Political grammars of justification and cost-benefit analysis in SEC rulemaking

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ABSTRACT

This study investigates the process by which accounting regulators persuade their public audience (and themselves) of the merits of their rulemaking decisions. We analyze the Securities and Exchange Commission’s justifications within the cost-benefit analysis (CBA) it performs as part of its regulatory process. We focus on a controversial rule that Congress mandated the SEC to implement but allowed the SEC to make discretionary decisions on particular aspects of the rule. We show a process at play in which accounting regulators address controversial decisions to their public audience through justifications that mobilize “political grammars”. These grammars suggest that the SEC justifies the mandatory nature of rulemaking differently from its discretionary decisions and lead us to the following findings. First, the SEC proposes that the Congressional mandate increases benefits to society and to market participants and increases costs to issuers. The SEC’s discretionary rulemaking, however, primarily decreases costs to issuers. Second, the SEC justifies the proposed benefits and costs of the regulatory mandate through “authoritative” political grammars and justifies discretionary decisions through “pragmatic” political grammars. Finally, the SEC mobilizes evidence in the form of constituent comment letters to support justifications for the costs of the regulatory mandate while ignoring evidence supporting the benefits of the rule. In this case, the regulator’s justification process suggests that CBA has a usefulness yet ultimately reflects its limits as an objective rulemaking mechanism. Our study highlights CBA as a potential tool for legitimizing decisions that advantage issuers at the expense of the broader public audience.

Keywords: justification; SEC rulemaking; cost-benefit analysis; political grammars

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1. Introduction

The stated mission of the United States Securities and Exchange Commission (SEC, hereafter) is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation (SEC 2013). Public company disclosure of financial and other information is central to this mission. To that end, the U.S. Congress authorizes the SEC to promulgate rules requiring the periodic disclosure of information by publicly traded firms. The SEC proposes rules in accordance with its own institutional agenda as well as rules that the SEC is mandated to promulgate by Congress. For instance, following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), Congress directed the SEC to produce several disclosure rules. For each rule it proposes, the SEC considers potential benefits and costs in determining whether to adopt a rule (Nagy 2015; Schwartz & Nelson 2016). While the SEC’s cost-benefit analysis (“CBA”) provides support for SEC rulemaking (SEC 2013), research has devoted little attention to this type of CBA or the role it plays in the rulemaking process.

In this study, we investigate the SEC’s rulemaking process through its cost-benefit analysis of a rule mandated by Dodd-Frank that requires the disclosure of the source of a firm’s conflict minerals (CM). The mandate to disclose the source of a firm’s CM arose through the U.S. Congress’ intent that commercial entities avoid purchasing raw materials from illegal groups in the Democratic Republic of Congo (DRC), as such purchases finance armed conflict that contributes to widespread human rights violations. In proposing the disclosure rule mandated by Dodd-Frank, the SEC suggested that the rule’s “social benefits are quite different from the economic or investor protection benefits that [the SEC’s] rules ordinarily strive to achieve” (SEC 2012, p.244). Furthermore, even the “economic benefits” of SEC disclosure rules are often claimed to be difficult to evaluate (Nagy 2015; Schwartz & Nelson 2016).

As such, we employ a case study to gain a deeper understanding of the SEC’s rulemaking process in a unique setting in which the proposed disclosure rule suggests an extension of the SEC’s stated mission. We

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1 The SEC defines the term “conflict mineral” as “cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the Covered Countries” (mainly, in the Democratic Republic of the Congo) (SEC 2012).
do so by examining justifications within the SEC’s CBA when describing both the mandatory and discretionary nature of a disclosure rule that the SEC deems outside of its typical domain. We also investigate the SEC’s mobilization of justifications presented in constituent comment letters regarding benefits and costs of the disclosures as certain letters are used to support the SEC’s justifications while others are not. Our examination sheds light on how the SEC evaluates benefits and costs in order to justify its final rules to the SEC’s public audience and (presumably) to themselves. In doing so, we highlight public regulators’ use of discourse, and discursive evidence, to construct the justifications they provide for their rulemaking decisions.

To understand public regulators’ discourse and justifications, we mobilize a grammatical approach understood through the work of Lemieux (2009, 2014). This author’s work considers grammars to be implicit rules adopted (or ignored) in situations in which normative claims are made, drawing from actors’ sense of justice (Lemieux 2009, 2014). Defined in this sense, grammars are useful in how they can be employed politically in the justification of rulemaking decisions where those decisions appeal to competing interests. Grammars give meaning to and place emphasis on concepts that indicate the set of rules to be followed to be recognized as acting and judging appropriately. While we refer to the notion of grammars as an analytical device, we let the data speak for itself in that we do not impose any particular grammars on our analysis. We anticipate that the notion of “political grammars” will help us to shed light on how the SEC justifies its rulemaking decisions by drawing on discourse and tracing their language of justification as it unfolds.

We find that the SEC justifies the mandatory nature of rulemaking differently from its discretionary rulemaking decisions by mobilizing “political grammars” and selective discursive evidence to support those grammars. In doing so, they engage with grammars reflecting distinct discursive patterns that aim to satisfy obligations to and interests of particular regulatory actors. Indeed, the CBA indicates that the Congressional mandate increases benefits to society and to market participants and increases costs to issuers. The SEC’s discretionary rulemaking, however, mainly decreases costs to issuers. The SEC’s justification for these benefits and costs mobilizes two key political grammars. First, the SEC justifies benefits and costs of the
regulatory mandate through authoritative grammars of ceremonial reference, jurisdictional abstraction, and constituent reliance. Second, the SEC justifies discretionary rulemaking decisions largely through pragmatic grammars of information quality, relieving burden, and definition framing. Finally, we find that the SEC selectively mobilizes evidence in the form of constituent comment letters to support certain of its justifications. Specifically, the SEC mobilizes comment letter evidence from the industries being regulated to support grammars around the costs of the regulatory mandate while ignoring comment letter evidence supporting the benefits of the rule.

Our work contributes to the accounting literature on the political nature of regulatory processes (Cooper and Sherer 1984; Fogarty, Hussein, and Ketz 1994; Zeff, 2002). Literature on the politics of accounting regulation often focuses on the power and influence of and in private accounting institutions (e.g. Botzem 2012; Allen and Ramanna 2013; Jiang et al. 2015; Baudot 2018) or on constituent’s attempts to exert power and influence over private accounting institutions (e.g. Schalow 1995; Saemann 1999; Kwok and Sharp 2005; Jorissen, Lybaert, Orens, and van der Tas 2011). Despite extant research on the politics of private accounting regulation, we agree with Gipper, Lombardi, and Skinner (2013) and Young (2014) that our knowledge of political forces in the broader field of accounting regulation remains limited and rather neglected in the last 20 years. Our paper takes the U.S. Securities and Exchange Commission (SEC) as its object of study. The SEC is a public, government regulator of accounting that, while (arguably) a powerful political and economic institution, has been understudied as a source of accounting regulation.

There is limited research directed at understanding public, government accounting regulators, specifically the SEC, and the role of such institutions in maintaining order or bringing about change in reporting and disclosure (Bealing 1994; Bealing, Dirsmith, and Fogarty 1996; Merino and Mayper 2001; Shapiro and Matson 2008; Bozanic, Dirsmith, and Huddart 2012). Research primarily focuses on the power and influence of external constituents, often downplaying the role of the SEC itself despite the fact that rulemaking decisions of the SEC have significant implications not only for capital markets but for society more broadly. Scant attention has been paid to the fact that public regulators in the U.S. justify their rulemaking decisions to their public audience through a cost-benefit analysis. We highlight the role of the
SEC in public rulemaking and the process of justifying benefits and costs associated with its rulemaking decisions. Through our analysis, we believe we are one of the first to elaborate the SEC’s cost-benefit analysis building on a limited stream of research studying the way in which regulators justify rulemaking decisions. In association with what is referred to as “evidence-based” rulemaking (Leuz 2018), this analysis is important in highlighting what and who gets privileged in rulemaking.

Our study of justificatory processes contributes to accounting literature that links accounting rulemaking decisions to broader meaning systems and discursive mechanisms (Robson 1993, 1994; Young 1996; 2003; 2006). Scholars have suggested that meaning systems and discourse play a key role in the construction of justificatory accounts, aiding in the creation, maintenance or reparation of legitimacy around contentious rulemaking decisions (Phillips et al. 2004; Suddaby and Greenwood 2005; Phillips and Malhotra 2008). We propose that legitimizing contentious rulemaking decisions depends on justificatory processes and highlight public justification and political grammars as a useful theoretical lens for understanding accounting regulatory processes and rulemaking decisions. Furthermore, as alluded to previously, prior research in this area also primarily examines constituent justifications for stances on specific SEC rules; however, we focus on regulator (i.e., the SEC’s) justifications for decisions made when shaping the rules while acknowledging that those justifications may refer to the discourse of select constituents. Thus, we consider the way the public regulator responds discursively (and selectively) to a multiplicity of conflicting influences on the process.

The remainder of this paper is structured as follows. The next section discusses the literature on SEC rulemaking with a focus on processes by which the regulator justifies its rulemaking decisions, in particular its cost-benefit analysis. We then combine perspectives on justification with the concept of political grammars in order to theorize the process. Section 3 presents the background of the regulation we study and discusses our research method. Following that, we analyze the process by which the SEC justifies its rulemaking decisions. In Section 5, we discuss the implications our study has for understanding the mechanisms involved in the accounting regulatory process. Section 6 concludes.
2. Theoretical foundations

Political and institutional forces in SEC rulemaking

Through the Securities Exchange Act of 1934, Congress created the U.S. Securities and Exchange Commission as an independent regulatory agency of the federal government. The stated aim of the SEC is to restore investor confidence in U.S. markets by providing investors with more reliable information and well-defined rules of trade (SEC 2013). Prior research calls into question the neutrality of the SEC in terms of both its rulemaking procedures and enforcement activities. Academic researchers often examine the SEC’s practices from an institutional theory perspective, a basic tenet of which is that an organization’s survival requires it to conform to social norms. Several studies suggest the 1933 and 1934 securities acts were designed to simply maintain the status quo, (i.e., to preserve the ongoing social unaccountability of large corporations) (Merino and Neimark 1982; Bealing 1994; Bealing et al. 1996; Merino and Mayper 2001; Baker, Bealing, Nelson, and Staley 2006). In this sense, the SEC’s disclosure rules represent symbolic regulation and not economic reform (Merino and Neimark 1982).

