

Osler Mining Review- February 2012

Introduction

This edition of the Osler Mining Review contains the following articles: (i) a look at the rules TSX resource companies should keep in mind when putting together a board of directors; (ii) an analysis of developments in Canada in the enforcement of cases under Canada's *Corruption of Foreign Public Officials Act* and the implications for companies, including mining companies, doing business with foreign governments or foreign government officials; (iii) a review of the mining landscape in Canada in 2011; and (iv) a discussion on the SEC's final rules governing mining safety disclosure.

TSX Venture Exchange Mining Directors – How to Avoid “Interesting Times”

Today's directors, and in particular today's TSX resource company directors, definitely live in interesting times. Directors of mining companies listed on the TSX Venture Exchange may make things less interesting for themselves by doing a little homework and being aware of the guidelines and recommendations of the TSX and of Canadian Securities Regulators and applying them as appropriate.

Pack your Compliance Program with your Passport- Foreign Corruption and Competition Risks for Firms Doing Business Internationally

The Niko Resources Ltd. case should serve as notice that Canada is stepping up enforcement under the CFPOA, as should recent RCMP revelations that there are 30 foreign corruption investigations currently under way in Canada. Canadian companies engaged in foreign government contracting or in dealing with government officials in relation to resource exploration and development must take particular care to ensure that effective corporate policies prohibiting bribery are in place and that local staff in foreign jurisdictions are adequately trained.

Mining in Canada in 2011

In 2011, the importance of mining and exploration companies to Canadian capital markets was once again reaffirmed. Canada continued to be globally recognized as a world class mining jurisdiction as a result of its sophisticated capital markets, its highly skilled and experienced advisors, the breadth and depth of its institutional and retail base, its strict and sophisticated mining regulatory regime, its flexible and numerous public and private capital raising options and its multiple public company entry points.

SEC Adopts Final Rules Governing Mine Safety Disclosure

On December 21, 2011, the SEC adopted the final rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding certain mine safety disclosure requirements. This article discusses some important amendments, including required disclosure in periodic reports and Form 8-K filing requirements.

TSX Venture Exchange Mining Directors – How to Avoid “Interesting Times”

By **Mark Trachuk**

“May you live in interesting times” the Chinese curse goes. Today’s directors, and in particular today’s TSX resource company directors, definitely live in interesting times. Directors of mining companies listed on the TSX Venture Exchange (TSX-V) may make things less interesting for themselves by doing a little homework and being aware of the guidelines and recommendations in TSX-V Corporate Finance Manual Policy 3.1 – *Directors, Officers, Other Insiders & Personnel and Corporate Governance* (Policy 3.1) and National Policy 58-201 – *Corporate Governance Guidelines* (NP 58-201) and applying them as appropriate. In this article we will review those guidelines and recommendations and make some suggestions as to which ones a TSX-V mining board should consider applying.

TSX Venture Exchange Policy 3.1

Some of the key guidelines of Policy 3.1 relate to the need to have a properly constructed board made up of directors with the right qualifications, profile, expertise and experience. The board does not have to be big, but it should be highly skilled with experience and technical expertise relevant to the company’s business and industry. Policy 3.1 does not purport to be an exhaustive statement of corporate governance requirements for TSX-V issuers (it specifically says that it must be read in conjunction with applicable corporate and securities laws including NP 58-201), but it does help us to construct the profile of a strong board.

Policy 3.1 specifically provides that the TSX-V considers the directors to be an important factor in determining whether to accept or maintain a listing. However, it also points out that the TSX-V will exercise discretion in considering all factors relating to directors and other insiders in deciding whether an issuer would be appropriate for listing. In particular, in exercising its discretion, the TSX-V may review the conduct of directors in order to satisfy itself that the business of the issuer is and will be conducted with integrity and in the best interest of the security holders and the investing public and that the TSX-V requirements and the requirements of the other regulatory bodies, such as the Canadian securities regulators, will be complied with. In addition, the TSX-V retains discretion to prohibit a particular individual from serving as a director.

Typically the TSX-V will not accept an initial listing where a director or other person involved with the issuer does not meet the applicable minimum requirements set out in Policy 3.1. In addition, on an on-going basis, the directors must continue to meet the requirements set forth in Policy 3.1 or the TSX-V may halt, suspend or de-list the securities of the issuer.

