Crowell

CLIENT ALERT

Mine Safety Disclosures to the SEC: A Recent Study Under the U.S. Securities Laws

Summer 2014

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") on July 21, 2010. A combination of legislation aimed largely at tightened financial regulation, the Dodd-Frank Act also included a few additional disclosure requirements for public companies. One of the last sections of the Dodd-Frank Act, Section 1503, mandates the public disclosure by public companies of mine safety and health violations and statistics in their filings with the U.S. Securities and Exchange Commission (SEC). While the provision was self-executing upon its August 20, 2010 effective date and was fairly detailed in its disclosure requirements, it also required the SEC to promulgate its own set of rules to administer the disclosure program. Because the SEC needed time to wade through its many Dodd-Frank Act rule promulgation requirements from the outset, consider the best form in which to require the disclosure, and solicit comments from the public, its final SEC rule on mine safety disclosure was not released until December 21, 2011.

Nearly four years into these requirements, unlike the turmoil, resistance, and legal challenges that have surrounded the SEC's implementation of the Dodd-Frank Act's requirements regarding the use of "conflict minerals" sourced from the region in and around the Democratic Republic of the Congo and the payments by natural resource extractors to U.S. or foreign governments for the development of those resources, implementation and compliance with Section 1503's mine safety disclosure rules have gone fairly smoothly. Affected mining companies seem to have a good understanding of the rules and their obligations. Further, based on the SEC's publicly available review correspondence, to date, the SEC has had little to criticize with respect to companies' mine safety disclosures under Section 1503.

Two Types of Section 1503 Disclosure

Section 1503 requires public companies that operate or perform services at a mine in the U.S. or its territories, or have subsidiaries that do so, to make mandatory mine safety disclosures in periodic reports (i.e., annual reports on Form 10-K and quarterly reports on Form 10-Q) and in current reports (i.e., a Form 8-K).

Periodic Reports on Form 10-K and 10-Q:

Annually, public companies – or "issuers" – must file a report on Form 10-K containing audited annual financial statements, related textual discussion and analysis and certain other enumerated disclosures in respect of their completed fiscal years. Further, on a quarterly basis, public companies must file a quarterly report on Form 10-Q containing unaudited interim

financial statements, related textual discussion and certain other, but more limited, enumerated disclosures, for the first, second and third completed fiscal quarters of their fiscal years (results of the fourth quarter are included on Form 10-K).

Under Section 1503, issuers who are mine *operators* (a term that includes independent contractors who perform services or construction work at a mine) must report their mine safety violations and MSHA notices, as enumerated below, for the period covered by that periodic report. That is, each Form 10-Q must include all violations, notices and other disclosable items occurring within the fiscal quarter to which the Form 10-Q relates. Further, each Form 10-K must include disclosure for the entire fiscal year, not just the fourth quarter, to which the Form 10-K relates.

With respect to the language specifically required by Section 1503 and Item 104 of Regulation S-K (the SEC's rule promulgated in accordance with Section 1503), issuers must include a brief disclosure in the body of their periodic reports with the required mine safety information included in an exhibit to the filing named and filed as Exhibit 95. The SEC recommends a tabular disclosure with explanatory footnotes. The issuer must report on a mine-by-mine basis; this means the issuer must provide information, if any, for each mine that has an MSHA-issued identification number and may not group or otherwise aggregate mines for reporting purposes. Otherwise reportable information for any independent contractors that are not subsidiaries of issuers need not be reported.

An issuer must disclose in the periodic report, for the time period covered by the report, the following information for each mine it operates:

- 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 Federal Mine Safety and Health Act of 1977 (the "Mine Act") for which the operator received a citation from MSHA (aka "S&S violations").
- The total number of orders issued under Section 104(b) of the Mine Act.
- The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under Section 104(d) of the Mine Act.
- The total number of flagrant violations 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.
- The total dollar value of proposed assessments from MSHA under the Mine Act (even if actively being challenged or appealed, although issuers may provide details on the status of their challenges or appeals in footnote or textual disclosure).
- The total number of mining-related fatalities.

- A list of the mines that receive 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.

- Any pending legal action before the Federal Mine Safety and Health Review Commission (FMSHRC) as of the last day of the period covered in the report, as well as the aggregate number of legal actions (i) instituted and (ii) resolved during that period. Further, the pending legal actions need to be categorized by type:

    - Contests of citations and orders (*i.e.*, pre-penalty contests).
    - Contests of proposed penalties.
    - Complaints for compensation (cases under Section 111 of the Mine Act filed by miners with FMSHRC for compensation they claim is owed for time they were idled as a result of an MSHA mine closure order).
    - Complaints of retaliation under Section 105 of the Mine Act (which includes (i) discrimination proceedings for adverse employment action related to miner conduct protected by the Mine Act (like safety complaints) and (ii) temporary reinstatement proceedings if the miner claims that there was discrimination and termination of employment).
    - Temporary relief applications (under Section 105(b)(2) of the Mine Act for relief from certain orders (or modifications or terminations of orders).
    - Appeals of judges' decisions or orders pending before the FMSHRC.

