

SEC Adopts Rules for Specialized Disclosure Relating to Mine Safety

On December 21, 2011, the Securities and Exchange Commission (“SEC”) adopted amendments to its rules that implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).¹

- Section 1503(a) of the Dodd-Frank Act “requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities.”²
- Section 1503(b) “requires each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to file a current report on Form 8-K with the Commission reporting receipt of certain shutdown orders and notices of patterns or potential patterns of violations.”³

Although Section 1503 of the Dodd-Frank Act is already in effect, the SEC, pursuant to statutory authorization, adopted rules that codify Section 1503’s disclosure requirements and clarify its scope and application. The rules adopted by the SEC adhere closely to Section 1503 of the Dodd-Frank Act and reflect changes made from the rules proposed in its release of December 15, 2010⁴ in response to comments received and in accordance with the SEC staff’s experience with Section 1503 disclosures received thus far.⁵

I. Amendments Regarding Required Mine Safety Disclosure in Periodic Reports

The SEC adopted amendments to Form 10-K, Form 10-Q, Form 20-F and Form 40-F to require the disclosures mandated in Section 1503(a) of the Dodd-Frank Act.

A. Scope of Required Disclosure

¹ See *Mine Safety Disclosure*, Release Nos. 33-9286; 34-66019; File No. S7-41-10 (Dec. 21, 2011), available at <http://www.sec.gov/rules/final/2011/33-9286.pdf>.

² *Id.* at 1.

³ *Id.* at 2.

⁴ See *Mine Safety Disclosure*, Release Nos. 33-9164; 34-63548 (Dec. 15, 2010), available at <http://www.sec.gov/rules/proposed/2010/33-9164.pdf>. See also Memorandum of Cahill Gordon & Reindel LLP, *SEC Proposes Rules for Specialized Disclosure Relating to Conflict Minerals, Mine Safety and Payments By Resource Extraction Issuers* (Jan. 18, 2011), available at http://www.cahill.com/news/memoranda/100259/res/id=sa_File1/CGR%20Memo%20-%20SEC%20Proposes%20New%20Specialized%20Minerals%20Disclosure%20Rules.pdf.

⁵ *Mine Safety Disclosure*, Release No. 33-9286, *supra* note 1, at 5. The final rules discussed in this memorandum are consistent with the rules proposed by the SEC unless otherwise noted herein. As a general matter, the SEC has decided not to adopt those proposals “that would have expanded the required disclosure beyond that required by Section 1503,” since “the added burden of these proposed requirements likely would have outweighed the potential incremental benefits of the additional disclosure.” *Id.*

Section 1503(a) of the Dodd-Frank Act applies to every issuer required to file reports with the SEC that is “an operator, or that has a subsidiary that is an operator, of a coal or other mine.” Section 1503(a) specifies that the term “operator” is defined as in Section 3 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”) and that “coal or other mine” means a coal or other mine as defined in Section 3 of the Mine Act, that is subject to the provisions of the Mine Act. The SEC has included “references to these definitions in new items of Regulation S-K, the instructions to a new item of Form 20-F and the notes to a new paragraph of General Instruction B of Form 40-F.”⁶ Unlike the rules proposed by the SEC, the SEC’s final rules also add a clarifying instruction that the term “subsidiary” has the same meaning as in Securities Exchange Act of 1934 (“Exchange Act”) Rule 12b-2.

The rules adopted by the SEC apply equally to smaller reporting companies and foreign private issuers. According to the SEC, this comports with the language of Section 1503(a), which applies to all issuers that are required to file reports under Section 13(a) or 15(d) of the Exchange Act. In addition, upon reviewing comments requested by the SEC “on whether the special provisions of Form 10-K and Form 10-Q permitting the omission of certain information by wholly-owned subsidiaries and asset-backed issuers should apply” to the mine safety disclosure, the SEC determined that they should not.⁷ The SEC believes that special treatment of wholly-owned subsidiaries and asset-backed issuers is “not necessary for the mine safety disclosure requirement” and that the language of Section 1503 “does not appear to contemplate special treatment for particular types of issuers.”⁸

The SEC’s final rules apply only to mines in the United States. The SEC reasoned that the language in the Dodd-Frank Act, which references the Mine Act, indicates that Section 1503 disclosures are required only for those mines covered by the Mine Act. Additionally, according to the SEC, “the application of the [Dodd-Frank] Act’s disclosure requirement to non-U.S. mines would be difficult to implement and could result in different disclosure from jurisdiction to jurisdiction, which would not be directly comparable.”⁹

The rules adopted by the SEC, which are consistent with Mine Safety and Health Administration (“MSHA”) reporting and with Section 1503, require disclosures to be made on a mine-by-mine basis. Issuers may not group mines by project or geographic region.