Consistent with this status quo perspective of the SEC, Bealing (1994) finds that the extent of SEC enforcement actions against regulatees, along with other political and institutional factors, influences SEC funding from Congress. This suggests that, like SEC rulemaking, SEC enforcement is more ritualistic than random. In their investigation of the emergence and evolution of the SEC, Bealing et al. (1996) conclude that SEC actions serve as political exchanges made not to apply effective regulatory changes, but to legitimize the SEC to several constituents with varying interests, including the U.S. Congress. Further, Merino and Mayper (2001) conduct an historical analysis of the correspondence and actions of early SEC commissioners and find that even when the intent of legislation is to cause a “real” change, the SEC does not perform in an activist manner to initiate the change. Rather, each of these studies characterize the SEC as a legitimacy-seeking entity that engages in ritualistic acts to conform to political and societal norms of acceptable behavior.

Other research extends the work that focuses on the institutional perspective of the SEC by considering a range of strategies that external parties employ in shaping SEC rules. This work often relies on Oliver’s
(1991) typology of strategic responses to institutional pressures. Shapiro and Matson (2008) show how the public accounting profession employed strategies of avoidance, defiance, and manipulation to successfully resist SEC efforts to impose client internal control regulations. Further, Bozanic et al. (2012) examine the development of insider trading regulations (particularly Rule 10b5-1) and find that those regulated by 10b5-1 effectively shaped the regulation, suggesting the actions of regulatees “endogenize” the regulations that govern them. Their evidence also supports the theory of regulatory capture, wherein a regulator advocates for the interest of the regulatees, particularly large commercial institutions with access to substantial resources to shape rulemaking outcomes, rather than the agency acting in the public’s interest (Bozanic et al. 2012). Finally, Alon and Dwyer (2016) show SEC acquiescence to powerful transnational players by allowing foreign registrants to file IFRS-based financial statements without reconciling to U.S. GAAP.

More closely related to the context of our study, prior research examines the SEC and external perspectives in relation to the Dodd-Frank disclosures. Cortese and Andrew (2020) explore the ways in which influential regulatees activate justifications to support their positions within the regulatory debates surrounding the rule for disclosure of government payments by resource extraction firms. They suggest that the SEC patched together the views of constituents from civic, industrial, and market worlds to reach a “justifiable compromise” of sorts with the regulatees. Their paper alludes to the symbolic rather than substantive nature of compromise, reminiscent of the ceremonial perspective of the SEC’s work (Merino and Mayper 2001). Rather than concern with how constituent views are used to produce regulatory outcomes, we study how those views may eventually be used to justify the outcomes to the public.

Moreover, Reinecke and Ansari (2016) explore how firms assume responsibility for a “wicked problem”, defined as a large-scale social challenge spanning national boundaries. They find that firms “tame the wicked problem” (e.g. humanitarian issues surrounding the mining of conflict minerals in the DRC) through the construction, shifting, and adoption of frames of responsibility. Further, Akiran et al.

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2 Oliver (1991) proposes a spectrum of five strategic behaviors organizations may enact in response to pressures toward conformity with the institutional environment: acquiescence, compromise, avoidance, defiance, and manipulation.
(2017) examine the SEC rulemaking process surrounding the conflict minerals regulation by analyzing the comment letters the SEC received from constituents as well as the SEC’s final conflict minerals rule. The authors identify a complex interplay between two diametrically opposed camps—those who view the firm as a “global citizen” with vast social responsibilities and those who view the firm as a “trader” with much narrower responsibilities. These papers suggest a tension around the development of disclosure rules by the SEC when those rules are perceived as providing social benefits. While each of the aforementioned studies provides insights regarding the SEC rulemaking process in general, including how regulatees employ various strategies to shape the rulemaking process, our study focuses on a particular aspect of the rulemaking process that prior research largely ignores—the cost-benefit analysis that justifies the SECs rulemaking process and decisions.

**SEC cost-benefit analysis as justification for rulemaking decisions**

Cost-benefit analysis (“CBA”), sometimes referred to as economic analysis, is promoted as essential to the SEC’s rulemaking process. No statute specifically mandates the SEC to conduct a CBA as part of its rulemaking process (RSFI and OCG 2012). The SEC, however, recognizes (since at least the early 1980s) that consideration of potential benefits and costs of the rules it adopts is a matter of good regulatory practice (RSFI and OCG 2012). Furthermore, statutory reforms in 1996 require the SEC to consider the effect of new rules on efficiency, competition, and capital formation, which some interpret as performing CBA (Verret 2014).

Although CBA is not compulsory, the SEC typically presents a discussion and evaluation of the potential costs and benefits of proposed rules within its rulemaking process, with legal developments over the past fifteen years compelling the SEC to become even more diligent in its CBA efforts (Nagy 2015). Specifically, the U.S. Court of Appeals for the D.C. Circuit deemed several SEC rules “arbitrary and capricious” due to the SEC’s failure to conduct an adequate CBA, rendering the rules invalid (Nagy 2015).³

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³ The three vacated SEC rules (rule release dates) include: (1) Investment Company Governance (July 27, 2004), vacated in *Chamber of Commerce v. SEC* in 2005; (2) Indexed Annuities and Certain Other Insurance Contracts
In 2011, the court argued that the SEC had “inconsistently and opportunistically framed the costs and benefits” of its proxy access rule (Business Roundtable v. SEC 2011). Further, the SEC had “failed adequately to quantify the certain costs or to explain why those costs could not be quantified” for that same rule (Business Roundtable v. SEC 2011). Regarding a 2005 mutual fund governance regulation, the court ruled that the SEC had failed to adequately “apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decided whether to adopt the measure” (Chamber of Commerce v. SEC 2005). In response, the SEC enacted structures around CBA in its rulemaking process, including forming the Division of Risk, Strategy, and Financial Innovation (RSFI) in 2009.4 The RSFI, in conjunction with the SEC’s Office of General Counsel (“OGC”) issued the “Current Guidance on Economic Analysis in SEC Rulemaking” in 2012.

The D.C. court’s decisions to vacate several SEC rules spurred legal scholars to examine the history and current state of the SEC’s CBA in rulemaking. Some regard CBA as a valuable tool to improve the overall quality of SEC rulemaking (Nagy 2015) and recommend the SEC allocate more resources to CBA efforts (Verret 2014). Others suggest the need for the adoption of a single CBA framework across several federal agencies engaged in rulemaking (Bartlett 2014), or for clearer definitions of the scope (judicial review) of SEC CBA to prevent inefficient and overly burdensome analyses (Benedict 2012). Much of the work in the legal literature, however, is critical of efforts to impose judicially reviewed, quantified CBA on the SEC (Gorton 2014; Coates 2014; Nagy 2015; Schwartz and Nelson 2016), especially as certain costs and benefits of the SEC’s rules are often characterized as difficult to quantify. These scholars argue that the quantification of CBA is not science but “number-laden guesswork” that should be treated instead as one input to the regulator’s analysis of rulemaking decisions alongside conceptual or qualitative considerations (Coates 2014, p.999).

(January 16, 2009), vacated in American Equity Investment Life Insurance Co. v. SEC in 2010; and (3) Facilitating Shareholder Director Nominations (August 25, 2010), vacated in Business Roundtable v. SEC in 2011.

4 The SEC renamed RFSI the “Division of Economic and Risk Analysis” (DERA) in 2013.
Another stream of literature aims to understand regulatory developments by quantifying the costs of regulation (Bushee and Leuz 2005; Cormier, Magnan, and van Velthoven 2005) and information (Healy et al. 1999; Heflin et al. 2005). Firm disclosures are often evaluated using calculative techniques that aim to model the impact of direct costs to the firm, which are already difficult to project. Furthermore, impacts can extend well beyond direct costs to include indirect impacts to the firm (e.g., alienation within a community and other reputational effects) (Froud 2003, p.102) as well as significant externalities (e.g., loss of confidence in institutions and lack of transparency, accountability, or governance). Such impacts, whether costly or beneficial, are claimed to be even more difficult to quantify, suggesting the need to consider conceptual or qualitative features and more subjective notions of costs and benefits. In this way, rather than an objectively quantifiable endeavor, CBA is acknowledged to be a process characterized by judgment and choice in rulemaking, yet one in which those decisions must be justified (Coates 2014).

**Justificatory discourse and political grammars**

According to Rawls (1999), justifications are addressed to those who may disagree with us (or to ourselves) as in regulators who must convince their public audience (and themselves) of the merits of their decisions. Extending this into accounting regulation, Gaa (1988) distinguishes justification as argumentation, or reasons, provided for a rulemaking decision that serves as a basis for explaining that decision to regulatory actors. The literature is full of classification schemes of reasons in different settings. Habermas (1991) distinguishes pragmatic, ethical and moral ones, while Hurd (2007) studies reasons related to outcomes, fairness and correct procedure. Alker (2011) writes about political, ethical and religious reasons, and Boltanski and Thevenot (2009) identify various reasons as orders of worth. In this study, we make use of the notion of grammars, understood broadly as “the set of rules to be followed in order to be recognized, in a community, as correctly knowing how to act and judge” (Lemieux 2009: 21, translated by Taupin and Lenglet 2017).