Here are some of the key qualification and duties Policy 3.1 identifies as being required for directors of TSX-V companies:

- they must be at least 18 years old and of the age of majority in the jurisdiction where they reside;
- they must be qualified under the corporate and securities laws applicable to the issuer to serve as a director;

- they must act honestly and in good faith with a view to the best interest of the issuer;
- they must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and
- they must ensure that the issuer complies with the applicable TSX-V requirements and corporate and securities laws.

Policy 3.1 also sets out requirements concerning appropriate board composition, which include that each issuer must have at least three directors with at least two independent directors (as determined by the board). In addition, the directors (and/or management and the officers) must have adequate experience and technical expertise relevant to the business and adequate reporting issuer experience in Canada or a similar jurisdiction.

Policy 3.1 sets out a number of factors by which the TSX-V will determine whether the board members or management have satisfactory industry specific technical experience and sufficient reporting issuer experience. These factors include:

- the person's previous involvement with other public and private issuers (including the number of boards on which the person has served);
- the positions and the length of time the person was a member of management or a director;
- the history of the corporate and financial success of any issuers with which the person was involved;
- any regulatory or securities law violations or infractions by the person;
- the prudent and responsible business conduct and practices of any issuer with which the person was involved;
- the industry in which the other issuer was involved and the extent of the experience obtained by the person;
- the stock exchange or market on which the other issuer or its securities were traded;
- any management position held by the person with the other issuer;
- the financial success of the other issuer; and
- whether the person has satisfactorily completed one or more corporate governance and reporting issuer management courses acceptable to the TSX-V.

In addition to the above requirements, the TSX-V specifically recommends that at least one independent board member and a minimum of two members of the board has satisfactory corporate governance experience.

National Policy 58-201

In addition to the requirements of Policy 3.1, TSX-V boards must consider the requirements of NP 58-201 which provides guidance on corporate governance practices from a securities law perspective. Although NP 58-201 applies

to all reporting issuers, other than investment funds, the guidelines in NP 58-201 are not intended to be prescriptive and are more in the nature of encouragement from the Canadian securities regulators for issuers to develop their own corporate governance practices.

The following corporate governance guidelines are contained in NP 58-201:

- establish and maintain a board consisting of a majority of independent directors;
- appoint a chair of the board or a lead director who is an independent director;
- hold regularly scheduled meetings of independent directors at which non-independent directors and members of management are not in attendance;
- adopt a written board mandate;
- develop position descriptions for the chair of the board, the chair of each board committee, and the chief executive officer;
- provide each new director with a comprehensive orientation, and provide all directors with continuing education opportunities;
- adopt a written code of business conduct and ethics;
- appoint a nominating committee composed entirely of independent directors;
- adopt a process for determining the competencies and skills the board as a whole should have, and apply this result to the recruitment process for new directors;
- appoint a compensation committee composed entirely of independent directors; and
- conduct regular assessments of the board effectiveness, as well as the effectiveness and contribution of each board committee and each individual director.

Policy 3.1 and NP 58-201 together provide a full menu for a TSX-V mining company board. The key for the board is to determine which items from the menu are most appropriate for the issuer given its age, stage, capitalization, industry and future. However there are a handful of obvious choices which most boards should choose to adopt including the following:

- the board should be composed of no less than 3 to 5 directors with a majority of independent directors (as determined by the board in accordance with applicable securities law requirements);
- some (but not necessarily all) directors should have meaningful public company experience with a track record of success;
- include directors with expertise in public company accounting, National Instrument 43-101 reports (after all, it is a mining company) and corporate governance;

- appoint committees but be mindful of the size of the board and whether the issuer will really need them (TSX-V issuers always require an audit committee comprised of at least three directors the majority of whom are independent and should have a compensation committee and a governance committee);
- meet at least quarterly as a board with separate audit committee meetings and in camera sessions for independent directors and take good (although not necessarily long) minutes of all meetings;
- adopt good mandates (they are easy to find) for the board and each of the committees; and
- go and see the issuer's mines or properties (this is not on the list but experience tells us it is a good thing to do for any director of a TSX-V company).

In addition to the above, an individual director should take steps and make choices that seem reasonable in the circumstances for the board (it helps sometimes to consult with counsel and the issuer's auditors). As long as a director considers the guidance of Policy 3.1 and NP 58-201, uses his or her judgement and experience and acts with a *bona fide* regard for the interests of the corporation, the director will be on solid ground and hopefully life as a director will not be at all interesting.

