

The New Safety Dance: The SEC Proposes Enhanced Disclosure and Reporting Requirements Regarding Mine Safety

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On December 15, 2010, the Securities and Exchange Commission (the “SEC”) approved proposed rules (the “Release”) implementing Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) regarding mine safety disclosures by certain issuers. If adopted as proposed, issuers regulated by federal mining authorities under the Mine Act¹ will be required to make additional disclosures in periodic and current reports of certain Mine Act violations. Comments on the Release are due by January 31, 2011.

Background

Mines are subject to inspection by the Mine Safety and Health Administration (“MSHA”). MSHA conducts regular, periodic inspections of surface and subsurface mines, as well as spot inspections and inspections when a mine worker files a complaint. In the event that the mine does not meet set safety standards, MSHA can issue citations and fines.

Disclosure in periodic reports

To enhance the limited MSHA disclosure already in place, the SEC is proposing to add new periodic reporting obligations for certain issuers. The SEC would add new Item 4 to Part II of Form 10-Q and

new Item 4(b) to Part I of Form 10-K. For foreign reporting issuers, the SEC is proposing to add new Item 16J to Form 20-F and new Paragraph (18) of General Instruction B of Form 40-F. These items would be largely identical and be entitled “Mine Safety Disclosure.”

Issuers subject to these proposed disclosure obligations are companies that are required to file reports with the SEC under Sections 13(a) or 15(d) of the Exchange Act and that are “an operator,² or that have a subsidiary that is an operator, of a coal or other mine.”³ Smaller reporting issuers and foreign private issuers would be subject to the enhanced disclosure obligations.

Issuers subject to the proposed rules would be required to make mine safety disclosures only for “coal or other mines” located within the United States. Issuers with foreign mines would not be required to make mine safety disclosures under the “Mine Safety Disclosure” section of each respective periodic report, but would be required to make disclosures regarding foreign mines in other portions of their periodic or current reports to the extent material under appropriate Regulation S-K items, such as, risk factors and management’s discussion and analysis.⁴

Moreover, the SEC believes that the language referring to “coal or other mines” in the Act requires the issuer to report on each distinct mine which receives a citation or violation, rather than grouping mines by geographic region or project. Although the SEC conceded that issuers with significant mine operations would be required to make lengthy and detailed disclosures, the SEC felt this was necessary to give effect to the plain language of the Act.

Location of disclosure in the issuer’s reports

For those issuers that must make mine safety disclosures, they must state in Part II of Form 10-Q, Part I of Form 10-K and Forms 20-F and 40-F that they have mine safety violations or other matters which they must report under Section 1503(a) of the Act and that the information is included in an exhibit⁵ to the filing. The SEC did not make further presentation requirements, but noted that tabular disclosure, when possible, often helps aid investor understanding.

Time periods where disclosure is required

As mentioned, the issuer must disclose the mine safety violations or citations in its periodic reports. Thus, for each 10-Q, the issuer must disclose any violations, orders, penalties or legal actions initiated during the quarter covered by the report. The issuer’s 10-K would cover the fourth quarter of its fiscal year as well as the cumulative information for the fiscal year. Forms 20-F and 40-F would require disclosure for the issuer’s entire fiscal year. Issuers often contest orders or violations issued by MSHA, or such orders or violations are stayed or dismissed. Although the SEC received comments suggesting that such orders or violations should not require disclosure, the SEC is proposing that issuers must make the disclosures regardless of whether the orders or violations are later dismissed or reduced. Nevertheless, the SEC would not prohibit the issuer from disclosing additional information regarding any such orders or violations to provide interested parties with additional context.

Required disclosure items

In accordance with Section 1503 of the Act, the required mine safety disclosures would include:

1. The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of coal or other mine safety or health hazards under Section 104 of the Mine Act for which the operator received a citation from MSHA.

Under the Mine Act, inspectors issue citations or orders for violations. These citations can be relatively minor, or they can fall under the category of “significant and substantial.” The proposed rules would require that the issuer disclose the number of “significant and substantial” violations in its periodic reports.

2. The total number of orders issued under Section 104(b) of the Mine Act.

Under Section 104(b) of the Mine Act, any violations which have not been cured during the prescribed time period can lead to a withdrawal order. This withdrawal order prohibits all persons, other than certain authorized persons, from working in the mine.

3. 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.

These citations or orders are issued for violations that could significantly and substantially contribute to the cause and effect of a safety or health hazard, but the conditions do not cause imminent danger, and the inspector finds that the violation is caused by an unwarrantable failure of the operator to comply with health and safety standards.

4. The total number of flagrant violations under Section 110(b)(2) of the Mine Act.

Under Section 110(b)(2) of the Mine Act, any violations that are “flagrant” can potentially be assessed maximum civil penalties. In this context, “flagrant” means “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

5. The total number of imminent danger orders issued under Section 107(a) of the Mine Act.

Imminent danger orders are issued under Section 107(a) of the Mine Act when a MSHA inspector determines that there is imminent danger in the mine. The order requires the operator of the mine to cause all persons to be withdrawn from the mine until the conditions that caused such imminent danger cease to exist.