A grammatical approach considers implicit rules adopted (or ignored) in situations in which normative claims are made, drawn from actors’ sense of justice (Lemieux, 2014). Lemieux (2009) identifies
three grammars that suggest different types of reflection: natural, public, and realist. The natural grammar corresponds with and dictates the inherent reasons for the engagement (or lack of engagement) of actors and their actions, reasons which tend to be taken for granted (Gardella 2011: 233, our translation; Taupin and Lenglet 2017). The public grammar, by contrast, suggests reasoning that reflects distancing of actors from their actions in public settings where some reasons may want to be protected from criticism or judgement (Gardella 2011: 233, our translation; Taupin and Lenglet 2017). Finally, the realist grammar suggests reasoning that reflects the anticipated constraints of a situation on actor’s experiences and practices (Gardella 2011: 233, our translation; Taupin and Lenglet 2017).

For our purposes, these grammars are useful as an analytical reference; however, we do not confine our discursive analysis to these categories. Rather, we are interested in how “grammars” can be political in the sense that, inherent in justification of a rulemaking decision, is the notion that regulatory constituents may be of competing interests. Prior research concludes that accounting regulation in many ways reflects and privileges certain constituent interests over others (Mezias and Chung 1989), including regulation promulgated by the SEC (Bozanic et al. 2012; Akiran et al. 2017). Robson (1993) suggests that actors’ interests are manifest in the discourse that actors employ in regulatory debates including the meaning given to concepts and the emphasis placed on those concepts. The meaning given to and emphasis placed on concepts are also indicative of the set of rules to be followed in order to be recognized, in a community, as correctly knowing how to act and judge. As for context, utterances are not always sincere, just or accurate; they may be disingenuous, false or occasionally the offshoot of manipulation (Bok, 1999). Still, a political utterance typically indicates that the speaker believes that other actors can be swayed by it. Moreover, even insincere speech may shape social orders and practices (Van Leeuwen, 2008). As such, we anticipate that the notion of political grammars, understood by drawing on discourse and tracing the language of justification as it unfolds, will help us to shed light on how the SEC justifies its rulemaking decisions.

Fogarty et al. (1994) prioritize the role of discourse and, more specifically, language exercised in accounting regulatory debates. Language employed in the process of regulatory debates constructs our society and our knowledge of it (Young 2003; Suddaby and Greenwood 2005; Green and Li 2011).
Accounting research has touched on this in revealing, for example, that while the FASB speaks in a language that maintains decision-useful information as its primary objective, this emphasis is made with limited knowledge about the information needs and decision processes of actual financial statement users (Young 2006; Stenka and Jaworska, 2019). The user’s engagement, however, operates not merely as stylistic discourse but as a powerful force actively involved in the creation and dissemination of meaning in accounting (Walters-York 1996; Walters and Young 2008). This shows how discourse can be about terminologies, language devices, and argumentation which constrains (enables) actors’ thoughts in a discipline or around a particular issue (Green and Li 2011).

For instance, Young (2003) shows how accounting standard setters employ language devices such as categorization and silencing in attempt to persuade not only that a standard-setting decision is “good” but also that the standard-setter is “good”. Young and Williams (2010) indicate that standard-setting decisions involve the selection from among different values and perspectives to be emphasized in supporting and justifying a “technical” decision. In both cases, the regulator sets the boundaries within which debates over proposed accounting and disclosure rules take place; in essence, determining what constitutes a valid argument for or against any rule through the exercise of discursive mechanisms (Young and Williams 2010). Yet we still know relatively little about the way in which discursive mechanisms, and language devices, are employed by regulators to construct and justify decisions to their public audience.

The remainder of this paper draws on the above ideas to examine in detail the dynamics involved in regulators justifying rulemaking decisions through the cost-benefit analysis of a contemporary disclosure case. First, we explore how the SEC evaluates costs and benefits in promulgating disclosure rules. Second, we reveal the discursive justifications that the SEC provides for rulemaking decisions. This also requires the examination of constituent comment letters, as the SEC publicly relies upon certain letters in rulemaking decisions. Our work sheds light on how the SEC’s evaluation of various costs and benefits translate into its justification of the nuances of the final rule.
3. Case methodology and materials

We conduct a case study of the process by which regulators evaluate and justify rulemaking decisions to their public audience. The case study method is useful in investigating accounting regulatory processes as they represent complex and dynamic phenomena in which context is crucial because it affects the phenomenon being studied (Cooper and Morgan 2008). The process by which regulators evaluate and justify rulemaking decisions encompasses many of these characteristics and therefore lends itself to case study. We analyze archival documents to follow the evolution of discourses around rulemaking decisions presented within the regulators’ cost-benefit analysis (CBA) as well as discourses of key regulatory actors on costs and benefits of the rule under study. Our analysis of public justification follows the research tradition of ‘abduction’, the essence of which lies in tracing the language of the social actors and through an iterative process of reflecting on social discourses and conceptualization (Wodak and Meyer 2009).

Case selection and background

To investigate the processes of evaluating and justifying policy decisions in accounting regulation, we select an SEC rule that requires US manufacturing firms to trace the origin and disclose the source of certain minerals used in production, which are typically obtained from African conflict zones (i.e., “conflict minerals”). While prior research examines the SEC’s rulemaking process in general (Gorton 1991; Bealing et al. 1996; Shapiro and Matson 2008; Bozanic et al. 2012; Alon and Dwyer 2016), we specifically analyze the SEC’s CBA justifications surrounding a disclosure rule having social and political implications. Several reasons motivated our choice of studying this case. First, Congress obliged the SEC to implement a rule related to the disclosure of conflict mineral sources within the US financial reporting framework as part of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (hereafter, the Dodd-Frank Act). Constituent demands for the disclosure of conflict minerals information, however, existed for some time before the rule’s enactment under Section 1502 of the Dodd-Frank Act. As such, we anticipated a potentially contentious regulatory process as the disclosure falls outside of the SEC’s own rulemaking-agenda and was debated by the SEC’s delegating authority leading up to enactment. Second,
the potential political and societal, in addition to economic, implications of this disclosure generated a wealth and diversity of interest in the rulemaking process and manifested tensions surrounding rulemaking decisions. This combination of factors provides a unique opportunity to gain insight into a regulator’s process of evaluating and justifying rulemaking decisions to the public on rules which may have not only economic, but also social and political, costs and benefits. We briefly present relevant historical context in relation to the mandated conflict minerals disclosure rule.

The Democratic Republic of Congo (DRC) suffered a civil war in 1996, named the First Congo War, and a Second Congo War that lasted from 1998 until 2003. Despite a signed peace agreement, the DRC continues to suffer from high levels of poverty and instability, including illegal armed groups committing widespread human rights violations. The illegal trade of extractive resources from the DRC supports conflict between militias and armed factions in neighboring countries (GAO 2007). Moreover, sexual violence and rape remain pervasive tools of war used by armed groups within the DRC.

Several past proposed congressional bills highlight the desire for commercial entities to avoid purchasing raw materials from illegal armed groups in the DRC, ultimately so those purchases do not finance armed conflict or result in human rights violations (e.g., H.R. 2954). To our knowledge, the earliest mention of conflict minerals disclosure is within the Congo Conflict Minerals Act of 2009 (S. 891). Amongst the many efforts within the bill intended to promote peace and security in the DRC, the bill also proposes the SEC promulgate rules requiring corporations disclose annually to the SEC the origin of certain conflict-zone minerals. The bill, however, did not make it past the Senate.

On July 21, 2010, however, following the 2008 financial crisis, Congress passed the Dodd-Frank Act. Within the extensive regulation, Section 1502 directs the SEC to issue rules requiring firms to perform a reasonable “country of origin” inquiry in good faith to determine whether any of its minerals originated in the conflict countries and to disclose their use of conflict minerals annually (SEC 2014). Congress enacted

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5 Several studies provide extensive descriptions of the conflict minerals disclosure requirements. See Herda and Snyder (2013) and Sankara, Lindberg, and Razaki (2016) for summaries of the rule.
this portion of the bill due to concerns that conflict minerals traded by armed groups in the DRC region helped to fund conflict in that area, resulting in an emergency humanitarian crisis (SEC 2014).

The SEC first proposed the conflict minerals rule on December 15, 2010, requiring manufacturing firms to provide a special disclosure report (Form SD) annually describing its country of origin inquiry and its determination of whether its products are “DRC conflict free”. Following a lengthy constituent comment period, the SEC adopted the final conflict minerals rule on August 22, 2012.\(^6\) Shortly thereafter, the National Association of Manufacturers and U.S. Chamber of Commerce\(^7\) filed a petition to the U.S. District Court, arguing that the SEC violated its duty to conduct an adequate economic analysis when promulgating the conflict minerals rule and that the rule compels speech in violation of the First Amendment.

After a series of court proceedings, the U.S. Court of Appeals declared the portion of the conflict minerals rule that requires disclosure regarding whether products are “DRC conflict free” or “not conflict free” as unconstitutional. Interestingly (considering the court’s recent history of vacating SEC rules due to inadequate CBA), the appeals court supported the SEC’s claimed inability to quantify the benefit side of the rule because the SEC lacked data about the rule’s effects. In 2014, the SEC released a “stay” confirming that firms must still conduct supply chain due diligence as outlined in the original SEC rule. Next, the SEC appealed the Court of Appeal’s decision asking the court to review its ruling. On August 18, 2015, the U.S. Court of Appeals for the District of Columbia affirmed the lower court’s ruling regarding the conflict minerals rule First Amendment violation. This court’s final judgment on the litigation was issued April 3, 2017 and remanded to the commission. As of that date, the SEC has indicated that it will not enforce the

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\(^6\) For details regarding the conflict minerals disclosure rules, see SEC Release No. 34-67716; File No. S7-40-10, Final Rule: “Conflict Minerals”, issued August 22, 2012.

