

Amended SEC Rules Mandate New Mine Safety Disclosures

On Dec. 21, 2011, the Securities and Exchange Commission (the "SEC") announced the issuance of new health and safety disclosure requirements pertinent to mine operators that are subject to the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). The SEC's newly amended rules will require issuers who are mining operators or who control mine operators to disclose in periodic reports information regarding:

- Specified health and safety violations;
- Various government issued orders and citations;
- Related assessments and legal actions; and
- Mining-related fatalities.

These rule changes were implemented pursuant to statutory imperatives of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which was previously described in our July 2010 Securities Law Update entitled "Summary of Corporate Governance Changes in the Dodd-Frank U.S. Financial Regulatory Reform Act," available on our website at www.burnslev.com/apps/uploads/publications/Securities_Update_Dodd-Frank_July2010.pdf.

The new specific SEC rules become effective on January 27, 2012, although the general requirements under Dodd-Frank have been in effect since August 20, 2010.

Securities issuers affected by the changes will need to make required disclosures in connection with their Form 10-K annual reports, Form 10-Q quarterly reports, and Form 8-K interim reports of material events. Annual reports on Form 20-F (for certain foreign private issuers) and Form 40-F (for certain Canadian companies) will also be affected.

This update provides an overview of the changes to disclosure rules pertinent to mining operations. The full text of the SEC

Release nos. 33-9286 and 34-66019 can be found at www.sec.gov/rules/final/2011/33-9286.pdf.

SCOPE OF RULES: AFFECTED ISSUERS

The amended rules affect every public company which is an "operator, or that has a subsidiary that is an operator, of a coal or other mine," as defined in the Mine Act, and that is subject to the provisions of the Mine Act.

Under the Mine Act, a "coal or other mine" means:

- An area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted by workers underground;
- Private ways and roads adjoining such areas; and
- Lands, excavations, underground passages, shafts, slopes, tunnels, structures, facilities, equipment, machines, tools or other property... used in or to be used in, or resulting from the work of extracting such minerals from their natural deposits in non-liquid form, or if in liquid form, with workers underground, or used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals, and specifically includes custom coal preparation facilities.

This definition, the SEC noted, includes any independent contractors who might be covered as mine operators. Furthermore, disclosures must be made on a "mine-by-mine" basis, according to the SEC, and not lumped together by regions, divisions or subsidiaries alone.

The rule does not apply to mines falling outside of the jurisdiction of the Mine Act, and thus does not mandate new disclosures regarding foreign mines. However, the SEC explicitly noted that "to the extent that mine safety issues are material", relevant disclosures by foreign operators may be

necessary pursuant to Regulation S-K Item 303 (Management Discussion and Analysis), Item 503(c) (Risk Factors), Item 101 (Description of Business), or Item 103 (Legal Proceedings). As a result, operators of foreign mines would be wise to consider the amended rules when determining the materiality of any disclosure related to health and safety.

REQUIRED DISCLOSURE ITEMS

Among other things, mine operators are specifically required to disclose for each coal or other mine subject to the Mine Act:

- The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Mine Act for which the operator received a citation from the Mine Safety and Health Administration (the "MSHA") of the U.S. Department of Labor.
- The total dollar amount of assessments proposed by the MSHA during the period covered by an applicable report (which does not include or require a statement of all outstanding assessments as of the last day of the reporting period).
- The total number of mining related fatalities (not including any fatalities on the job determined by the MSHA to not be mining-related).
- The identity of each mine and the number of legal actions involving each mine that were pending before the Federal Mine Safety and Health Review Commission (the "FMSHRC") as of the last day covered by an applicable periodic report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period.

The amended rules also require that the total

number of legal actions pending before the FMSHRC (as of the last day of the time period covered by any periodic report) should be categorized according to:

- Contests of citations and orders, including citations and orders under section 104 of the Mine Act, contests of imminent danger withdrawal orders under Section 107 of the Mine Act, and emergency response plan dispute proceedings as required by law.
- Contests of proposed penalties, which are administrative proceedings before the FMSHRC challenging a civil penalty that MSHA has proposed for the violation contained in a citation or order.
- Complaints for compensation, which are cases under Section 111 of the Mine Act that may be filed with the FMSHRC by any miners who were idled by a closure order issued by the MSHA and who are entitled to compensation.
- Complaints of discharge, discrimination or interference under Section 105 of the Mine Act, which cover discrimination involving allegations of adverse employment actions because of safety complaints or other protected activity, as well as temporary reinstatement proceedings in cases where a miner has filed a complaint with MSHA regarding such discrimination and a loss of position.
- Applications for temporary relief, which are applications for relief from any order, modification or termination of any order issued under Section 104 of the Mine Act.
- Appeals of judges' decisions or orders to the FMSHRC, including petitions for discretionary review and review by the FMSHRC on its own motion.