6. Total dollar value of proposed assessments from MSHA under the Mine Act.

As mentioned, MSHA has the ability to levy fines against mine operators for certain violations of the Mine Act. Issuers would be required to disclose, in each periodic or annual report, the total dollar amount of the proposed assessments “for the time period covered by” the period and the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. This would include any fines contested by the issuer that have yet to be finally resolved. However, the issuer may add additional context around such disclosures.

7. The total number of mining-related fatalities.

Issuers must disclose the number of mining-related fatalities which occur at mines covered by the Mine Act. MSHA has policies and

procedures for determining whether a fatality is related to a mining activity.

8. A list of mines for which the issuer or subsidiary received a 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 or the potential to have such a pattern.

MSHA has the ability to determine whether a mine has a “pattern” of violations for such health or safety standards, and if such a determination is made, MSHA must so notify the operator.

MSHA must also give the mine operator written notice of the potential to have a pattern of violations of mandatory health or safety standards. Any such notice would require the issuer to disclose the identity of the mine.

9. Any pending legal action before the Federal Mine Safety and Health Review Commission (the “FMSHRC”) involving such coal or other mine.

FMSHRC is an independent agency that acts as an administrative trial court and appellate review body regarding disputes under the Mine Act. Any legal actions that occur before the FMSHRC involving a coal or other mine for which the issuer or a subsidiary is the operator would be required to be disclosed in an exhibit to the periodic report covering the time period during which the legal action was initiated. Any developments material to such legal action would be required to be disclosed in an exhibit to the report covering the period during which such development occurred. The disclosure, as proposed, would include the date the pending legal action was instituted and by whom, the name and location of the mine involved and a brief description of the category, violation, order or citation underlying the proceeding.

10. A brief description of each category of violations, orders and citations reported.

To provide investors who may not have Mine Act expertise with an understanding of the violations reported, the SEC has proposed that issuers provide a brief description in an exhibit to the periodic report of the nature of each category of violations, orders and citations reported under new Item 106 of Regulation S-K. For example, an issuer that reports mining-related fatalities would disclose that the fatalities do not include deaths that cannot be connected to a mining activity as determined under the policies and procedures of MSHA.

Filing the Form 8-K in response to certain events

The SEC is proposing to amend Form 8-K to add new Item 1.04 to require issuers to report events within four business days of the receipt of certain information or notices. This includes:

- 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 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.

Any such notices would, in effect, have to be reported twice for issuers using Forms 8-K, 10-Q and 10-K – first, within four business days of

receipt in the issuer's Form 8-K, and second, in the issuer's periodic report in accordance with new Item 106 of Regulation S-K. The Form 8-K disclosure would require the date of receipt of the order or notice, the category of order or notice, and the name or location of the mine involved. The SEC is proposing **not** to extend the limited safe harbor for Form 8-K under Section 10(b) or Rule 10b-5 under the Exchange Act because such an event does not require management to make a rapid materiality determination and therefore the safe harbor should not extend to such item. Note that the SEC, in connection with proposed new Item 1.04 of Form 8-K, is proposing to amend General Instruction I.A.3.(b) of Form S-3 to provide that an untimely filing on Item 1.04 of Form 8-K would not result in the loss of Form S-3 eligibility.

In contrast, foreign private issuers will not be required to file a Form 6-K upon the receipt of such notice or order. These issuers' disclosure obligations are only required to be reported in such issuer's Form 20-F or 40-F annual report, as discussed above.

Conclusion

Issuers with mines subject to the Mine Act and MSHA inspection should take actions to review their internal reporting and notice requirements such that any alleged violations are reported to the proper individuals who can make a timely disclosure of the ongoing matter on Form 8-K and on a periodic basis. In addition, issuers who operate coal or other mines should revise their 10-K and 10-Q checklists to ensure that the information under the Release is captured in the proposed "Mine Safety Disclosure" section.

Endnotes

[1] 30 U.S.C. 801 *et seq.*

[2] For the purpose of the proposed rules, an “operator” means any “owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” Release, 7. This definition is adopted from the definition of the Mine Act. See 30 U.S.C. 802.

[3] For the definition of “coal or other mine”, see 3(h) of the Mine Act. Release, 7.

[4] For example, if an explosion shut down a foreign mine’s operations, and the mine consisted of a material aspect of the issuer’s assets or revenues, then the issuer would have to make the proper disclosures, but would not be obligated to report the safety problems in the “Mine Safety Disclosure” section of the issuer’s periodic report because the mine was not subject to the Mine Act.

[5] This information is required to be furnished in Exhibit 95 to Forms 10-K and 10-Q.