\(^7\) The petition was amended to add the Business Roundtable as a petitioner on October 22, 2012.
section of the rule requiring disclosure of whether products are “DRC conflict free”.

Table 1 reflects the chronological development of conflict minerals rulemaking events.

Data collection and analysis

To understand the process of evaluating and justifying rulemaking decisions, we study relevant events occurring during the SEC’s rulemaking process for our conflict minerals case. The SEC’s rulemaking process typically involves three steps (SEC 2013). First, the SEC publishes a detailed formal rule proposal for public comment. Second, the SEC provides the public between 30 and 90 days to review the rule proposal and comment. Third, the SEC considers the public comments, agrees on the specifics of a final rule, and then adopts the final rule. Within both formal rules proposed for public comment and the final rule adopted, the SEC prepares a cost-benefit analysis (CBA) in which they provide justifications for any mandatory facets of the rule and any discretionary decisions.

Our approach involves analyzing the CBA component of the disclosure rule, rather than the rule in its entirety. Here, our analysis primarily focuses on four types of source documents—Congress’ provisions within the Dodd-Frank Act, the SEC’s proposed rule, constituent comment letters submitted on the proposed rule, and the SEC’s final rule. Table 1 shows the archival data sources employed in our case analysis. Our approach includes three components: (1) a regulatory analysis of CBA components through the evolution of the CM rule, (2) a discursive analysis of the SEC’s CBA, and (3) an analysis of SEC references to constituent comment letters within the final CM rule. We complement our primary analysis on SEC justifications for the costs and benefits of the rule with discursive data from court petitions, motions, and appeals where relevant.

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8 The conflict minerals disclosure rule was effectively rolled back by executive order in February 2017. As of December 2017, the US Congress advanced votes to repeal Section 1502 on conflict minerals. Neither the court outcomes nor the roll-back of the laws impact our study as we focus on understanding regulator’s evaluation of and justification for policy decisions. We mobilize the court and executive branch discourse around the cost-benefit of the rule to triangulate our analysis of the SEC’s justification.
First, we conduct a gap analysis, comparing the mandatory and discretionary facets of the SEC’s cost-benefit analysis within its proposed and final rules. We analyze the SEC’s CBA language around what the SEC identifies to be mandatory and discretionary rulemaking decisions. We compare the SEC’s CBA language around rulemaking decisions within the proposed rules to the SEC’s CBA language around rulemaking decisions within the final rules. We code every reference to costs or benefits in the CBA section of the proposed and final rules along several dimensions based on the SEC’s discourse: (1) key requirements under the rule, (2) whether the requirement is beneficial or costly to constituents, and (3) the type of constituent the SEC indicates to be affected by the requirement.

In terms of key requirements, we code each requirement described within the SEC’s CBA to one of Congress’ mandates within Section 1502 of the Dodd-Frank Act. For instance, Section 1502 mandates requirements for “Due Diligence”, “Annual Disclosure” and “Audit” within the CM rule. We also code each requirement in terms of whether the SEC indicates that requirement will increase or decrease benefits or costs to constituents. Furthermore, we observe that the SEC speaks about three types of constituents affected by the requirements of the rule: issuers, market participants, and society. Through coding of key topics, benefits and costs, and constituents affected, we form a picture of the evolution of the Congressional mandate and the discretionary decisions made by the SEC in its proposed and final rules.

Second, we conduct a discursive analysis of the SEC’s justifications for both the requirements of the Congressional mandate and aspects of the rule presented as discretionary SEC decisions. We concentrate on the role of language in structuring social action (e.g. justifications for rulemaking) with a specific focus on suasion and influence (Suddaby and Greenwood, 2005: 39). While discourse analysis views language as a form of social practice, we focus on political or interest-laden discourse and seek to identify genres or recurrent patterns of interests, goals and shared assumptions that become embedded in persuasive texts (Freedman and Medway, 1994). We seek to identify overarching and recurrent patterns of justifying the benefits and costs of CM disclosure in order to understand the SEC’s CBA.

Third, we generate a summary of the constituent comment letters that the SEC references in the CBA section within the final CM rule. Again, this comment letter summary provides insight into which
constituent comment letters and grammars are used as evidence to support the justification for SEC rulemaking decisions. In conjunction with this, we analyze the constituent comment letters which are not explicitly used to justify rulemaking decisions. We review passages from these comment letters that refer to benefits and costs of the rules and analyze the SEC’s justification in terms of those discourses that the SEC included in its CBA analysis and those that were excluded from analysis.9

Our overall research approach provides an in-depth discursive examination of the SEC’s CBA process. We analyze the SEC’s evaluation and justification of the benefits and costs of the mandate and the SEC’s discretionary rulemaking decisions along eight key requirements of Section 1502. We highlight the nature and evolution of rulemaking decisions and the justifications the SEC provides for those decisions. In analyzing justifications, we focus on discursive language patterns and trends. We also investigate the selectivity of the SEC’s justifications through an analysis of constituent comments. This data allows us to better understand how and when the SEC uses particular political grammars to justify rulemaking decisions and which constituents and constituent arguments the SEC pays attention to or ignores within this process.

4. How regulators justify through cost-benefit analysis

Regulatory analysis: Evolution of rulemaking

Our analysis investigates the evolution of SEC justifications surrounding both mandatory and discretionary components within both the proposed and final CM rules. To begin, the proposed CM disclosure rule contains a section entitled “Cost-Benefit Analysis”.10 Within this section, the SEC first lays out the mandatory requirements of Section 1502 (of the Dodd-Frank Act) but does not address associated benefits or costs of those mandates. The SEC then qualitatively evaluates benefits and costs related to aspects of rulemaking over which the SEC exercised discretion (SEC Release No. 34-63547, p.84). Within this discretionary portion of the CBA in the proposed rule, we find that the SEC primarily speaks about the benefits and costs of its decisions to issuers, (less so) to market participants and not at all to society.

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9 For this analysis, we utilize comment letter excerpts extracted by Baudot, Huang, and Wallace (2020) in connection with their examination of the risk-related discourse within the comment letters related to the proposed CM rule.

10 The CBA is Section IV out of eight total sections of the proposed rule.
Specifically, we find that the SEC describes benefits and costs of its discretionary rulemaking decisions within the proposal as decreasing costs to issuers and increasing benefits to market participants. Interestingly, the SEC does not quantify benefits or costs of the proposed rule within the CBA nor is there an evaluation of benefits and costs of the rule’s mandatory and discretionary aspects, taken together.\footnote{A quantification of costs does, however, occur in Section III of the rule, titled “Paperwork Reduction Act”. While the focus of our study is on the CBA portion of the rule, we note that the SEC estimated a $71M increase in the paperwork burden for all affected companies to comply with the proposed disclosure requirements.}

The final CM disclosure rule contains a section, titled “Economic Analysis”.\footnote{The Economic Analysis is Section III out of six total sections in the final rule.} Within this section, the SEC separately presents benefits and costs of the mandatory requirements of Section 1502, benefits and costs of its discretionary rulemaking decisions, and an evaluation of the overall economic effects of the rule. First, in the sub-section on the benefits of the mandated Act, the SEC indicates that increased societal benefits derive from the stated intent of Congress to decrease conflict and promote peace and benefits to market participants derive from better-informed investment decision-making. However, the SEC suggests that such benefits are those that, with their social aims, cannot be readily quantified with any precision as the SEC does “not have the data to quantify the benefits and are unable to assess how effective Section 1502 will be in achieving those benefits” (SEC Release No. 67716, p.243-244). Thus, we find that the SEC identifies benefits with cost-related caveats stemming from the mandate, suggesting that Section 1502 is more beneficial than costly to society and has a net neutral effect on market participants.

Second, in the sub-section on costs of mandatory reporting requirements, the SEC reports cost estimates contained in four constituent comment letters submitted to the SEC prior to the issuance of the proposed rule.\footnote{We focus on the SEC’s justification and discourse, not on the quantification of cost figures per se; however, it is important to note the discursive effort made by the SEC to distance its own discretionary decisions from calculation.} The SEC states that these comment letters do not distinguish between the costs of the Section 1502 mandate versus the requirements over which the SEC exercised discretion (p.245). Still, the SEC presented the quantified costs within the section on costs resulting from mandatory requirements. The SEC suggests
that these comment letters indicate that requirements around annual disclosure, due diligence, conflict free reporting, and audit are all more costly than beneficial to issuers.

Finally, in the sub-section presenting the SEC’s discretionary rulemaking decisions, the SEC interestingly states that they are “unable to quantify the impact of each of the[ir] decisions … with any precision because reliable, empirical evidence regarding the effects is not readily available and commenters did not provide sufficient information to allow us to do so” (p.269). As such, the SEC makes no attempt to quantify the costs of its discretionary decisions, presenting costs of discretionary rulemaking decisions in a purely qualitative fashion. As in the proposed rule, when speaking about discretionary rulemaking decisions in the final CM rule, the SEC refers only to benefits and costs to issuers and (less so) to market participants.

In summary, when the SEC discusses benefits and costs of the Congressional mandate, it speaks about the mandate as increasing benefits to market participants as well as society while increasing costs to issuers. In contrast, when the SEC presents benefits and costs of its discretionary rulemaking, the discourse suggests that SEC decisions are decreasing benefits to market participants and decreasing costs to issuers. Thus, the SEC CBA appears to show SEC rulemaking as providing relief to issuers to the potential detriment of market participants and society. Table 2 reflects our analysis of the SEC’s rulemaking and the overall CBA the SEC provides in terms of the benefits and costs of the mandate and of discretionary decisions. As we analyzed the evolution of the rule, several overarching discursive patterns and trends emerged in the way the SEC justifies the costs and benefits of the CM rule. Our analysis demonstrated the existence of distinct grammars that point to different ways of justifying the benefits and costs of rulemaking depending on the SEC’s use of discretion and on the constituent affected.

