further analyzed in Part III.C.1. Part III.C.2 explains an additional pitfall of this proposal: requiring heightened disclosures can be costly, creating the possibility of fraud liability for information that is not of any notable importance otherwise and for information that companies would not be compelled to disclose in the absence of heightened disclosure requirements.²⁵⁷

248. See Press Release, *supra* note 67; see also *supra* text accompanying note 127.

249. See generally *supra* note 69.

250. See *supra* notes 128–38 and accompanying text.

251. See *supra* Part II.A.2. Moreover, given that there is a demand for this information, greater consistency in solicitation is a desirable goal. Insufficient or inconsistent disclosure will always fall short of investor demand, whether investors are aware of the deficiencies of the disclosures or not. A Regulation S-K requirement thus serves to *better* fulfill investor demand than existing disclosure mechanisms do.

252. See *supra* note 16 (establishing the interests of investors as the principal concern of this Note).

253. See generally *supra* text accompanying notes 130–32.

254. See, e.g., *supra* Parts II.B.2, II.C (detailing the risk of ineffectiveness in current standards).

255. See *supra* Part II.B.2.

256. See *supra* Part II.B.1.

257. See *supra* Part II.C.2.

1. Maintaining Regulation of SSTs Under the SEC

A weakness of this Note's proposal is that it fails to address the more sweeping concern that SST disclosure requirements are inherently problematic because the SEC should not regulate in this sphere.²⁵⁸ Any proposal seeking to retain some semblance of the current SST disclosure framework would fall victim to the same parallel critiques: that the SEC is an inappropriate regulator and that there are other agencies better suited to the task.²⁵⁹ Given the compelling interests in retaining SST disclosure mechanisms in some form,²⁶⁰ it is difficult to propose a practical solution that would entirely eliminate this criticism. The SEC, whether by the broad mandates of the materiality standard or the more narrowly tailored methods of comment letters and legislation pertaining to SST disclosure specifically, will likely continue to regulate in this sphere regardless.

Nevertheless, the solution proposed by this Note at least cabins the authority of the SEC's focus on a "political or foreign policy agenda."²⁶¹ Specifically delineating a disclosure standard under Regulation S-K confines the SEC's currently murky disclosure-forcing capabilities to notions of materiality disclosure already expressed in Regulation S-K.²⁶² This solution ensures that the SEC continues to act consistently with its traditional agenda of overseeing disclosure of material information.²⁶³

2. Creating Costs for Companies Through Fraud Liability

As explained in Part II.C.2, necessary considerations in any disclosure mechanism are the associated costs.²⁶⁴ These may include costs associated with gathering information²⁶⁵ and, inevitably, some degree of omissions liability where companies fail to disclose information that might be considered material to investors.²⁶⁶ However, a proposal that creates a Regulation S-K item that specifically gives rise to heightened SST disclosure requirements necessarily implicates additional costs: costs associated with the increased risk of fraud liability.

Again, when corporations disclose risk factors, they create statements on the basis of which fraud claims can be brought.²⁶⁷ This liability would not otherwise exist in a system where disclosure of certain information is not

258. *See supra* Part II.B.1.

259. *See supra* Part II.B.1.

260. *See supra* Parts II.A.1–3.

261. Lynn, *supra* note 93, at 351.

262. *See supra* Part II.B.2.

263. *See* Lynn, *supra* note 93, at 351.

264. *See supra* Part II.C.2.

265. *But see supra* note 217 (explaining that these costs are relatively low, as companies already have access to their own information). *See also* Bebchuk & Jackson, *supra* note 145, at 853.

266. *See supra* note 214 and accompanying text.

267. *See* Langevoort, *supra* note 177, at 1014; *see also supra* notes 207–13 and accompanying text.

mandated. For example, the proposed addition to Regulation S-K requires disclosure of all business in or with SSTs. This compels disclosure of certain statements that are neither currently captured under the provisions of materiality and existing items in Regulation S-K nor solicited via comment letters or the ITRA²⁶⁸ because the proposed standard requires more information mandated with greater specificity. In turn, any misstatement in these disclosures, no matter how small or immaterial, risks fraud liability, and companies will inevitably face greater costs. Such liability risk does not exist under current standards to this same degree because current standards do not mandate such sweeping disclosures. Nevertheless, as discussed in Part II.C.2, costs of some form are inherent in any disclosure mechanism. This proposal therefore accepts increased fraud liability as a necessary hurdle in achieving more consistent SST disclosure practices.

CONCLUSION

This Note first addressed the designation of SSTs in the world: Syria, Iran, North Korea, and Cuba.²⁶⁹ Then, this Note identified four different mechanisms that the SEC uses to solicit SST disclosures from corporations: the materiality standard, the provisions of Regulation S-K, comment letter solicitations, and requirements of the ITRA.²⁷⁰ The various standards at play, and their varying degrees of exactitude in the disclosures they require, create a disjointed framework for SST disclosure requirements. Therefore, although SST disclosures theoretically ensure transparency, fulfill an existing investor demand, and lead to socially beneficial practices,²⁷¹ the existing standards are not successfully accomplishing these aims because they are too inconsistent to produce a meaningful set of information.

Developing a singular, cohesive standard that ensures that corporations make SST disclosures and that these disclosures are meaningful when compared to one another is critical to developing an effective disclosure system in the SST sphere. An addition to Regulation S-K that unifies the existing mechanisms under one heightened requirement to disclose all business in or with SSTs solves many of these problems. Although critics may be discontented with such a recommendation,²⁷² this proposal maintains SST oversight under the umbrella of the SEC in a way that creates a stronger and fairer standard and introduces clarity to a discussion currently plagued with inconsistencies. It is time for a clearer standard in SST disclosure.

268. *See supra* Parts I.B.1–4.

269. *See supra* Part I.A.2.

270. *See supra* Part I.B.

271. *See supra* Part II.A.

272. *See supra* Part II.B.1.