

January 10, 2011

SEC Proposes Mine Safety Disclosure Rules

In December, the SEC published proposed amendments to its rules to implement a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) that requires U.S. and non-U.S. companies that are required to file reports with the SEC and are owners, operators or have a subsidiary that is an operator of a coal or other mine, to disclose in their periodic reports filed with the SEC information regarding specific health and safety violations, orders and citations, related assessments, legal actions and mining-related fatalities at mines located in the United States.¹ The SEC has also proposed amendments to its rules requiring companies that report as domestic filers to file a Form 8-K disclosing the receipt of certain orders and notices from the U.S. Labor Department’s Mine Safety and Health Administration (“MSHA”). The new disclosure requirements in the Dodd-Frank Act, which are already in effect, are based on the health and safety requirements applicable to mines that are included in the Federal Mine Safety and Health Act of 1977 (the “Mine Act”), administered by the MSHA. The SEC’s proposed rule amendments are intended to specify how the new disclosure requirements will be implemented.

Scope of Applicability

The proposed rule amendments implement and specify the scope of Sections 1503(a) and 1503(b) of the Dodd-Frank Act requiring certain issuers to provide specific health and safety disclosure information for each of their coal or other mines located in the United States. The proposed amendments apply to all issuers, including foreign private issuers and smaller reporting companies, that file reports with the Commission under Sections 13(a) or 15(d) of the Exchange Act that are owners, operators or have a subsidiary that is an operator of a coal or other mine. As such, the proposed amendments would apply to domestic issuers that are required to file a Form 10-K, foreign private issuers that are required to file a Form 20-F and Canadian issuers that are required to file a Form 40-F, in each case only with respect to mines located in the United States.

Operator. Under the Dodd-Frank Act, an “operator” includes 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 a mine.

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¹ The proposed rules were published in an SEC release, Mine Safety Disclosure, pursuant to Sections 1503 of the Dodd-Frank Act.

Each coal or other mine. Under the Dodd-Frank Act, the definition of “coal or other mine” is limited to mines located in the United States. As proposed, issuers would not need to disclose mine safety information for mines located outside the United States, unless such disclosure were appropriate in the context of other sections of the periodic report such as the business, risk factors, legal proceedings or management’s discussion and analysis sections.

The proposed amendments would require disclosure of any citations, orders or violations for each distinct mine and would not permit issuers to provide disclosure by grouping mines by project or geographic region. The SEC has noted that information on an individual mine basis is already available publicly through a data retrieval system operated by the MSHA.

Location of Disclosure and Time Periods Covered

Location. The SEC is proposing to require issuers to include a brief statement in the body of Form 10-Q, Form 10-K, Form 20-F and Form 40-F mentioning that they have mine safety violations or other regulatory matters to report and that the required information is included in an exhibit to the filing. The exhibit would include the detailed disclosure about specific violations and regulatory matters required by the proposed amendments. This approach is intended to avoid overburdening the traditional Exchange Act disclosure with extensive new disclosures. Although the SEC has indicated that it encourages tabular presentations, the new rules do not require a particular format for the presentation of this information in an exhibit.

Time period. As proposed, issuers will need to disclose orders, violations, citations, penalties or legal actions initiated during the time period covered by the report. Each Form 10-Q will need to include the required disclosures for the quarter covered by that quarterly report, while each Form 10-K will be required to include disclosure covering both the fourth quarter of the fiscal year and cumulative information for the entire fiscal year. Forms 20-F and 40-F must include information for the entire fiscal year. The SEC noted that while issuers often contest and are sometimes granted relief from proposed assessments and citations they have received, issuers will not be allowed to exclude information about orders, violations or citations that were received during the period of time covered by the report but were subsequently reduced or dismissed. Nevertheless, issuers will be permitted to include additional explanatory information discussing the context or status of any such orders, violations or citations.

Required Disclosure Items

As proposed, the amendments will require issuers to provide the following disclosure items for each coal or other mine over the time period covered by the periodic report:

- a) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of mine safety or health hazard for which the operator received a citation from the MSHA.

Under the Mine Act, MSHA inspectors are required to issue citations or orders for health or safety violations and determine whether the violation of a mandatory standard is reasonably likely to result in a serious injury or illness, referred to by MSHA as a "significant and substantial" violation. It is these citations or orders that would need to be disclosed under this item.