Insert Table 2 here

Discursive analysis of SEC’s CBA justification

Our previous analysis shows the SEC’s CBA justifications vary depending on whether the SEC is justifying the Section 1502 mandate or the SEC’s discretionary rulemaking decisions, suggesting a political aspect of its justification discourse. Our analysis also reveals a pattern in which the SEC uses discourse that
reflects what we label “authoritative grammars”, including ceremonial reference, jurisdictional abstraction and expert reliance. Authoritative grammars appear primarily in justifying the mandated requirements of Section 1502 arising from the Congressional Act. Authoritative grammars are reminiscent of Lemieux’s (2009) public grammars as they reflect the SEC distancing itself from regulatory actions around the CM rule. In contrast, the SEC employs discourse that represents what we categorize as “pragmatic grammars”, including information quality, relieving burden and definition framing. The SEC mobilizes pragmatic grammars primarily to justify the SEC’s discretionary rulemaking decisions. Pragmatic grammars resonate with Lemieux’s (2009) realist grammars as they address the constraints of the CM rule on the practice of issuers. Furthermore, both grammars evoke prior work on appeals to various constituent groups involved in rulemaking (Mezias and Chung, 1989; Bozanic et al. 2012; Akiran et al. 2017). In our setting, these appeals correspond with Lemieux’s (2009) natural grammar in the way they reflect actors’ taken-for-granted assumptions about and reasons for engagement with the CM rule.

Authoritative grammars and mandatory rulemaking

In justifying the requirements of Section 1502, the SEC uses ceremonial reference to justify benefits to society, mimicking the language of Congress in mandating the rule. For instance, the SEC explains the benefits of the Section 1502 mandate suggesting that disclosing conflict minerals furthers Congress’s goals of “deterring the financing of armed groups in the DRC countries through commercial activity” (SEC Release No. 34-63547, p.84) and “decreas[ing] conflict and (sexual and gender based) violence, promot[ing] peace and security” (SEC Release No. 34-67717, p.242). When referring to the benefits that Congress anticipated from the enacted legislation, the SEC uses discourse that tends to detach the SEC from such benefits, including: “Congress intended”, “the Congressional object”, and “Congress likely sought to”. In addition, the SEC suggests that there are unintended consequences to Congressional intent that hurt the general economy and population of the DRC. Furthermore, the SEC acknowledges benefits to market

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14 Note that we do not distinguish between the proposed and final CM rules in this part of our analysis, as the political grammar patterns we identify (i.e., authoritative grammars within mandatory justifications and pragmatic grammars within discretionary justifications) were consistent across both the proposed and final CM rules.
participants in that the disclosure may be material to investment decisions where it informs market participants’ understanding of risk in the supply chain and reputation. The SEC notes, however, that the Congressional intent of the disclosure does not appear to provide direct economic benefits to investors. Thus, when describing the benefits of the mandatory aspect of the disclosure rule, the SEC frames the benefits from the perspective of Congress’s intentions and provides its own caveats related to costs. In this way, ceremonial reference involves subordination to the aims of higher administrative authorities (i.e. Congress as the administrative apparatus governing the SEC).

The SEC’s CBA justification for Section 1502 requirements reflects a second type of authoritative grammar, jurisdictional abstraction that involves referencing the SEC’s stated mission to consider decisions based on their potential economic impact on market pricing, efficiency and capital formation. For instance, the SEC highlights that investors believe benefits of CM disclosure arise from increased understanding of risk in issuers’ reputation and supply chain (p.246). Despite this acknowledgement, the SEC indicates that such benefits “do not appear to be those that will necessarily generate measurable, direct economic benefits to issuers or investors” (p.244). In contrast, the SEC indicates that, under Section 1502, issuers “may be put at a competitive disadvantage with respect to private … and foreign firms” (p.299). Furthermore, the SEC considers Section 1502 as aiming to “achieve compelling social benefits… which are quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve” (p.244). This discourse reflects the SEC’s discomfort in promulgating regulation outside of its economic domain, allowing the SEC to distance itself from benefits to market participants arising from Section 1502. Through ceremonial reference and jurisdictional abstraction, the SEC makes no commitment regarding the potential increased benefits to society (or to market participants) of CM disclosures.

The SEC exhibits a third type of authoritative grammar, constituent reliance, within its CBA, primarily to justify costs arising from the mandatory requirements of Section 1502. Constituent reliance entails deferring the determination of costs to constituents and utilizing those determinations to explain the potential costs of the disclosure to issuers. In the proposed rule, the SEC estimated (within the Paper Reduction Act of the rule and not within the CBA) that the total annual increase in costs of implementing
the disclosure for all affected firms amounted to $71 million (SEC Release No. 34-63547, p.72-75). In the final CM rule, within the CBA the SEC refers to cost estimates provided in the comment letters of four constituents who evaluate costs as ranging from $387 million to $16 billion (SEC Release No. 34-67717, p.245). 15 The SEC relies primarily on two estimates, those provided in the comment letters of a manufacturing industry association and a university research team, denoting them as more useful, transparent and generalizable than others (p.302). At the same time, the SEC indicates that these two estimates “did not provide sufficiently documented evidence to support all of their assumptions and assertions” (p.303). As such, the SEC considers comment letters from other constituents in order produce an estimate that “better synthesizes the information provided [to us] in the comment process”. In doing so, the SEC’s cost analysis focuses on the “categories of costs most often identified as significant” in the constituent comment letters (p.303): namely, reporting criteria requiring due diligence and audit alongside (related) costs of information technology. With a focus on the costs significant to constituents, and using constituent estimates as a baseline for adjustment, the SEC revised its estimate of costs of the final rule to CM issuers, suggesting initial (recurring) costs to issuers in the range of $3 to 4 billion ($207 to 609 billion). In making this determination, it appears the SEC did not engage in its own independent analysis of costs but rather relied on “evidence” received from (arguably) interested constituents, including one of the main industry associations affected by the disclosure. We refer to the discourse of the SEC around these cost determinations as constituent reliance which, like the previous authoritative grammars, allows the SEC to assign responsibility for determinations of cost to the authority of its constituents.

Pragmatic grammars and discretionary rulemaking

The SEC employs pragmatic grammars in its CBA to justify benefits and costs arising from the SEC’s discretionary rulemaking. For instance, the SEC refers to grammars of information quality to justify benefits and costs to market participants. In such justifications, the SEC mobilizes information characteristics such

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15 The first two letters come from industry associations, the National Association of Manufacturers (NAM) and Association Connecting Electronics Industries (IPC); the third letter is from a policy organization, Tulane University Payson Center for International Development; and the fourth letter is from an advisory firm, Claigan Environmental Inc.
as usefulness, comparability, and credibility. For instance, the SEC suggests that market participants benefit from SEC rulemaking that standardizes CM disclosure. Standardization makes that disclosure easier to find, compare across issuers, recognize as credible and use in decision making (SEC Release No. 34-67717, p. 281-283; 291-293). At the same time, justifications for the SEC’s discretionary rulemaking allude to decreased benefits to market participants related to rulemaking decisions acknowledged as potentially jeopardizing the quality of CM disclosure in terms of its usefulness to market participants (SEC Release No. 34-67717, p. 290-291). Generally, the SEC presents these decreases in benefits to market participants as offset by reductions in costs to issuers. We identify two types of pragmatic grammars the SEC mobilizes to justify decreased costs to issuers stemming from the SEC’s discretionary rulemaking.

First, the SEC uses grammars of relieving burden to justify rulemaking that decreases costs to issuers. Specifically, this type of grammar refers to justifications for discretionary SEC decisions that decrease competitive and administrative costs associated with complying with the disclosure. Competitive burden refers to requirements that raise the potential economic impact of compliance costs to issuers subject to the CM rule as compared to issuers not subject to the rule. For instance, the SEC justifies decisions around the type of products to which the CM rule applies as decreasing compliance costs (p. 280-281) by reducing the negative impact of the rule on issuer competition. In contrast, discourse surrounding administrative burden includes the compilation, presentation and reporting of information required by the disclosure. In particular, the SEC justifies decisions that decrease administrative burden by removing officer certification requirements (SEC Release No. 34-67717, p.283-284), changing the location and date of the filing (p. 291-293), and allowing more flexible interpretation of whether issuers must conduct due diligence, obtain and audit and prepare a report (p. 269-275).

Related to the notion of increased flexibility, we observe that the SEC mobilizes definition framing, a third type of pragmatic grammar. Definition framing allows the SEC to formulate the CM rule in a way that provides issuers with flexibility to decrease costs through conceptual vagueness around whether an issuer or its activities are subject to the rule. To do so, the SEC allows (does not allow) exemptions or clarifies (does not clarify) terms and concepts in the Act. For instance, the SEC uses definition framing discourse in
the final CM rule related to the concepts of “contract to manufacture”, “DRC conflict free”, “person described” and “necessary to the functionality of production”. Specifically, the SEC choose not to define the terms “contract to manufacture” or “necessary to the functionality of production”, claiming that this decreases compliance costs to issuers “to the extent that any definition could be overbroad” (p. 280-281), allowing issuers “to use the definition that applied best to their circumstances” (p. 293-295).