Pack your Compliance Program with your Passport - Foreign Corruption and Competition Risks for Firms Doing Business Internationally

By [Graham Reynolds](#), [Michelle Lally](#)

In June 2011, Niko Resources Ltd., a TSX-listed oil and gas exploration and production company, was convicted on charges laid under Canada's *Corruption of Foreign Public Officials Act* (CFPOA) and fined \$9.5 million. The CFPOA prohibits giving or offering a loan, reward, advantage or benefit of any kind to a foreign public official, where the purpose is to obtain or retain a business advantage. Niko ran afoul of these requirements when its local representatives purchased a vehicle and paid travel and accommodation expenses for a senior government official in Bangladesh.¹

The CFPOA has been in force since 1999, yet has resulted in very little enforcement activity. Canada has faced international criticism, most recently from the OECD, for its failure to act in foreign bribery cases. The Niko case should serve as notice that Canada is stepping up enforcement under the CFPOA, as should recent RCMP revelations that there are 30 foreign corruption investigations currently under way in Canada. Canadian companies engaged in foreign government contracting or in dealing with government officials in relation to resource exploration and development (e.g., mining, oil and gas) must take particular care to ensure that effective corporate policies prohibiting bribery are in place and that local staff in foreign jurisdictions are adequately trained. Such companies may also face prosecution under anti-bribery laws implemented by Canada's trading partners: the U.S. Department of Justice has sharply increased its prosecution of companies and individuals for foreign corruption in recent years, and a strict new anti-bribery law was introduced in the U.K. effective in July 2011. As an example of the dramatic enforcement action that can occur, RCMP officers executed search warrants at the offices of SNC-Lavalin in September 2011, allegedly looking for evidence relating to a World Bank funded project in Bangladesh.

The RCMP's foreign corruption task force might look to Canada's Competition Bureau as a model for ramping up enforcement of the CFPOA. The *Competition Act* prohibits price-fixing, market allocation, supply restriction agreements and bid-rigging with an effect in Canada, even when these agreements are entered into outside Canada. As with foreign corruption, it is difficult to detect cartel and bid-rigging activities since such activities are by their very nature covert. Notwithstanding these challenges, the Competition Bureau has built a strong track record of enforcing the criminal provisions of Canada's *Competition Act* against international cartels, most recently obtaining a \$12.5 million fine in a case involving international price-fixing for polyurethane foam. This track record may be linked to several factors, which find parallels in foreign corruption proceedings:

- *Role of whistleblowers* – The Competition Bureau has put in place programs under which it will recommend that the first-in cooperating party to report illegal activity receives full immunity from prosecution, and that second-in and later cooperating parties receive reduced sentences. These immunity and leniency programs provide very significant incentives to corporate whistleblowers. No similar immunity or leniency program is available under the CFPOA; however, it is well known that whistleblowers can play a significant role in corruption prosecutions.
- *International enforcement cooperation* – Canada's Competition Bureau cooperates closely with its international counterparts in the US and Europe in cartel and bid-rigging investigations, by sharing investigative information, coordinating searches/dawn raids and communicating with each other on strategy throughout an investigation. We expect that Canada will similarly benefit from cooperation with, and expertise offered by, its foreign counterparts as it ramps up enforcement under the CFPOA.
- *Willingness to target individuals* – In recent years, the Competition Bureau has been increasingly willing to target individuals and to seek a sentence of (house arrest) imprisonment for cartel and bid-rigging offences. We understand that the U.S. Department of Justice is seeking and obtaining jail time for individuals convicted of violating its foreign corruption laws. It remains to be seen whether Canada will begin targeting individuals under the CFPOA. The threat of individual sanctions would add a powerful deterrent for executives considering such conduct and make them vulnerable to corporate whistleblowers.
- *Use of invasive enforcement tools* – Search warrants have been a longstanding tool in the Competition Bureau's arsenal, and domestic or international "dawn raids" are standard in almost all significant cartel investigations. Searches are also an important tool for detecting alleged foreign corruption. In recent years, the Competition Bureau has relied on wiretap and other forms of surveillance evidence in its cases. These tools allow the Competition Bureau to infiltrate a cartel and collect "live" evidence of illegal conduct as it occurs. We understand that U.S. authorities actively use wiretapping and "sting" operations in collecting evidence in foreign corruption cases. It remains to be seen whether these tools will also be used in CFPOA cases.

