OSLER

SEC Adopts Final Rules Governing Mine Safety Disclosure

Dec 28, 2011

By Kevin D. Cramer

On December 21, 2011, the U.S. Securities and Exchange Commission (the **SEC**) adopted the final rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Act**) regarding certain mine safety disclosure requirements. Section 1503(a) of the 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 SEC information regarding specified (i) health and safety violations, (ii) orders and citations, (iii) related assessments and legal actions, and (iv) mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K (Current Report) disclosing 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 general, the SEC decided not to adopt provisions in its proposed rules that would have expanded the required disclosure beyond that mandated by Section 1503. Importantly, the rules clarify that the disclosure requirements only apply to mine operations in the United States and that only U.S. issuers need comply with the Form 8-K requirements. Nevertheless, foreign private issuers will be required to disclose in their annual reports filed with the SEC (Form 40-F for reporting Canadian companies and Form 20-F for non-U.S. reporting companies other than Canadian companies) various mine safety violations or other regulatory matters involving their mining operations in the United States. The final rules will become effective 30 days after publication in the Federal Register.

Background and Summary

On December 15, 2010, the SEC proposed amendments to certain of its rules and forms relating to mine safety disclosure. Based upon a review of comments on the proposed rules, as well as the experience of the SEC staff with the disclosure already being provided under Section 1503, the SEC has adopted amendments to Form 10-K (annual reports for U.S. issuers), Form 10-Q (quarterly reports for U.S. issuers), Form 40-F and Form 20-F to require the disclosure mandated by Section 1503(a) of the Act. It has also adopted new Item 104 of Regulation S-K, which sets forth the disclosure requirements for Forms 10-Q and 10-K, and amended Item 601 of Regulation S-K to add a new exhibit to Form 10-K and Form 10-Q for provision of this information. The SEC also adopted amendments to Forms 20-F and 40-F to include the same disclosure requirements as those adopted for issuers that are not foreign private issuers. In addition, the SEC added a new item to Form 8-K to implement the requirement imposed by Section 1503(b) of the Act. Finally, the SEC amended the Form S-3 registration statement under the U.S. Securities Act to add the new Form 8-K item to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

Discussion of the Amendments

Required Disclosure in Periodic Reports

Scope of the Rules

Section 1503(a) of the Act mandates that specified disclosure be provided in each periodic report filed with the SEC by every issuer that is required to file reports with the SEC pursuant to Section 13(a) or 15(d) of the U.S. Securities Exchange Act (the **Exchange Act**) and that is “an operator, or that has a subsidiary that is an operator, of a coal or other mine.” The Act specifies that the term “operator” has the meaning given such term in Section 3 of the Federal Mine Safety and Health Act (the **Mine Act**).

The final rules apply only to mines in the United States. In its adopting release the SEC indicated that while it considered the views of commentators that requested the application of the disclosure requirement to non-U.S. mines, it continues to believe that the statutory language referencing the Mine Act clearly indicates that the Section 1503 disclosures are required only for coal or other mines covered by the Mine Act. The SEC also agreed with commentators who expressed concerns that application of the 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. It did, however, note that to the extent mine safety issues regarding non-U.S. mines are material, under the SEC's existing rules disclosure could be required pursuant to the following items of Regulation S-K: Item 303 (*Management's Discussion and Analysis of Financial Condition and Results of Operations*), Item 503(c) (*Risk Factors*), Item 101 (*Description of Business*) or Item 103 (*Legal Proceedings*).

The final rules require disclosure on a mine-by-mine basis. In adopting this approach, the SEC noted that MSHA's data retrieval system provides information on a mine-by-mine basis using the MSHA mine identification number assigned to each mine or facility.

The final rules do not provide special treatment to smaller reporting companies or foreign private issuers. The SEC continues to believe their inclusion is consistent with the plain language of Section 1503(a), which applies broadly to issuers that are required to file reports under Section 13(a) or 15(d) of the Exchange Act. In addition, the SEC noted that these issuers have been complying with the Section 1503 disclosure requirements since August 20, 2010, the effective date of that provision of the Act.

Location of Disclosure and Manner of Presentation

The Act states that companies must include the disclosure in their periodic reports required pursuant to Section 13(a) or 15(d) of the Exchange Act. Under the final rules issuers that have matters to report in accordance with Section 1503(a) must include brief disclosure in Part II of Form 10-Q, Part I of Form 10-K and Forms 40-F and 20-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. The exhibit must include detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in the new rules.

The final rules do not require disclosure in the body of the periodic report of certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations. In the event that mine safety matters raise concerns that should be addressed in other parts of a periodic report, such as risk factors, the business description, legal proceedings or management's discussion and analysis, inclusion of this new disclosure would not obviate the need to discuss mine safety matters in accordance with other rules as appropriate.

