

ClientAlert

Financial Markets Developments

Capital Markets | Metals and Mining

January 2012

SEC Adopts Final Rules on Mine Safety Reporting Requirements



On December 21, 2011, the Securities and Exchange Commission (the "SEC") adopted final rules implementing Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Act (the "Dodd-Frank Act"), which relate to mine health and safety disclosure requirements.¹ The rules will become effective on January 27, 2012. This Client Alert generally summarizes the final rules, highlights key differences between the adopted rules and the proposed rules, and outlines certain practical considerations relating to compliance with the new reporting regime.

General Overview of Section 1503

Applicability

Generally, the final rules apply to any SEC reporting company that is an "operator, or that has a subsidiary that is an operator, of a coal or other mine," with the terms "operator" and "coal or other mine" having the meanings defined in the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). The disclosure obligations apply only to mines located in the United States, but they do apply to foreign private issuers that operate US mines (subject to certain exceptions regarding Form 8-Ks, described below).

Summary and Regulatory Background

Section 1503 of the Dodd-Frank Act became effective on August 20, 2010. Pursuant to Section 1503, the Dodd-Frank Act imposes certain disclosure obligations (including on Form 10-Q, Form 10-K, Form 20-F and Form 40-F, as applicable, and current reports on Form 8-K) on any SEC reporting company that is an operator of a coal or other mine. Specifically, Section 1503(a) requires mine operators to disclose in their SEC reports information regarding health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) requires mine operators to file a Form 8-K to disclose the receipt of certain shutdown orders and notices of patterns or potential patterns of violations from the Mine Safety and Health Administration (the "MSHA"). In December 2010, the SEC proposed rules to implement Section 1503 of the Dodd-Frank Act. The final rules, as adopted, are substantially similar to the proposed rules, except for certain minor changes, described below, that make the rules generally less burdensome to issuers.

1. A copy of the SEC final rules can be found here: <http://www.sec.gov/rules/final/2011/33-9286.pdf>.

Disclosure Requirements

Scope of Section 1503(a) Periodic Disclosure

Under the final rules, if an issuer has matters to report in connection with Section 1503(a) of the Dodd-Frank Act, it must include brief disclosure in an appropriately captioned section of the annual or quarterly report stating that the issuer has mine safety violations or other regulatory matters to report in accordance with Section 1503(a) and that the required information is included in a new “Exhibit 95” to that filing. Although the detailed information specified by Section 1503(a) is only required to be in Exhibit 95, the SEC notes that if any mine safety matters raise concerns that should be addressed in other parts of a periodic report (e.g., risk factors, legal proceedings, MD&A, etc.) then such disclosure is still required. For each US mine for which the issuer or a subsidiary of the issuer is an operator, the issuer must identify the mine and disclose the following items:

- 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 (so called “S&S violations”).
- 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.
- The total dollar value of proposed assessments from MSHA under the Mine Act (regardless of whether challenged or appealed, but with an optional explanation of status).
- The total number of mining-related fatalities.
- A list of mines that received written notice from the MSHA of (i) 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 a coal or other mine safety or health hazard under Section 104 of the Mine Act or (ii) the potential to have such a pattern.

- For each mine, the total number of legal actions before the Federal Mine Safety and Health Review Commission (the “FMSHRC”) that are pending, instituted and resolved during the given period, broken down by FMSHRS category.²

The SEC notes that an issuer does not have to report orders and citations issued to independent contractors working at the issuer’s mine site, although these would have to be reported by the independent contractor if it is an SEC reporting company.

The SEC recommends that issuers present this disclosure in a tabular format, specifying that the information pertains to the time period covered by the annual or quarterly report. More detailed information may be included in footnotes to the table. There is no requirement to include the information in interactive data, or XBRL, format. While the disclosure must include all orders and citations received during the covered period, issuers may include an explanation regarding any that are subsequently dismissed, reduced or vacated.

Issuers should note that even though the information is to be provided in an exhibit, the SEC considers it to be “filed,” not “furnished.” Therefore, as is the case with other disclosure filed as part of a periodic report, Section 18 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) will apply and the disclosure is covered by certification under the Exchange Act Rules 13a-14 and 15d-14.