Overall, the SEC’s justifications for the benefits and costs of Section 1502 suggests that the SEC uses authoritative grammars that defer to the authority of Congress in terms of the mandatory requirements of the rule and to the authority of issuers in terms of the discretionary components of the rule. The SEC’s discourse suggests that they “have designed a final rule to help achieve the intended humanitarian benefits in the way that Congress directed, even though we recognize that the final rule will impose significant compliance costs on companies who use or supply conflict minerals” (p. 247). They also use discourse that abstracts Section 1502 from the SEC’s jurisdictional mission. In contrast, the SEC mobilizes pragmatic grammars to justify discretionary rulemaking decisions offsetting decreases in information quality to market participants against relieving burden and framing definitions in a way that decreases costs to issuers. Pragmatic grammars, however, are also couched in the notion that the SEC’s “discretionary authority… is limited” and that SEC decisions are “consistent with” the provisions of the Congressional Act and “necessary or appropriate” to implement Section 1502 in a manner consistent with Congress’s intent. Thus, the SEC discourse on discretionary rulemaking reveals a level of ceremonial reference through which the SEC intimates that any areas of discontent following the SEC’s discretionary rulemaking are out of the control of the SEC.

**Analysis of evidence-based justification**

Our final analysis considers the evidence from constituent comment letters that the SEC references in its CBA. Following the release of the proposed CM rule, numerous constituents expressed their views on the rule by submitting comment letters to the SEC. The SEC indicates that they “considered and analyzed
the numerous comments received regarding the costs and complexities of the statute and the proposed rule and have taken them into account in the final rule” (SEC Release No. 34-67717, p. 240). As such, the SEC categorically highlights the discourse of certain constituents and disregards others, which indicates a selectivity in identifying evidence to support justifications presented to the public. Our comment letter examination provides insight into which constituent evidence the SEC focuses its attention in public justifications and which constituent comment letters are not explicitly referred to as evidence in justifying rulemaking decisions.

Insert Table 4 here

In total, constituents submitted 442 comment letters regarding the proposed rule. Individuals submitted the most letters (130), followed by industry associations (83), NGOs (64), and issuers (57). When promulgating the final CM rule, the SEC incorporated the views from various constituents as evidence supporting the CBA. Within the CBA of the final rule, we find that the SEC references a total of 77 comment letters. The constituent group with the highest number of comment letters acknowledged within the CBA is the industry associations (27, or 32% of industry association letters), followed by US Congress (14, or 50% of letters submitted by Congress) and advisors (11, or 31% of letters submitted by advisors). It appears the SEC does not consider comment letters submitted by individuals as providing appropriate evidential support with only 1 of 130 letters referenced in the CBA. We observe that the SEC refers to constituent comment letters more when justifying the mandatory components of the conflict minerals rule (54 letters) than when justifying the discretionary portions of the rule (30 letters). However, some of those letters were referenced more than once in the CBA.

In terms of references to constituent comment letters within the CBA of the final CM rule, we find a total of 163 references. Again, these references occur much more frequently (i.e., over three times more) when justifying the mandatory nature of the CM rule (123 references) than within justifying the discretionary decisions made by the SEC (40 references). In the case of justifications related to the Section

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16 Advisors include environmental firms, consultants, attorneys, accountants, etc.
1502 mandate, the SEC references industry associations the most (41% of references in the mandatory section) and advisors the second most (17%). With regards to the justifications for benefits and costs of the SEC’s discretionary rulemaking decisions, the SEC again references industry associations the most (38% of references within the discretionary section), US Congress members second (25%) and issuers third (18%). Despite being the most represented group in terms of the number of comment letters submitted (130 out of 442 or 29% of total letters), only one NGO commenter letter reference appears.

**Authoritative grammars and mandatory rulemaking**

Regarding the context of the comment letter references within the mandatory section of the CBA, the SEC makes references to comment letters in justifications related to both the benefits of the rule as well as the costs of the rule, with the majority of references related to the cost side. These comment letters support the SECs use of authoritative grammars. In relation to the authoritative grammar of *ceremonial reference*, the SEC uses comment letter references supporting justifications for the increased benefits of the CM rule to society that come from NGOs and Congressional representatives arguing that the CM rule will reduce the amount of money provided to armed groups engaged in conflict in the DRC, thereby achieving the objective of the statute (p.243). However, the SEC also refers to letters, primarily from advisors, suggesting that the CM rule will instead have a negative impact on the DRC (p.243).

In contrast, in line with the authoritative grammar of *jurisdictional abstraction*, the SEC uses comment letter references supporting justifications for the increased benefits of the rule to market participants. Those letters, submitted by institutional investors, indicate that conflict minerals information is material to an investment decision (p.244) and, therefore, serves important investor protection objectives (p.246). One commentator noted that, “[a]s a sustainable and responsible investor,” this commentator “values firms’ prudent management of risk in their global supply chains and has been concerned in recent years by the use of certain minerals to fund the continuing bloody conflict in the” DRC (p.244). However, the SEC again refers to letters, primarily from advisors, firms and industry associations arguing the opposite, that CM
information is not material and, additionally, that the SEC has not demonstrated how the rule provides investor benefits in terms of efficiencies for the market or promotion of capital formation (p.246).

Finally, as noted previously, with regards to the cost side of the Section 1502 mandate, the SEC primarily references four comment letters that provide quantitative cost estimates of implementing the CM rule. They use the authoritative grammar of constituent reliance in conjunction with these comment letters to support and justify a significant upwardly revised estimate of the costs of complying with the statutory requirement. For example, the SEC outlines how a number of commenters, mainly firms and industry associations, indicated that the SEC underestimated costs in the proposed CM rule. One commentator, a policy organization, asserted that the CBA was both “thorough and accurate”. Another, an NGO, stated that the cost estimates in comment letters from industry “seem[ed] significantly inflated” (p.245).

Pragmatic grammars and discretionary rulemaking

Regarding the comment letter references within the discretionary portion of the CBA, we find some evidence that the discourse in these comment letters supports the SEC’s use of pragmatic grammars. In relation to the pragmatic grammar of information quality, the SEC uses no comment letter references supporting justifications for decreases or increases in the benefits of the CM rule to market participants related to the its discretionary rulemaking. The SEC indicates that increased benefits to market participants arise from decisions related to more simplified and easily located disclosures (p. 291). Decreases in benefits to market participants revolve around reduced utility of the disclosure (p.272, 280).

The SEC’s decisions that decrease benefits to market participants stand in opposition to the pragmatic grammars of relieving burden and definition framing. In both cases, the SEC suggests that any decreased benefit to market participants is offset by decreased costs of compliance to issuers arising from the choices made by the SEC (p. 272, 281). For instance, in using the pragmatic grammar of relieving burden by decreasing costs to issuers, the SEC refers to the comment letters of firms and industry associations to support a longer period of time before issuers are subject to identify and report CM due to anticipated costs of establishing systems to support the reporting (p. 278).
Finally, the SEC uses the pragmatic grammar of \textit{definition framing} within select comment letter references to support and justify its decisions to not define, or to vaguely define, certain terms. Allowing issuers to determine whether they are required to report CM information based on their own facts provides issuers with significant flexibility to use a definition that applies best to their particular circumstances (p.280). The SEC supports such justifications through reference to firm and industry association comment letters persuading the SEC that its definition was “overbroad” and “confusing” and would impose on an issuer “significant,” “unrealistic,” and “costly” burdens (p. 281). In another instance of definition framing indicated to decrease issuer cost burden, the SEC relies on industry association comments to support a decision to broadly define issuers subject to the CM rule. Here, the SEC mobilizes the industry association’s argument that a broad definition will protect domestic issuers from competitive disadvantage that would arise from exempting foreign issuers and from exempting smaller reporting firms that rely on such suppliers to provide information needed for the disclosure (p.296).

As in Bozanic et al. (2012), letters not cited by the SEC as evidence supporting its CBA are primarily those of the intended beneficiaries of the proposed regulation who supported the CM rule, including individuals, NGOs, and policy organizations. We reviewed these letters in order to understand the nature of discursive evidence such constituents present for benefits and costs of the CM rule. We find that most individuals and NGOs suggest that CM disclosure benefits the DRC society by changing issuer behavior in a way that reduces funding to illegal militia groups that perform humanitarian abuses against the Congolese. Through their comment letter discourse, individuals reveal their conception of Section 1502 as “an important measure to address the connection between business and harm to human rights… that, if implemented properly, could provide a model for similar forms of legislation in the future that would address similar humanitarian situations as that occurring in the DRC”. As such, this suggests that individual contributors to the rulemaking process are those that believe issuers have a responsibility to do no harm to society, implying that the SEC’s jurisdictional abstraction regarding societal concerns is not fully accepted by constituents. Individuals also suggest they will benefit from transparency around issuer’s sourcing of CM by making more informed purchasing and investing decisions. NGOs also indicate a benefit of CM
disclosure is that where such groups also hold investments, they may unwittingly be complicit in financing the very human rights abuses their organizations aim to eliminate. As such, the benefits of information quality perceived to arise from the rule are highly downplayed within the SEC CBA due to the SEC’s neglect of individual and NGO constituents.

Overall, in justifying the benefits and costs of the Section 1502 mandate (the Act itself), the SEC refers to the discursive evidence of constituents submitting comment letters in supporting its CBA. In contrast, the SEC refers to the discursive evidence of constituents submitting comment letters much less frequently in justifying the benefits and costs of the SEC’s discretionary rulemaking. In both cases, the SEC highlights the discourse of certain constituents and disregards others which indicates a selectivity in the justifications presented to the public as well as the evidence supporting those justifications that favors the regulated over other constituencies.

