

December 23, 2011

## SEC Adopts Final Mine Safety Disclosure Rules

On December 21, 2011, the SEC adopted its final rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which mandates disclosure of certain health and safety matters in the mining industry in reports filed with the SEC. In particular, Section 1503 requires U.S. and non-U.S. reporting companies that own or operate, or have a subsidiary that operates, a coal or other mine located in the United States to disclose information regarding specific health and safety violations, orders and citations, related assessments, legal actions and mining-related fatalities at such U.S. mines. The SEC has also adopted 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 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 final rules (the "Final Rules") are intended to specify how the disclosure requirements in the Dodd-Frank Act will be implemented, and will become effective 30 days after publication in the Federal Register.

The SEC adopted the Final Rules largely as proposed in December 2010. The key differences between the proposed rules and the Final Rules being:

- a) The SEC decided not to adopt the proposals that would have expanded the disclosure required by Section 1503. Specifically, the Final Rules do not require a brief description of the category of order or citation underlying each proceeding before the Federal Mine Safety and Health Review Commission (the "FMSHRC"). In addition, the Final Rules do not require additional information such as the date an action was instituted and by whom or the location of the mine, and they do not require that information about legal actions be updated for material developments in subsequent periodic reports.
- b) The SEC did not adopt the proposal to require disclosure of the cumulative total of all assessments outstanding as of the last day of the reporting period. The Final Rules require disclosure in each periodic report of the total dollar amount of assessments proposed by the MSHA during the period covered by the report.

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- c) The Final Rules require that each Form 10-K include disclosures regarding orders, citations, assessments, legal actions and fatalities on an aggregate basis for the year, and do not also require such disclosure for the fourth quarter, as proposed.

#### **Scope of Applicability**

The Final Rules 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 Final Rules 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 and that are owners, operators or have a subsidiary that is an operator of a coal or other mine. As such, the Final Rules 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.

**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. Under the Final Rules, issuers do not need to disclose mine safety information for mines located outside the United States, unless such disclosure would be 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.

**Subsidiary.** In the Final Rules, the SEC indicated that the term “subsidiary” has the meaning set forth in Rule 12b-2 under the Exchange Act. Rule 12b-2 provides that a “subsidiary” of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.

The Final Rules require disclosure of any citations, orders or violations for each distinct mine and do 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. The SEC further noted that orders and citations issued to independent contractors (who are not subsidiaries of the issuer) who are working at the issuer’s mine site do not need to be reported by the issuer.

#### **Location of Disclosure and Time Periods Covered**

**Location.** The Final Rules 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 should include the detailed disclosure about specific violations and regulatory matters required by the Final Rules. 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, and has provided an example of possible tabular disclosure (see Exhibit I hereto), the Final Rules do not require a particular format for the presentation of this information in an exhibit. The SEC further noted that the required disclosure need not be submitted in interactive data format.

***Time period.*** Under the Final Rules, issuers must disclose orders, violations, citations, penalties or legal actions initiated during the time period covered by the report. Each Form 10-Q must include the required disclosure for the quarter covered by that quarterly report, while each Form 10-K is required to include disclosure for the entire fiscal year. Forms 20-F and 40-F must also 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 are not 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 are permitted to include additional explanatory information discussing the context or status of any such orders, violations or citations.

#### **Required Disclosure Items**

The Final Rules require issuers to provide the following disclosure items for each U.S. 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 need to be disclosed under this item.

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

The Final Rules 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 Final Rules 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.

Under the Final Rules, 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 Final Rules 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 Final Rules, issuers are required to disclose the total dollar value of proposed assessments of penalties for the time period covered by the report, including penalties that the issuer is contesting. The Final Rules do not prohibit inclusion of additional information regarding contested penalties to provide context.

g) The total number of mining-related fatalities.

The Final Rules 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 FMSHRC involving such coal or other mine.

Under the Final Rules, issuers are required to disclose, for each coal or other mine subject to the Mine Act, the identity of the mine and the number of legal actions involving such mines 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. In addition, the Final Rules require 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 accordance with the categories established in the Procedural Rules of the FMSHRC. These categories are: (i) contests of citations and orders; (ii) contests of proposed penalties; (iii) complaints for compensation; (iv) complaints of discharge, discrimination or interference under Section 105 of the Mine Act; (v) applications for temporary relief; and (vi) appeals of judges' decisions or orders to the FMSHRC. Issuers who wish to provide additional information about pending legal actions are not prohibited from doing so.

#### **Form 8-K Requirement**

In addition to the amendments to periodic reports, the SEC has also adopted amendments that 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.

Under the Final Rules, 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.

Under the Final Rules, untimely filing on Form 8-K regarding mining safety disclosure will 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 Final Rules are not 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 Final Rules do not 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.

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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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**Exhibit I – Example of Tabular Disclosure**

Mine or Operating Name/MSHA Identification Number	Section 104 S&S Citations (#)	Section 104(b) Orders (#)	Section 104(d) Citations and Orders (#)	Section 110(b)(2) Violations (#)	Section 107(a) Orders (#)	Total Dollar Value of MSHA Assessments Proposed (\$)	Total Number of Mining Related Fatalities (#)	Received Notice of Pattern Violations Under Section 104(e) (yes/no)	Received Notice of Potential to Have Pattern Under Section 104(e) (yes/no)	Legal Actions Pending as of Last Day of Period (#)	Legal Actions Initiated During Period (#)	Legal Actions Resolved During Period (#)

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