Item 106 of Regulation S-K, which applies to a variety of periodic reports, also requires each covered public issuer to provide for each coal or other mine the following disclosures of regulatory action for the time period covered by the applicable report:

- The total number of orders issued under Section 104(b) of the Mine Act (relating to health and safety hazards);
- The total number of citations and orders

for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act;

- The total number of flagrant violations as designated under Section 110(b)(2) of the Mine Act;
- The total number of imminent danger orders issued under Section 107(a) of the Mine Act;
- 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 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
- 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.

DISCLOSURE FORMS AND METHODOLOGY

The SEC is requiring issuers to provide in periodic reports and in exhibits to periodic reports the new information required by statute and rule.

Issuers that have matters to report under the amended rules will be required to make disclosures in Part II of Form 10-Q, and in Part I of Forms 10-K, 20-F or 40-F, as applicable.

There are several new disclosure items that specifically address the required mine health and safety disclosures in these forms, including:

- New Item 4 to Part II of Form 10-Q;
- New Item 4(b) to Part I of Form 10-K (incorporating new Items 106 and 601(b) (95) of Regulation S-K);
- New Item 16J to Part I of Form 20-F; and
- New paragraph (18) of General Instruction B to Part I of Form 40-F.

The final rules do not necessarily require that disclosures be made in the body of the applicable periodic report, and they explicitly allow for the relevant information to be

included in an exhibit to the filing.

However, the SEC emphasized that some material mine safety concerns may require discussion in the body of a periodic report, such as material information pertinent to the risk factors section, or to the discussion of legal proceedings or management's discussion and analysis.

There are no specific and particular presentation requirements applicable to the new disclosures, but the SEC reiterated that issuers should use tabular presentations whenever possible "if to do so would facilitate investor understanding," further noting that "the use of footnotes, accompanying narrative disclosure or additional tables may also help to clarify information, as appropriate."

DISCLOSURE TIME PERIODS FOR PERIODIC REPORTS

Based on public comments to proposed rules, the SEC adopted final rules that include some modifications to its original proposals.

For instance, the final rules require each Form 10-Q to include the required disclosures only for the quarter covered by the report. Similarly, the final rule requires each Form 10-K, 20-F or 40-F to include disclosure of the pertinent information for the fiscal year only, and not also for the fourth quarter or cumulatively, inclusive of prior periods.

The SEC was persuaded by commentators that inclusion of both final quarter and annual information was not necessary in annual reports, and the SEC rejected arguments that cumulative "trending" information was necessary to include in periodic reports.

Some commentators pushed for a rule allowing issuers to exclude information about orders or citations that were received during a periodic reporting period but subsequently dismissed or vacated.

The SEC rejected their arguments, insisting on comprehensive reporting of all citations or orders from MSHA because of explicit directives in the Dodd-Frank Act. However, the SEC did note that neither the statute nor the rules prohibit inclusion of "additional" disclosure with regard to the status of orders or citations that have been vacated, dismissed or reduced.

FORM 8-K REQUIREMENTS

The SEC amended Form 8-K to add new Item 1.04, which requires the filing of a Form 8-K report within four business days of the receipt by an issuer (or a subsidiary of an issuer) of any of the following:

- An imminent danger order under Section 107(a) of the Mine Act;
- 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; or
- Written notice from MSHA of the potential to have a pattern of such violations.

In defending its decision to specify a filing deadline that was opposed by some commentators, the SEC stated that “we continue 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.”

The SEC did not apply the new Form 8-K reporting requirements to foreign private issuers, but added that foreign private issuers “will not be able to avoid disclosure of the orders and notices specified in Item 1.04 of Form 8-K” in annual reports.

IMPACTS ON FORM S-3 AND ISSUER LIABILITIES

The final rule adds Item 1.04 to the list of Form 8-K items in the General Instructions for Form S-3 (for simplified registration of public securities offerings) to provide that untimely filing of a new disclosure item will not result in the loss of Form S-3 eligibility.

Nonetheless, the SEC refused to bow to commentators’ concerns with regard to Section 10(b) or Rule 10b-5 liability for failure to report an item on Form 8-K. Some commentators had pushed for a rule that omission of a Form 8-K item could not constitute the basis for a Section 10(b) or Rule 10b-5 claim, but the SEC asserted that such a rule would be inappropriate because management is not being required to make a

materiality determination on the specified Form 8-K disclosure items.

Explanatory Notes:

This update is intended to call your attention to a number of rule changes of possible interest and relevance, but it is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you.

Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these proposed rule changes or if you want to learn more about our expertise in this area.

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In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting resales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

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