B. Location of Mine Safety Disclosure

The SEC’s amendments require issuers subject to the mine safety disclosure requirement to include a “brief disclosure in Part II of Form 10-Q, Part I of Form 10-K and Forms 20-F and 40-F noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing.”¹⁰ The exhibit must disclose the details surrounding the specific violations or other regulatory matters. Consistent with the SEC’s proposal, “the final rule does not require disclosure in the body of the periodic report of certain information, such as all fatal accidents or receipt of

⁶ *Id.* at 7.

⁷ *Id.* at 8, 14.

⁸ *Id.* at 14-15.

⁹ *Id.* at 12. Notwithstanding the inapplicability of Section 1503 to foreign mines, material issues pertaining to safety in foreign mines may need to be disclosed pursuant to other items of Regulation S-K. *Id.*

¹⁰ *Id.* at 19.

notice that a mine has a pattern of violations”¹¹; however, mine safety matters may still need to be addressed in the periodic report in accordance with other disclosure rules.

The amendments adopted by the SEC do not dictate specific presentation requirements for the mine safety disclosure. However, the SEC encourages the use of tabular presentations (perhaps with footnotes and/or accompanying narrative disclosure for further clarification) if doing so would facilitate investor understanding.

C. Relevant Time Periods for Purposes of Mine Safety Disclosure

As proposed, the SEC’s final rule “requires each Form 10-Q to include the required disclosure for the quarter covered by the report” and requires each Form 20-F and Form 40-F to include the disclosure for the issuer’s fiscal year.¹² Unlike the SEC’s proposal, however, which suggested that each Form 10-K include the required disclosure for both the fourth quarter of the issuer’s fiscal year and for the entire fiscal year, the final rule requires issuers to include in its Form 10-K only information pertaining to the fiscal year. The SEC was “persuaded by commentators that requiring information about both the fourth quarter and the entire year in the Form 10-K would add incrementally to the burden of the rule, is not required by the Act, and may not add significant useful information to the report.”¹³ The SEC believes that reporting information for the fiscal year is both consistent with Section 1503(a) of the Dodd-Frank Act, which mandates that the mine safety disclosure be included in each public report “for the time period covered by the report,” and with “the general Form 10-K requirement to report results as of the issuer’s fiscal year-end.”¹⁴

Issuers are not permitted to exclude information regarding orders or citations that were received during the time period covered by the report but were subsequently dismissed, reduced, or vacated. In the SEC’s opinion, “the language of Section 1503(a) of the [Dodd-Frank] Act dictates that all orders or citations received from MSHA be disclosed.”¹⁵ Issuers are authorized, however, to add in their disclosure information regarding the status of orders or citations received.

D. Required Disclosure Items

The rules adopted by the SEC specify the mine safety items required to be disclosed in public reports pursuant to Section 1503(a) of the Dodd-Frank Act, and further clarify the scope of each disclosure item.

1. Section 1503(a)(1)(A) requires disclosure of the total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Mine Act for which the operator received a citation from MSHA. The SEC’s rules clarify that this section requires the disclosure of all citations received under Section 104 of the Mine Act in which MSHA noted a “significant and substantial” violation (*i.e.*, a “violation of a

¹¹ *Id.*

¹² *Id.* at 24.

¹³ *Id.*

¹⁴ *Id.* at 24-25. Issuers are still permitted to add separately information pertaining to the fourth quarter. *Id.* at 25.

¹⁵ *Id.* at 25-26.

mandatory safety standard that is reasonably likely to result in a reasonably serious injury or illness under the unique circumstance contributed to by the violation”).¹⁶

2. Section 1503(a)(1)(F) requires disclosure, for each mine, of the total dollar value of proposed assessments from MSHA under the Mine Act. The rule adopted by the SEC “provides that disclosure is required in each periodic report of the total dollar amount of assessments proposed by MSHA during the period covered by the report” (during the quarter, for each Form 10-Q, and during the fiscal year, for each Form 10-K, Form 20-F and Form 40-F).¹⁷ The SEC’s rule further requires the total amount of assessments to include proposed assessments that are contested or were dismissed or reduced before the date of filing of the periodic report, and includes a clarifying instruction “that contested amounts may neither be omitted from the disclosure nor reported separately, but that issuers are permitted to note the contested amounts and provide additional disclosure.”¹⁸ The SEC declined to adopt its proposal to also require issuers to disclose “the cumulative total of all assessments outstanding as of the last day of the reporting period,” explaining that thus expanding the disclosure requirement beyond the scope of the Dodd-Frank Act is unnecessary and “likely would not result in additional useful information being provided to investors that would justify the increased burden on issuers.”¹⁹
3. Section 1503(a)(1)(G) requires disclosure of the total number of mining-related fatalities with regard to each mine. The SEC’s final rule requires disclosure of mining-related fatalities at mines that are subject to the Mine Act. The rule further provides that all fatalities must be disclosed unless the fatality is determined by MSHA to be “non-chargeable” to the mining industry (*i.e.*, unrelated to mining activity). Issuers are permitted to provide additional information regarding fatalities, such as whether a fatality is under review by MSHA.
4. Section 1503(a)(3) requires disclosure of any pending legal action before the Federal Mine Safety and Health Review Commission (“FMSHRC”) involving a mine. The SEC adopted a rule requiring issuers to disclose “the identity of the mine and the number of legal actions involving such mine that were pending before the FMSHRC as of the last day of the period covered by the periodic report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period.”²⁰ Instead of the SEC’s proposed rule, which required “a brief description of the category of order or citation underlying each proceeding, the final rule requires that the total number of legal actions pending before the FMSHRC as of the last day of the time period covered by the report be categorized according to the type of proceeding, in