The final rules do not specify any particular presentation requirements for the new disclosure, but the SEC continues to encourage issuers to use tabular presentations whenever possible if doing so would facilitate investor understanding. The SEC noted that many issuers are currently providing the disclosure required by Section 1503(a) in tabular format in their periodic reports. Following the suggestions of numerous commentators, the SEC included in the adopting release an example of a potential tabular presentation. It reiterated, however, that issuers are free to present the required information in any presentation they believe is appropriate for the disclosure.

The SEC decided not to adopt a requirement that issuers provide this information in interactive data format. Section 1503 does not require the disclosure to be submitted in interactive format. After considering the comments received, it believed the added costs of imposing such a requirement would likely not be justified by the potential benefits to investors.

The final rules provide that the disclosure will be considered "filed," not "furnished", stating that this approach is consistent with the statutory language of Section 1503 -- which provides that an issuer must "include, [the required disclosure] in each periodic report filed with the Commission." Therefore, as is the case with other disclosure filed as part of a periodic report, the provisions of Section 18 of the Exchange Act (which imposes liability in certain circumstances on any person who makes or causes any statement in any application, report or document filed pursuant to the Exchange Act which is false or misleading with respect to any material fact) will apply. In addition, the disclosure will constitute part of the information required to be covered by the issuer's principal executive and principal financial officers in their Exchange Act Rule 13a-14 and 15d-14 certifications. Finally, if the issuer files a Securities Act registration statement (such as Form S-3) that incorporates by reference its periodic reports, the disclosure included in Exchange Act reports in accordance with the new rules will be incorporated by reference.

Time Periods Covered

Section 1503(a) of the Act states that each periodic report must include disclosure "for the time period covered by such report." The final rule requires each Form 10-Q to include the required disclosure for the quarter covered by the report. For each of Forms 40-F and 20-F, the disclosure is required for the issuer's fiscal year. Similarly, in a change from the proposal, the final rule requires each Form 10-K to include disclosure of the information for the fiscal year only, not also for the fourth quarter.

The final rule does not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently dismissed, reduced or vacated. The adopting release notes that although the final rule requires disclosure covering the fiscal year, issuers are permitted, but not required, to also separately present the information for the fourth quarter. In addition, the final rule does not prohibit the inclusion of additional disclosure with regard to the status of orders or citations received.

Required Disclosure Items

Section 1503(a) of the Act includes a list of items required to be disclosed in periodic reports:

Section 1503(a)(1)(A) of the Act references violations 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. Section 104 of the Mine Act requires MSHA inspectors to issue various citations and orders for violations of health and safety standards. A violation of a 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 is referred to by MSHA as a "significant and substantial" violation (commonly called an "S&S" violation). In the adopting release the SEC stated that it continues to believe that the language of Section 1503(a)(1)(A) referencing violations that could "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104" was intended to elicit disclosure only of citations received under Section 104 of the Mine Act that note an S&S violation.

- **The total dollar value of proposed assessments from MSHA under the Mine Act**

The SEC adopted a final rule that 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. Therefore, each Form 10-Q is required to include the dollar amount of assessments proposed by MSHA during the quarter, while the Form 10-K, Form 20-F and Form 40-F annual reports must include the dollar amount of assessments proposed by MSHA during the fiscal year.

It decided not to adopt the proposed requirement to also disclose the cumulative total of all assessments outstanding as of the last day of the reporting period. After considering the comments received, the SEC was persuaded that expanding the disclosure requirement in this manner beyond the scope of the Act was not necessary and likely would

not result in additional useful information being provided to investors that would justify the increased burden on issuers.

The final rule requires disclosure of the amount of all assessments of penalties proposed by MSHA during the reporting period relating to any type of violation, and regardless of whether such proposed assessments are being contested or were dismissed or reduced prior to the date of filing of the periodic report. While acknowledging commentators' concerns about the potential for reputational harm from disclosing proposed assessments before they are final, the SEC reiterated its belief that the language of Section 1503 requires disclosure of all such proposed assessments.

The final rule adds an instruction clarifying 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.

- **The total number of mining-related fatalities**

The final rule requires disclosure of mining-related fatalities at mines that are subject to the Mine Act. In the adopting release the SEC states that it continues to believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. Issuers that wish to provide additional information about fatalities, such as whether a fatality is under review by MSHA, are not prohibited from doing so under the final rule.

- **Any pending legal action before the Federal Mine Safety and Health Review Commission**

The final rule requires issuers 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 mine that were pending before the Federal Mine Safety and Health Review Commission (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. Instead of the proposal to require 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 accordance with the categories established in the Procedural Rules of the FMSHRC.

The SEC decided not to adopt the proposal to require certain additional information about the legal actions, such as the date the action was instituted and by whom, the location of the mine, or the proposal that would have required the information about legal actions to be updated for material developments in subsequent periodic reports. In doing so it stated that it agreed with commentators who expressed the view that the rule as proposed required information not necessary to implement Section 1503 and could result in voluminous disclosure of limited informational value.

Issuers who wish to provide additional information about pending legal actions are not prohibited from doing so under the final rules. In addition, the SEC noted that Item 103 of Regulation S-K (*Legal Proceedings*) continues to apply, so that to the extent a legal proceeding is required to be disclosed under that item, disclosure and updates for material developments would be required.