Scope of Section 1503(b) Notice-Triggered Disclosure

Under Section 1503(b), an issuer that is an operator or has a subsidiary that is an operator of a mine must file a Form 8-K if it receives certain notices from MSHA. The final rules establish a four business day deadline for making this filing and add new Item 1.04 to the Form 8-K to implement this requirement.

Any of the following types of notices from MSHA would trigger a requirement to file under Item 1.04 Form 8-K:

- An imminent danger order issued under Section 107(a) of the Mine Act.
- 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 a coal or other mine safety or health hazard under Section 104 of the Mine Act.
- A written notice from MSHA of the potential to have such a pattern of violations under Section 104(e) of the Mine Act.

2. Briefly, the six categories are: (1) contests of citations and orders, (2) contests of proposed penalties, (3) complaints for compensation; (4) complaints of discharge, discrimination or interference, (5) applications for temporary relief, and (6) appeals of judicial decisions or orders to the FMSHRC.

For each triggering event, new Item 1.04 of Form 8-K will require disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

An untimely filing on Form 8-K regarding new Item 1.04 would not result in the immediate loss of Form S-3 eligibility, so long as an issuer's Form 8-K reporting is current at the time the issuer files the Form S-3. However, investors should be mindful that the addition of Item 1.04 to General Instruction I.A.3(b) does not relieve an issuer from liability under Section 10(b) or Rule 10b-5 of the Exchange Act for failure to file a Form 8-K for Item 1.04.

Foreign private issuers will not be required to furnish a Form 6-K upon receipt of a notice of a mine safety violation. However, foreign private issuers will need to include this information as part of the Section 1503(a) disclosure in their annual report, albeit on a less burdensome annual basis.

The adopting release acknowledged the concerns of some mine operators regarding Form 8-K filings to, for example, report issuances of imminent danger orders that were cancelled immediately upon issuance. However, the SEC indicated that the plain language of Section 1503(b) requires the receipt of any orders or notices to be disclosed, whether or not such orders or notices are cancelled or withdrawn within the four-business day Form 8-K filing period, and suggested that the issuer may include additional disclosure explaining the status of such orders or notices.

Differences Between the Final Rules and the Proposed Rules

The final rules largely adopt the proposed rules, with some modifications making them generally less burdensome for the issuers, as outlined below.

- Under the proposed rules, Form 10-K would have required disclosure covering both the fourth quarter of the issuer's fiscal year and cumulative information for the entire fiscal year. The final rules only require cumulative mine safety disclosure for the fiscal year.
- In response to concerns that requiring disclosure of the cumulative total of all outstanding assessments proposed by MSHA as of the last day of the reporting period would go beyond the scope of the Dodd-Frank Act, the final rules omit this disclosure requirement.
- The final rules allow issuers to exclude fatalities that MSHA determines to be "non-chargeable" to the mining industry.
- The proposed rules would have required additional information regarding each legal proceeding before the FMSHRC as well as a duty to update for material developments in subsequent period reports. The final rules simply require disclosure of the total number of legal proceedings broken down by category with no duty to update.
- Although not required by Section 1503 of the Dodd-Frank Act, the proposed rules would have required issuers to provide a brief description of each category of violations, orders and citations reported, so that investors could understand the basis for the violations, orders or citations referenced. The final rules do not include this requirement.

Practical Considerations

Section 1503 imposes significant disclosure and recordkeeping requirements upon issuers in the mining industry. The following considerations may help streamline compliance with the new rules:

- Because the requirements of Section 1503 are based on the Mine Act, keeping current on the requirements of the Mine Act may help streamline compliance with the Dodd-Frank mine safety disclosure rules. Effective recordkeeping may help ease the burden of data gathering and presentation when a current report or a periodic report disclosure obligation is triggered.
- The information required to be disclosed under Section 1503 is already subject to an extensive recordkeeping regime under MSHA and, for the most part, is readily available on MSHA's website database that reports data on inspections, violations and accidents for all mines across the United States.
- As a practical matter, because mining issuers are already reporting this information to MSHA, issuers need to make sure that their disclosure teams are informed in a timely manner to make the required SEC filings. An internal alert mechanism for prompt filing of MSHA notices may help streamline compliance with the new requirements and help avoid any potential deficiencies in MSHA-related disclosure controls and procedures subject to annual certifications.

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