- b) The total number of orders issued under section 104(b) of the Mine Act.

The proposed amendments would require disclosure of violations that had previously been cited that, upon follow-up inspection by the MSHA, were found not to have been entirely resolved within the permitted time period, resulting in the issuance of an order requiring the mine operator to immediately withdraw all persons from the mine.

- c) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under the Mine Act.

The proposed amendments would require disclosure of violations caused by an unwarrantable failure of an operator to comply with health and safety standards that could significantly and substantially contribute to the cause and effect of a safety or health hazard, but under conditions that do not cause imminent danger.

- d) The total number of flagrant violations under the Mine Act.

As proposed, issuers must disclose violations consisting of 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, defined as "flagrant" in the Mine Act.

- e) The total number of imminent danger orders issued under the Mine Act.

The proposed amendments mandate disclosure of orders issued when an MSHA inspector determines that there is an imminent danger in a mine, requiring the mine operator to cause all persons (except certain authorized persons) to be withdrawn from the mine until the imminent danger has passed.

- f) The total dollar value of proposed assessments from MSHA under the Mine Act.

Under the proposed amendments, issuers will be required to disclose the total dollar value of proposed assessments of penalties for the time period covered by the report and a cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report, including penalties that the issuer is contesting. The proposal would not prohibit inclusion of additional information regarding contested penalties to provide context.

g) The total number of mining-related fatalities.

The proposed amendments require issuers to include all fatalities required to be reported pursuant to MSHA regulations, unless the fatality is determined to be non-chargeable to the mining industry, such as a homicide, suicide, death due to natural causes and death involving trespassers.

h) A list of mines for which the issuer or a subsidiary received written notice from the MSHA of a pattern of violations of mandatory health or safety standards that are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health and safety hazards under the Mine Act.

i) A list of mines for which the issuer or a subsidiary received written notice from MSHA of the potential to have such a pattern.

j) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

As proposed, issuers will be required to disclose any legal actions before the Federal Mine Safety and Health Review Commission, including but not limited to actions brought by the issuer or a subsidiary to contest citations or penalties received from the MSHA. The required disclosure would include (i) the date the legal action was initiated; (ii) by whom the legal action was initiated; (iii) the name and location of the mine involved; and (iv) a short description of the category of violation, order or citation involved.

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

In order to help investors understand the basis of a citation, violation or order, the SEC has proposed to require issuers to provide a brief description of the category to which such citation, violation or order belongs.

Form 8-K Requirement

In addition to the amendments to periodic reports, the SEC has also proposed amendments that would require domestic filers to file a Form 8-K within four business days of the receipt by the issuer or a subsidiary of any of the following items:

- An imminent danger order under section 107(a) of the Mine Act;

- Written notice from the MSHA of a pattern of violations of mandatory health or safety standards that could have significantly or 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 the MSHA of the potential to have a pattern of such violations.

As proposed, the filing on Form 8-K should include disclosure of (i) the date of receipt of the order or notice; (ii) the category of order or notice; and (iii) the name and location of the mine involved.

The SEC has proposed that untimely filing on Form 8-K regarding mining safety disclosure would not result in a loss of Form S-3 eligibility as long as the Form 8-K is current when the Form S-3 is filed. Filings of Form 8-K pursuant to the proposed new rules would not be eligible for the limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act that is provided for events that require management to make a rapid materiality determination.

The SEC has not proposed to modify the requirements with respect to current reports filed by foreign private issuers filing on Form 6-K in order to explicitly include mine safety disclosure.

Although the SEC has not yet adopted final rules implementing Section 1503 of the Dodd-Frank Act, the disclosure requirements are already in effect, and issuers who are subject to these requirements should ensure that they have the necessary compliance and recordkeeping provisions in place in order to track and accurately report items that must be disclosed as appropriate in a Form 8-K filing, a Form 10-Q, Form 10-K, Form 20-F or Form 40-F filing. For more information on the disclosure requirements that are currently in effect, see <http://www.paulweiss.com/files/upload/27Sep10CM.pdf>

In the proposing release, the SEC lists a number of specific questions regarding the proposed rules as to which it is seeking comment. Comments on the proposed rules are due January 31, 2011.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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