**Discussion and conclusion**

Our paper concentrates on public regulators’ promulgation of rules where the benefits and costs of the proposed rule are justified in a cost-benefit analysis (CBA). CBA necessitates a consideration of which benefits and costs and are appropriate to address, which affected constituents are appropriate to consider and what constitutes appropriate evidence to support the analysis. The major conclusion of our paper is that a potential conflict exists between the SEC’s commitment to CBA and its CBA process. This conflict arises from the important role that SEC rulemaking plays in regulating capital markets and advancing the stated purpose of securities laws to protect investors. This conflict also speaks to the potential societal and political implications of SEC rulemaking, implications that are often downplayed if not completely set aside in rulemaking. The discourse of private accounting standard setters suggests that societal and political consequences, and whether they are beneficial or costly to the broader public, are not the purview of private standard setters but issues of government regulators, like the SEC, who have a public rulemaking role (Baudot and Cooper 2019; Cortese and Andrew 2020). However, we find a similar discourse on societal and political consequences and their benefit or costs to the public in a public regulatory setting. This aligns
with prior work suggesting a tension around the development of disclosure rules by the SEC when those rules are perceived as providing social benefits (Cortese and Andrew 2020).

In looking at the SEC’s CBA from a discursive standpoint, we highlight how the SEC justifies rulemaking to external constituents (and to themselves). First, the analysis shows that the SEC justifies the Congressional mandate as increasing benefits to society and to market participants while increasing costs to issuers. In contrast, the SEC’s discretionary rulemaking decisions primarily decrease costs to issuers. In connection with the way in which the SEC justifies decisions, the SEC uses distinct grammars around benefits and costs in the CBA process depending on whether the SEC is justifying benefits and costs of the Section 1502 mandate imposed on the SEC or of the SECs discretionary rulemaking decisions.

Second, our analysis shows that the SEC mobilizes authoritative grammars in justifying mandatory aspects of the rule and pragmatic grammars in justifying its discretionary rulemaking. For instance, the SEC justifies increased benefits to society and market participants arising from the Section 1502 mandate using authoritative grammars of ceremonial reference and jurisdictional abstraction. Furthermore, the SEC describes increased costs to issuers arising from the Section 1502 mandate using the authoritative grammar of constituent reliance. These authoritative grammars allow the SEC to delegate the work of justification to Congress, to the SECs institutional mission, and to issuers. In this sense, the SEC mobilizes the discourse of others as authoritative on benefits to society and to the market and costs to issuers, distancing the SEC from the projected effects of the regulatory mandate.

In contrast, the SEC justifies decreased benefits to society and market participants arising from its discretionary rulemaking decisions using the pragmatic grammar of information quality. In contrast, the SEC describes reduced costs to issuers arising from its discretionary rulemaking using the pragmatic grammars of relieving burden and definition framing. The SEC uses these pragmatic grammars to explain how the SECs discretionary rulemaking either constrains the usefulness of information disclosed to market participants or relieves the constraints of compliance for issuers through the way the SEC defines concepts. In this sense, the SEC mobilizes the pragmatic experiences of others in justifying reduced costs to issuers at the expense of benefits to market participants.
Last, we find there is a hierarchy of constituent’s discursive evidence which the SEC deems appropriate or inappropriate to support justifications for the benefits and costs of proposed rules. This hierarchy is consistent with literature that characterizes the SEC as engaging in ritualistic and ceremonial acts that conform to constituent expectations for the institution (Merino and Mayper, 2001). Neither conformation of the SEC with Congressional expectations (Bealing, 1994; Bealing et al., 2009) nor with expectations of the regulated (Bozanic et al., 2012) address the SEC’s stated mission to protect investors and, thus, conform to expectations of market participants. At the same time, conformance to market expectations alone ignores the SEC’s implicit responsibility to consider the expectations of society more broadly in its role as a public, government regulator.

Cortese and Andrew (2020) propose that the SEC reached a “justifiable compromise” with issuers by activating argumentation put forth by constituents on the SEC’s promulgation of a different Dodd-Frank mandate. Our work shows that despite what might appear to be a “justifiable compromise”, the SEC is highly selective in mobilizing constituent argumentation in justifying the benefits and costs of the CM rule. That selectivity favors the regulated, including issuers, industry associations, and industry advisors over individuals, NGOs and policy organizations. The SEC all but ignores benefits of the CM rule amassing to individuals, including citizens who expect issuers to act in a responsible manner and those who make investing and purchasing decisions on this basis. Overall, there is much to explore about benefit and cost considerations, including how benefits and costs are conceptualized, which benefits and costs “count”, which affected constituents matter and the relationship of the rulemaking body to those constituents.

Our study contributes to several streams of literature. First, we add to research that highlights the political nature of regulatory processes (Cooper and Sherer 1984; Fogarty, Hussein, and Ketz 1994; Zeff, 2002). Our analysis is unique in that the focal regulator in our study is a public, quite powerful government entity (i.e., the SEC) that is understudied in many regards. Second, our study contributes to a stream of literature that aims to better understand the role of accounting regulators in bringing about change (Bealing 1994; Bealing, Dirsmith, and Fogarty 1996; Merino and Mayper 2001; Shapiro and Matson 2008; Bozanic, Dirsmith, and Huddart 2012). To our knowledge, our study is the first to deeply examine the SEC’s CBA.
Last, our study adds to research that links accounting rulemaking to justificatory processes and discursive mechanisms (Robson 1993, 1994; Young 1996; 2003; 2006).

More work can be done on public justification and political grammars as a theoretical lens for understanding accounting regulatory processes and rulemaking decisions. For instance, the SEC may justify a rule that was entirely discretionary differently than a mandated rule and, while we anticipate that authoritative and pragmatic grammars will still be present in that justification, perhaps they may be differently mobilized. Regardless, both grammars, authoritative and pragmatic, suggest that the CBA process is political in the sense that constituent preferences and expectations do enter the SEC’s justification for rulemaking decisions and result in the SEC forming its justifications in particular ways. While the political nature of SEC rulemaking may not be surprising considering the SEC is a public regulatory institution, what is important is which preferences and expectations expressed in comment letters enter into SEC rulemaking and the way in which those preferences and expectations are mobilized as “evidence” of costs (primarily) and benefits in order to justify rulemaking decisions.

Research on private accounting standard setting processes often claims difficulty in attributing regulatory outcomes to comment letters. In our setting, the SEC explicitly acknowledges its rulemaking decisions as taking into account constituent expectations as well as referring to the discursive evidence of select constituents to justify the benefits and costs of a proposed rule. Thus, while prior research examines how constituents justify their own positions on specific SEC rules (Akiran et al., 2017; Cortese and Andrew, 2020), our work considers how the SEC relies on the argumentation of constituents in order to justify regulatory outcomes. Where Leuz (2018) defines evidence-based policymaking as “a rigorous attempt to base policy decisions (e.g. new regulation) on scientific and empirical evidence, including impact studies, cost–benefit analyses, programme evaluation and academic research in general” (p.582), reliance on the argumentation of constituents as evidence justifying regulatory outcomes may not meet the implied standard of rigor.

On this theme, we find that not only does SEC discount societal benefits and costs of CM disclosure but that it has seemingly been relieved from quantitative efforts to consider such benefits and costs through
a court decision on the CM rule. The court decision indicates that the SEC is not expected to consider certain types of benefits and, by extension, benefits to all constituents (U.S. Court of Appeals 2014, p.16). The courts stated that “an agency is not required to ‘measure the immeasurable’” and that the “rule’s benefits would occur half-a-world away in the midst of an opaque conflict about which little reliable information exists and concern a subject about which the Commission has no particular expertise” (p.16). While the quantification of societal benefits may indeed be challenging, that the courts have relieved them of responsibility stands in contrast to prior court cases that previously found the SEC’s CBA inadequate. At the same time, Congress recently proposed initiatives that would require formal economic analysis.17

In the CM case, the courts did not take issue with the cost side of the SEC analysis, even indicating the analysis to be “exhaustive” (U.S. Court of Appeals 2014, p. 15), despite what others call a lack of transparency and rigor around the SEC’s determination of costs (Swartz and Nelson, 2016). These authors, along with our study, highlight that the SEC does not build its own cost model but relies on constituent cost models adjusted by the SEC for assumptions that are not well defined and whose effects are not well supported in the CBA. Thus, it seems that the SEC is expected to make a judgement as to the costs of a proposed rule regardless of how unsophisticated or subjective the judgment may be. On the other hand, the SEC is not held to the same standard on the benefits of a rule, particularly when those benefits are non-economic, resulting in an uneven application of CBA. This results in a potentially misleading basis for rulemaking determinations where cost calculations, often poorly designed, will always exceed inestimable benefits. All of this suggests that we have much more to unravel about the way in which regulators justify rulemaking decisions.