- **A brief description of each category of violations, orders and citations reported**

Although not required by Section 1503 of the 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 require a brief description of each category of violations, orders and citations reported. After considering the comments received, the SEC believed that the disclosure that would be elicited by the proposed

requirement would not be useful enough to investors to justify the expansion of the disclosure requirement beyond the scope of Section 1503. Issuers may provide additional information in their periodic reports to the extent they believe it would be useful to investors. In addition, if particular mine safety issues are material and required to be disclosed under other SEC rules, then information about the nature of the violation likely would be necessary to satisfy such disclosure requirements.

- **Other disclosure items specified in Section 1503(a)**

The final rules mandate that each issuer that is required under Section 1503(a) to provide mine safety disclosure must provide, for each coal or other mine for the time period covered by the report:

- total number of orders issued under Section 104(b) of the Mine Act;
- 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;
- total number of flagrant violations under Section 110(b)(2) of the Mine Act;
- 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 such a pattern of violations of mandatory health or safety standards.

Form 8-K Filing Requirement

Section 1503(b) of the Act requires each issuer that is an operator, or has a subsidiary that is an operator, of a coal or other mine to report on Form 8-K the receipt of certain notices from MSHA.

Disclosure Requirements and Deadline

Under the final rule, issuers are required 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 (i) an imminent danger order under Section 107(a) of the Mine Act, (ii) 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 (iii) written notice from MSHA of the potential to have a pattern of such violations. Item 1.04 of Form 8-K requires 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.

As discussed above, these orders and notices are also required to be disclosed under Section 1503(a) of the Act in issuers' periodic reports. Although it considered the views of commentators that the Form 8-K disclosure is duplicative, the SEC believed the plain language of Section 1503 of the Act requires such orders and notices to be reported in both issuers' Forms 8-K and their periodic reports, and noted that issuers generally seem to have been complying with these requirements since Section 1503(b) became effective.

With respect to the filing deadline for the required Form 8-K, although Section 1503(b) of the Act does not specify a filing deadline, the SEC continues to believe that, because the triggering events are clear and do not require management to make rapid materiality judgments, the customary Form 8-K four business day deadline provides adequate time for issuers to prepare accurate and complete information.

In adopting this standard, the SEC acknowledged there is a possibility that an order or notice could be issued and subsequently vacated by MSHA within the four business day time period for filing the Form 8-K. As discussed above, however, with respect to reporting of dismissed, reduced or contested matters, it believes the language of Section 1503(b) of the Act dictates that the "receipt" of the specified orders or notices must be disclosed. The SEC notes that issuers may include additional disclosure explaining the status of these orders and notices if they choose to do so.

Treatment of Foreign Private Issuers

The SEC has determined not to apply the new Form 8-K reporting requirement to foreign private issuers. Although it is mindful of concerns that the disclosure requirement should be as equal as possible in order to avoid disadvantaging U.S. issuers in comparison to foreign private issuers, the SEC continues to believe that this approach is consistent with Section 1503(b) of the Act, which references Form 8-K, a form applicable only to domestic issuers, not to foreign private issuers.

Further, the adopting release notes that although foreign private issuers will not be subject to the Form 8-K requirement, they will not be able to avoid disclosure of the orders and notices specified in Item 1.04 of Form 8-K. As described above, the SEC is adopting amendments to Forms 40-F and 20-F that require a foreign private issuer to disclose in each annual report the items described in Section 1503(a) of the Act. This is the same information that is required of domestic issuers, including disclosure of the receipt during the foreign private issuer's past fiscal year of (i) any imminent danger order issued under Section 107(a) of the Mine Act, (ii) written notice from 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 or safety hazards under Section 104(e) of the Mine Act, and (iii) written notice from MSHA of the potential to have a pattern of such violations.

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

Under the SEC's existing rules, the untimely filing on Form 8-K of certain items does not result in loss of Form S-3 eligibility to register securities under the Securities Act, so long as Form 8-K reporting is current at the time the Form S-3 is filed. The existing rules also provide a limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act for certain Form 8-K items.

The final rule 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. While Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8-K, in the past when the SEC has adopted new disclosure requirements that differed from the traditional periodic reporting obligations of companies, it has acknowledged concerns about the potentially harsh consequences of the loss of Form S-3 eligibility, and addressed such concerns by specifying that untimely filing of Forms 8-K relating to certain topics would not result in the loss of Form S-3 eligibility.

Finally, in the adopting release the SEC takes the position that the limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act is only warranted if the triggering event for the Form 8-K requires management to make a rapid materiality determination. Given that the filing of an Item 1.04 Form 8-K is triggered by an event that does not require management to make such a determination, the SEC believes that it is not appropriate to extend the safe harbor to this new item.

A copy of the SEC's adopting release can be found here.

We would be glad to discuss any questions you may have regarding the implementation of these new rules.