

January 11, 2012

SEC Adopts Final Rules Regarding Mine Safety Disclosure

On December 21, 2011, the Securities and Exchange Commission (the "SEC") adopted rules it proposed in late 2010 that codify the mine safety and health disclosure requirements imposed by Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") into the SEC's disclosure rules. Section 1503, which went into effect on August 20, 2010, requires reporting companies that (i) own, lease, or otherwise operate, control or supervise a mine, or (ii) are independent contractors performing services or construction at a mine, to disclose certain information regarding mine safety and health violations to the SEC. The new rules will become effective on January 27, 2012.

Background

The Federal Mine Safety and Health Act of 1977 (the "Mine Act") imposes significant safety and health requirements on operators of mines, and also provides for periodic inspections of mines by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA"). If, during any of these inspections, the MSHA inspectors find violations of the Mine Act's safety or health standards, they will issue citations or orders to the mine operator, and also assess civil monetary penalties against the mine operator. The mine operator can appeal any citation, order, or monetary penalty to the Federal Mine Safety and Health Review Commission ("FMSHRC"), an independent adjudicative agency. The FMSHRC's administrative law judges also have jurisdiction to hear miners' complaints of safety- or health-related discrimination.

Section 1503(a) of the Dodd-Frank Act requires reporting companies to disclose, in their periodic reports to the SEC and for each mine the reporting company operates, information about the total number of violations of the Mine Act's safety and health standards, the total number of orders and citations issued by the MSHA, the total value of civil penalties assessed against the operator by the MSHA, and the total number of mining-related fatalities, among other things. Additionally, a reporting company must disclose any pending legal action before the FMSHRC with respect to each mine it operates.

Section 1503(b) of the Dodd-Frank Act requires a reporting company to file a current report on Form 8-K in the event the MSHA issues an imminent danger order with respect to a mine such reporting company operates, or if the MSHA issues a notice of patterns or potential patterns of violations of the Mine Act's safety and health standards with respect to a mine such reporting company operates.

Scope, Location and Form of Disclosure

Because the Mine Act only applies to mines located within the United States, the final rules as adopted by the SEC only require disclosure as to mines located within the United States. Nevertheless, the SEC was careful to note in the adopting release that mine safety issues in foreign mines may be material to investors, and would thus be subject to disclosure under existing rules and disclosure standards. Additionally, the final rules mirror Section 1503's mine-by-mine approach to disclosure, as each mine is identified with its own MSHA mine identification number.

The final rules would not require a reporting company to disclose orders and citations issued to independent contractors working at a mine the reporting company operates. The final rules treat all reporting companies equally regardless of whether they are well-known seasoned issuers, accelerated filers, non-accelerated filers or foreign private issuers. However, a foreign private issuer would only have disclosure requirements in respect of mines located in the United States, as noted above, or unless otherwise material.

The final rules amend Forms 10-Q, 10-K, 20-F and 40-F to include new items or instructions implementing Section 1503's disclosure requirements. Each report must contain the required disclosure for the period covered by the report and the disclosures under these rules will be deemed to be "filed," not "furnished," for the purposes of Section 18 of the Securities Exchange Act of 1934, the Rule 13a-14 and 15d-14 certifications, and incorporation by reference into registration statements.

Required Disclosure Items

The final rules mirror the disclosure items enumerated in Section 1503, although the SEC offered the following guidance with respect to some of the required disclosure items:

- with respect to disclosure of the total number of violations of health and safety standards for which the mine operator received a citation from the MSHA, the SEC clarified that reporting companies must only disclose those violations that the MSHA's citation indicated could significantly and substantially contribute to the cause and effect of a mine safety or health hazard (a "S&S violation");
- with respect to disclosure of the total dollar value of proposed assessments from the MSHA for the relevant reporting period, such disclosure is required regardless of whether such assessments are being contested, or were dismissed or reduced prior to the date of filing of the periodic report;
- with respect to disclosure of the total number of mining-related fatalities, such disclosure may exclude fatalities determined by the MSHA not to be mining-related; and
- with respect to disclosure of any legal action or proceeding before the FMSHRC, such disclosure need not include a brief description of each action, but must be categorized according to the type of proceeding in accordance with the categories established in the procedural rules of the FMSHRC.

Disclosure on Form 8-K

Reporting companies must file a current report under new Item 1.04 of Form 8-K no later than four business days after receipt by the reporting company (or its subsidiary) of (i) an imminent danger order under Section 107(a) of the Mine Act, (ii) written notice of a pattern of S&S violations, or (iii) written notice of the potential to have a pattern of S&S violations in addition to the disclosure of these events in the periodic reports. The current report must contain the date of receipt of such order or notice, the type of order or notice, and the name and location of the mine involved.

Additionally, the final rules amend Form S-3 to provide that failure to file a current report containing the new disclosure requirements does not result in the reporting company losing its eligibility to file a registration statement on Form S-3. However, failure to file a current report containing the new disclosure requirements will still expose the reporting company to potential liability under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

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