17 Examples include the SEC Regulatory Accountability Act, the Independent Agency Regulatory Analysis Act and the Regulatory Accountability Act.
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| Date            | Event                                                                 | Reference                                                                                     | Pages |
|-----------------|----------------------------------------------------------------------|---------------------------------------------------------------------------------------------|-------|
| July 21, 2010   | US Congress enacts the Dodd-Frank Act                                 | Pub. L. No. 111-203 Section 1502: Conflict Minerals                                          | 6 pages (of 2223 total) |
| Dec 15, 2010    | Issuance of proposed CM rule                                          | SEC Release No. 34-63547                                                                    | 113 pages |
| Jan 28, 2011    | Comment letter extension on proposed CM rule                          | SEC Release No. 34-63793                                                                    | 2 pages |
| Mar 2, 2011     | Comment letter submissions                                            | Refer to Table 4 for details                                                                | 442 letters/ 2150 pages (est) |
| Aug 22, 2012    | Issuance of final CM rule                                             | SEC Release No. 34-67716 77 F.R. 56,274                                                    | 356 pages |
| Sept 12, 2012   | Petition filed for review of final order of SEC regulation            | US District Court, NAM, Chamber of Commerce, Business Roundtable vs. SEC, Amnesty International | 2 pages |
| Oct 19, 2012    | Opening brief of petitioners for review of final order of SEC regulation | US District Court, NAM, Chamber of Commerce, Business Roundtable vs. SEC, Amnesty International | 75 pages |
| July 23, 2013   | Motion denying petition for review of regulation                       | US District Court, NAM, Chamber of Commerce, Business Roundtable vs. SEC, Amnesty International | 63 pages |
| Aug 12, 2013    | Appeal of motion denying petition                                    | US Court of Appeals, NAM, Chamber of Commerce, Business Roundtable vs. SEC, Amnesty International | 3 pages |
| April 14, 2014  | Court decision on appeal                                              | US Court of Appeals, NAM, Chamber of Commerce, Business Roundtable vs. SEC, Amnesty International | 29 pages |
| May 2, 2014     | Order issuing stay of regulation                                      | SEC Release No. 72079                                                                       | 2 pages |
| Aug 18, 2015    | Affirmation of lower court’s ruling regarding the conflict minerals rule | US Court of Appeals, Nat’l Ass’n of Mfrs., et al. v. SEC, 800 F.3d 518, 530                   | 23 pages |
| April 3, 2017   | Final judgement remanded to the commission                            | US Court of Appeals, Nat’l Ass’n of Mfrs., et al. v. SEC, No. 13-CF-000635                    | 24 pages |
### TABLE 2  
CBA regulatory evolution of CM rule

| Requirement | Congressional Mandate | Proposed Rule (CBA) | Justification – Discretionary* | Final Rule (CBA) | Justification – Mandate** | Justification – Discretionary* |
|-------------|-----------------------|---------------------|-------------------------------|-----------------|---------------------------|-------------------------------|
| **1**       | "Person described"    | ...requiring any person described in paragraph (2)" [where CM are necessary to functionality or production] | Applies to issuers that file with SEC, provided CM necessary to production; Could interpret broadly as any business using CM | Net Neutral* | No exemptions based on issuer size or domesticity | Net Neutral |
|             |                       | Exclude mining firms from "persons described" | | Decreases Costs | Mining is not manufacturing, so exclude mining firms as manufacturing issuers | Decreases Costs |
| **2**       | "Necessary to functionality or production" | "CM are necessary to the functionality or production of a product manufactured by such person [described]" | \[Not specifically addressed in Proposal CBA\] | *Decreases Costs* | Do not define "necessary to the functionality or production", allowing more flexibility | Net Neutral | *Decreases Benefits* | Increases Benefits |
|             |                       | Recycled/scrap sources considered DRC conflict-free | \[Not specifically addressed in Proposal CBA\] | *Decreases Costs* | For recycled/scrap sources, only perform RCOI and not due diligence or audit certification | \[Not specifically addressed in Proposal CBA\] | CM Derivatives: Limits the term "CM" | Decreases Costs |
| **3**       | "Contract to manufacture" | "...products manufactured or contracted to be manufactured..." | \[Not specifically addressed in Proposal CBA\] | *Decreases Costs* | Do not define "necessary to the functionality or production”, allowing more flexibility | (a) Increases Costs (b) Net Neutral | (a) Decreases Benefits (b) Decreases Costs |
| **4**       | "DRC conflict free" | "...a product may be labeled as 'DRC conflict free' if the product does not contain CM that…finance or benefit armed groups in the DRC..." | \[Not specifically addressed in Proposal CBA\] | *Decreases Costs* | "DRC Conflict Undeterminable": (a) Temporarily allows alternative to "not DRC conflict free" (b) No audit required if "DRC Conflict Undeterminable" | Increases Costs (issuers) | (a) Decreases Costs (b) Decreases Costs |
| **5**       | Annual disclosure | "Disclose annually... whether CM...did originate in the DRC" | \[Not specifically addressed in Proposal CBA\] | *Decreases Costs* | Reason firm is providing CM report not required | Increases Benefits |
|             |                       | (a) Issuers furnish CM report as an exhibit to annual report (d) Include statement in body of annual report that CM report is furnished and that CM and audit reports available on issuer's Internet website | (a) Increases Costs (d) Decreases costs | (a) Increases Benefits | (a) New Form SD, with potential for CM report and audit (b) Single filing date (May 31), independent from annual reports (c) Form SD removes officer certification requirement from CM information (d) File rather than furnish | (a) Increases Costs (b) Decreases Costs (c) Decreases Costs (d) Increases Costs | (a) Increases Benefits (b) Increases Benefits (c) Decreases Costs (d) Increases Benefits |
| Requirement | Congressional Mandate | Proposed Rule (CBA) | Justification – Discretionary* | Final Rule (CBA) | Justification – Mandate** | Justification – Discretionary* |
|-------------|----------------------|---------------------|-------------------------------|-----------------|--------------------------|-------------------------------|
| Issuers     | Market Participants  | Constituent          | Issuers                       | Market Participants                      |
| 6 Due diligence | "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such materials" | Issuers conduct a Reasonable Country of Origin Inquiry (RCOI) in determining whether CM originated in the DRC, with no guidance on the standard | Net Neutral | Increases Benefits | Reasonable Country of Origin Inquiry: (a) Performance rather than design standard (b) RCOI instead of due diligence (c) Require CM report only if issuer believes CM come from DRC (d) Require description of RCOI efforts (e) No requirement to keep records for five years | Increases Costs (issuers) | (a) Increases Benefits (b) Decreases Costs (c) Decreases Costs (d) Increases Costs (e) Increases Benefits |
| Issuers use a Due Diligence Framework in making supply chain determinations, with no guidance on the standard | Decreases Costs | Increases Benefits | (a) Use a recognized due diligence framework in CM report (b) Framework established by body that follows due-process procedures, including broad distribution of framework for public comment, consistent with standards in GAGAS | |
| 7 Audit | "…a certified audit shall constitute a critical component of due diligence in establishing the source…" | Audit report furnished as part of the same exhibit to the annual report as the CM report | Net Neutral | Net Neutral | Liability for the Audit and Audit Certifications: (a) Officer of issuing company not required to certify (b) Auditor does not assume expert liability | Increases Costs (issuers) | (a) Increases Benefits (b) Decreases Costs | Decreases Benefits |
| 8 Internet website | "...make available to the public on the Internet website of such person the information disclosed by such person..." | Propose disclosure be posted on issuer’s Internet website at least until the issuer files its subsequent annual report | Increases Benefits | [Not specifically addressed in Proposal CBA] | Clear audit objective: ...for auditor to express an opinion as to whether the design of due diligence measures is in conformity with criteria set forth in recognized due diligence framework | | Decreases Costs | [Not specifically addressed in Final CBA] |

This table links the SEC justifications from the cost-benefit analysis (CBA) within the final Conflict Minerals rule to the proposed rule and to the Congressional mandate. We group the justifications into eight major components of the Conflict Minerals rule. Based on the SEC’s discourse, we determine whether the SEC justifies an aspect of the rule that: (1) increases costs, (2) decreases costs, (3) increases benefits, or (4) decreases benefits for a particular constituent.

*Blank cells indicate the SEC provided no justification regarding that particular constituent.

Unlike the CBA in the SEC’s final Conflict Minerals rule, which includes one section of justifications for the mandated portion of the rule and another for the discretionary portion of the rule, the CBA in the SEC’s proposed rule does not provide a separate section with justifications for the mandatory portion of the rule.

"Net Neutral" refers to topics in which the SEC provides an equal number of justifications for an increase in costs (or benefits) and a decrease in costs (or benefits), resulting in a net neutral effect.
### TABLE 3
Analysis of SEC justification for CM rule

| Constituent | Type of Grammar | Congressional Mandate: Authoritative Grammar | Discretionary Rulemaking: Pragmatic Grammar |
|-------------|----------------|-----------------------------------------------|---------------------------------------------|
|             |                | Ceremonial Reference | Jurisdictional Abstraction | Constituent Reliance | Information Quality | Relieving Burden | Definition Framing |
|             |                | Society             | Market Participants | Issuers            | Market Participants | Issuers          | Issuers          |
| Overall Direction | Increases | Increases | Net Neutral | Increases Costs | Decreases Benefits | Decreases Costs | Decreases Costs |

### TABLE 4
Comment letters referenced in final rule as evidence-based justification

| Constituent        | Total Letters Submitted* | # Letters Referenced in CBA | Letters Referenced in CBA as % of Total Letters Submitted | By Comment Letter | By Comment Letter Reference |
|--------------------|--------------------------|-----------------------------|------------------------------------------------------------|-------------------|-----------------------------|
|                    |                          |                             |                                                            | Mandatory         | Discretionary Distribution |
| Advisor            | 35                       | 11                          | 31%                                                       | 21                | 17%                         |
| Firm               | 56                       | 8                           | 14%                                                       | 10                | 8%                          |
| Individual         | 130                      | 1                           | 1%                                                        | 2                 | 2%                          |
| Industry Association| 84                       | 27                          | 32%                                                       | 50                | 41%                         |
| Investor           | 10                       | 5                           | 50%                                                       | 6                 | 5%                          |
| NGO                | 64                       | 4                           | 6%                                                        | 8                 | 6%                          |
| Policy Org         | 35                       | 7                           | 20%                                                       | 16                | 13%                         |
| US Congress        | 28                       | 14                          | 50%                                                       | 10                | 8%                          |

|                | 442                      | 77                          | 123                                                       | 40                | 25%                         |

This table shows the total number of comment letters submitted by different categories of constituents compared to the number of letters referenced by the SEC within each category of constituent as well as the number of references the SEC made to letters submitted by constituents in each category. For instance, the SEC made 21 references to advisors in justifying the Section 1502 mandate and 6 references to advisors in justifying its discretionary decisions. Those 27 references relate to 11 letters submitted by advisors.