In the United States, there have also been cases that have involved *both* antitrust/competition law and FCPA violations. The Bridgestone case is an example: Bridgestone recently agreed to plead guilty and to pay a US\$28 million fine for its role in conspiracies to rig bids and to make corrupt payments to foreign government officials related to the sale of marine hose and other products. Any bid-rigging case involving public procurement markets may also raise similar concerns about corruption – does implementing the cartel require corrupt payments to public officials to ensure that the bidder to whom a bid is allocated actually wins the bid?

While it is not yet clear whether Canada will be as successful pursuing cases under the CFPOA as it has been under the criminal provisions of the *Competition Act*, enforcement activity under both statutes raises the stakes for

companies doing business in Canada and internationally, including mining companies. In this environment, the best way to reduce risk is through the implementation of effective compliance programs. The key elements of a credible and effective compliance program, whether it is geared at competition or foreign corruption laws, include senior management support, clear internal policies and procedures (e.g., a “Do's and Don'ts” guideline), ongoing training, compliance monitoring and audits, whistleblower reporting mechanisms and consistent disciplinary procedures to punish non-compliance.

Osler has significant and relevant experience in assisting companies in the design and monitoring of compliance programs so as to help prevent the shock and damage of criminal competition law and corruption investigations. The authors of this article would be glad to assist you in your efforts to reduce your risk in these areas, or to answer any questions you may have.

¹ For a more comprehensive review of the Niko Resources decision, see our [Osler update](#) from June 27, 2011, on the case.

Mining in Canada in 2011

By [David Hanick](#), [David Vernon](#), [James R. Brown](#)

In 2011, the importance of mining and exploration companies to the Canadian capital markets was once again reaffirmed. According to the TMX Group (owner of the Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSX-V)), the TSX and TSX-V are home to 58% of the world's public mining companies. Issuers listed on these two markets were involved in raising 60% of the world's mining equity capital. Canada's significant exposure to natural resources and its seasoned capital markets once again made it the jurisdiction of choice for Canadian and international mining explorers, developers and operators seeking to raise new capital and manage their businesses in a stable and predictable environment. Canada continued to be globally recognized as a world class mining jurisdiction as a result of its sophisticated capital markets, its highly skilled and experienced advisors, the breadth and depth of its institutional and retail investor base, its strict and sophisticated mining regulatory regime (including National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*, which was updated in June 2011, and proposed amendments to the *Mining Act (Quebec)*), its flexible and numerous public and private capital arising options and its multiple public company entry points.

Canadian Mining Capital Markets Significance

In 2011, Canada's mining capital markets continued to be comprised of both Canadian issuers with projects in Canada and abroad, and foreign issuers with projects in Canada or with no affiliation to Canada other than the maintenance of a Canadian listing. It is estimated that half of the approximately 9,500 mineral exploration assets owned by TSX and TSX-V listed companies are located outside Canada.

The 2011 Canadian capital markets continued to be fuelled by fundraising activities and mergers and acquisitions transactions by TSX and TSX-V listed companies. Financial transactions in this sector continued to include offerings by way of long form prospectus, shelf prospectus, short form prospectus or private placement (with limited restrictions on investors – primarily a four-month hold period on the purchased stock). Canadian mining issuers also continued to enjoy the benefit of access to U.S. investors without SEC review, using the MJDS system. Additionally, early stage exploration and development issuers without sufficient revenue to support capital expenditures continued to issue flow-through shares to Canadian investors.

Continued Strength in Canadian Mining Capital Markets

In the period from January 1, 2011 through November 30, 2011, TSX and TSX-V issuers completed 1,811 financings, raising a cumulative total of almost \$12 billion. While the market for initial public offerings was significantly constrained, a few initial public offerings in the mining sector were completed, including Black Iron Inc., Midas Gold Corp. and the exchange traded receipts of the Royal Canadian Mint. Reverse take-overs, whether by CPC Qualifying Transaction or traditional means, continued as a viable public listing option for junior and mid-tier resource-based companies seeking a listing on the TSX-V.

The prevalence of capital markets activities for mining companies on the TSX and TSX-V is not a new trend. In the past 10 years, 80% of worldwide mining financings completed have been completed on the TSX or TSX-V. In 2010, approximately 2,400 mining equity financings were completed on the TSX and TSX-V with a value of \$17.8 billion, representing 91% of all global equity financings completed in that year (by number) and approximately 66% of global equity financing (by dollar value).