¹⁶ *Id.* at 27-28.

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 32.

²⁰ *Id.* at 39.

accordance with the categories established in the Procedural Rules of the FMSHRC.”²¹ The SEC also declined to adopt its proposal to require the disclosure of certain additional information regarding the legal actions, such as the date the action was instituted and by whom and the location of the mine, as well as its proposal that information regarding legal actions be updated for material developments in subsequent periodic reports.²²

5. Additional disclosure items specified in Section 1503(a) that are reiterated in the SEC’s final rules are:
- the total number of orders issued under Section 104(b) of the Mine Act;
 - the total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act;
 - the total number of flagrant violations under Section 110(b)(2) of the Mine Act;
 - the total number of imminent danger orders issued under Section 107(a) of the Mine Act;
 - a list of mines for which the issuer or a subsidiary received written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act; and
 - a list of mines for which the issuer or a subsidiary received written notice from MSHA of a potential to have a pattern of violations of mandatory health or safety standards of the sort described above.²³

II. Amendments Pertaining to the Form 8-K Filing Requirement

The SEC adopted amendments to Form 8-K to add new Item 1.04 in order to implement the requirement in Section 1503(b) of the Dodd-Frank Act that each issuer that is an operator or has a subsidiary that is an operator of a coal or other mine report on a Form 8-K the receipt of certain notices from MSHA.

A. Disclosure Requirements and Deadline

The rule adopted by the SEC requires issuers to file a Form 8-K under new Item 1.04 “no later than four business days after the receipt by the issuer (or a subsidiary of the issuer) of an imminent danger order under Section 107(a) of the Mine Act, written notice from MSHA of a pattern of violations of mandatory health or

²¹ *Id.* at 39-40.

²² Issuers are permitted to provide additional information regarding pending legal actions at their discretion. Additionally, Item 103 of Regulation S-K still applies to require disclosure of material developments regarding legal proceedings that must be disclosed under that item. *Id.* at 42.

²³ *Id.* at 48. Though not required by Section 1503(a) of the Dodd-Frank Act, the SEC had proposed to add a requirement that issuers give a brief description of each category of violations, orders and citations reported. Upon reviewing the comments received, however, the SEC abandoned this proposal. *Id.* at 42-44.

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safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act or written notice from MSHA of the potential to have a pattern of such violations.”²⁴ Pursuant to Item 1.04, issuers must disclose the date the order or notice was received, the category of order or notice, and the name and location of the mine involved.

Disclosure of the specified orders and notices on an issuer’s Form 8-K is required even though the issuer is required to make the same disclosure in its periodic reports under Section 1503(a). In addition, disclosure on an issuer’s Form 8-K is required with regard to the specified orders and notices received, regardless of whether they were subsequently vacated by MSHA within the four business day time period for filing the Form 8-K.

B. Treatment of Foreign Private Issuers

The new Form 8-K filing requirement does not extend to foreign private issuers. The SEC believes that this is consistent with the language of Section 1503(b), which specifically references Form 8-K, a form applicable only to domestic issuers. Pursuant to the amendments adopted to Forms 20-F and 40-F in accordance with Section 1503(a) of the Dodd-Frank Act, however, foreign private issuers must disclose on those forms, among other things, information pertaining to the orders and notices specified in Item 1.04 of Form 8-K.

III. Amendment to General Instruction I.A.3.(b) of Form S-3

An amendment adopted by the SEC “adds Item 1.04 to the list of Form 8-K items in General Instruction I.A.3.(b) of Form S-3 to provide that untimely filing of the new item will not result in the loss of Form S-3 eligibility.”²⁵

IV. Conclusion

The SEC’s amendments to its rules implement the mine safety disclosure requirements in Section 1503 of the Dodd-Frank Act. These amendments serve to clarify the scope and application of the mine safety disclosure requirements already in effect.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.

²⁴ *Id.* at 52.

²⁵ *Id.* at 57. The SEC also refrained from including Item 1.04 “in the list of items in Rules 13a-11(c) and 15d-11(c) with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5.” *Id.*