Notable M&A Activity

Canada also remained a strong centre for both friendly and hostile mergers and acquisitions in 2011, despite the economic climate. During the first two weeks of the year, two large transactions were announced – HudBay Minerals Inc.'s acquisition of Norsemont Mining Inc. and the merger of Lundin Mining Corporation and Inmet Mining Corporation. The quick announcement of these transactions led many to believe that 2011 would be a strong year for M&A.

While in the end the year was not as strong as many capital markets participants would have liked, a number of significant transactions were announced or completed in 2011. Notable transactions included the acquisition of Equinox Minerals by Barrick Gold Corporation, Cliffs Natural Resources Inc.'s acquisition of Consolidated Thomson Iron Mines Ltd. and Minmetals' supported acquisition of Anvil Mining Ltd. Notwithstanding the global nature of each of these mining companies, their connection to Canada is indicative of a desire for, and the benefits to be had from, maintaining a nexus to Canadian capital markets, particularly in an industry where listed securities provide attractive consideration in the context of M&A transactions.

Several other notable transactions were completed in 2011, including two significant competitive situations. Cameco Corporation announced an all-cash unsolicited offer for Hathor Exploration Ltd., which ultimately partnered with Rio Tinto plc, and Northgate Minerals Corporation was acquired by AuRico Gold Inc. following an agreement by Northgate to acquire Primero Mining Corp. Most recently, Polish miner, KGHM, announced an all-cash acquisition of Quadra FNX Mining Ltd.

Canada Remains an Global Mining Leader

Overall 2011 was an exciting year for resource companies listed on Canadian exchanges, with Canadian capital markets continuing as the global leader for mining transactions.

This article was originally published as part of Osler's 2011 Capital Markets Review, which can be accessed [here](#).

SEC Adopts Final Rules Governing Mine Safety Disclosure

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 are effective as of January 27, 2012.

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.

Our Reputation and Recent Representative Work

Our Reputation

In 2011, Osler was once again ranked among the top law firms for Canadian M&A deals. Osler was also mentioned in three of *Lexpert* magazine's "Top 10 Deals of 2011", including the top deal of the year: *Rocks, Rocks, Rocks: Barrick Takes Equinox*. Osler acted for Equinox.

Recent Representative Work

- **Winsway Coking Coal Holdings Ltd.** and **Marubeni Corporation** in their \$1 billion acquisition of Grande Cache Coal Corp.
- **Telegraph Gold Inc.** in its reverse take-over of Foxpoint Capital Corp., a TSX Venture Exchange Capital Pool Company.
- **Karmin Exploration Inc.** in its acquisition and lease of Peruvian mining concessions.

Who, What, Where

Osler's Mining Group attended the following conferences in January and February 2012:

- Dahlman Rose & Co. Emerging Miners CEO Conference in New York, New York, United States, January 12-13, 2012.
- Vancouver Resource Investment Conference in Vancouver, British Columbia, Canada on January 22-23, 2012.
- Association for Mineral Exploration British Columbia (AME BC), Mineral Exploration Roundup 2012 in Vancouver, British Columbia, Canada on January 23-26, 2012.
- Mining Indaba in Cape Town, South Africa on February 6-9, 2012.

OSLER

Osler's Mining Group will be attending the following conference in March 2012:

- PDAC Conference in Toronto, Ontario, Canada on March 4-7, 2012. David Hanick, Co-Chair of the Mining Group, is a member of the PDAC Planning Committee and is chairing a PDAC short course entitled "Director's Duties: an Overview for Mid and Junior Public Mining Company Executives and Directors" on Tuesday March 6 2012 from 9:00 a.m. – 12:00 p.m. Participants involved in the course include Osler corporate partner Mark Trachuk and Osler litigation partner, Mark Gelowitz.
- Osler Partners Richard Wong and Shawn Denstedt spoke at the *Osgoode Certificate in Mining Law*. Richard spoke on the topic of "Development, Construction & Operating Agreements" and Shawn spoke on "Dealing with Indigenous Communities: Law and Best Practices".

Recent Publications

In case you missed it, here is a recent Osler Update that may be of interest:

- [Supreme Court of British Columbia Issues Injunction Restraining Exploration Activities Authorized by Provincial Permits](#)

PDAC Reception

Osler will be hosting a reception during the PDAC Conference on Monday, March 5, 2012 from 6:00 – 9:00 p.m. at Canoe, 66 Wellington Street West, Toronto.

Contact us

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