Any occurrence of a violation, order, or other event from the list above must be reported; no materiality threshold applies. The SEC's rules do not permit issuers to exclude from disclosure information about orders or citations that were received during the time period covered by the filing but subsequently dismissed, reduced, or vacated, although issuers can explain the status of reported matters. These additional details are frequently included by footnotes attached to the specific event or mine name in the table.

The reporting obligations on Form 10-K and Form 10-Q apply to all public companies, including "smaller reporting companies" and "foreign private issuers," as long as they operate, or have subsidiaries that operate, mines in the U.S. or its territories.

Current Reports on Form 8-K:

As a result of Section 1503, the SEC added a new line item disclosure to Form 8-K, Item 1.04 for U.S.-based public companies (foreign private issuers do *not* need to make similar filings). An issuer is required report on Form 8-K under Item 1.04 upon the receipt of either of the following:

- An imminent danger order issued under Section 107(a) of the Mine Act.

- A written notice from MSHA of a pattern of violation 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 (please note that Section 1503 also called for a Form 8-K where the issuer received a written notice from MSHA of the potential to have a pattern of such violations, but that requirement has effectively been nullified by a recent MSHA rule that eliminated the "potential pattern" notice).

Like all events reportable on Form 8-K, the Form 8-K must be filed with the SEC within four business days of the occurrence of the triggering event, by 5:30 p.m. Eastern time.

For each specified notice or order, issuers are required to report under Item 1.04 of Form 8-K (i) the date of receipt, (ii) the category of notice or order and (iii) the subject mine's name and location. Such disclosure requirements are still required even if the notice or order is vacated by MSHA within the four business days' time period for filing the Form 8-K. However, if the order is vacated prior to filing the Form 8-K, the issuer can provide details on the status of the order in the Form 8-K.

The Form 8-K, Item 1.04 reporting obligations apply to smaller reporting companies, but do *not* apply to foreign private issuers, who would not need to report the enumerated events on Form 6-K or 8-K, but would need to make the reports on a quarterly and annual basis as described above.

Trends in SEC Comments on Section 1503

While not conducted on a set schedule, as required by the Sarbanes-Oxley Act of 2002, the SEC reviews the SEC filings of public companies at least once every three years, and even more frequently for larger companies or companies who have experienced reporting challenges in the past. These periodic SEC reviews typically focus on issuers' reporting under the Securities Exchange Act of 1934 – i.e., the companies' most recent annual report Form 10-K and the quarterly reports on Form 10-Q, current reports on Form 8-K and proxy statements filed thereafter. The review process entails the SEC's issuance of a comment letter to the issuer with its concerns, and the issuer carefully responds to the SEC staff by a response letter. This correspondence becomes publicly viewable on the SEC's filing database, EDGAR, around 45 days after filing.

Therefore, inasmuch as Section 1503's requirements became effective approximately four years ago, affected mine operators that have been in continuous operation should by now have undergone at least one SEC review cycle since the effective date of the mine safety disclosure obligations. We have undertaken a comprehensive review of all relevant SEC comment correspondence since January 2010 – a few months prior to the enactment of Section 1503.

As one might suspect, the SEC is not an authority on mine safety and health law; it relies on MSHA for enforcement of applicable rules and regulations. Instead, the SEC is an authority on disclosure. Not surprisingly, we do not observe a significant uptick in SEC comments following the enactment of Section 1503 related to mine safety disclosures.

Overall, very few SEC comment letters of the last three and a half years include comments related to deficiencies or other concerns with mine safety disclosures – whether related to Section 1503 or otherwise. Of the modest number of substantive SEC comments and issuer responses regarding Section 1503 disclosure, most constitute a reminder by the SEC to mine operators of their disclosure obligations (or at the time, upcoming obligations) under Section 1503. Put simply, in the early days of compliance, a few issuers either did not appropriately include disclosure or they included it in the wrong location. In

limited other instances, the SEC issued comments asking issuers for missing Section 1503 disclosures, only to be corrected by such issuers that they were not operators of U.S. or U.S. territorial mines subject to Section 1503 disclosure.

Of the limited number of comments on the substance of provided disclosure, the SEC reiterated the clear requirements and instructions of the disclosure rules. Violations, orders, citations, assessments or legal actions cannot be omitted from disclosure under Section 1503 because the issuer finds such events to be immaterial. Disclosure is still required for each incident or event even if the issuer challenged or appealed the matter, though such disclosure could be supplemented with further discussion. Each legal action needed to be identified in the related category of action.

In one instance in our review we observed the SEC reaching below the surface of an otherwise apparently "complete" disclosure on Exhibit 95, requesting that the issuer reconcile the dollar value of a citation included in its table with a higher dollar value listed for such violation on the MSHA website. The issuer explained that the total assessment under the citation was issued by MSHA in two different calendar years.

Disclosure Obligations of Mine Safety and Health Issues Are Not Limited to Section 1503

Section 1503 does not represent the entirety of mine safety and health disclosures that a publicly traded mine operator or related entity might be required to provide under the securities laws. Indeed, mine safety issues can be material – and therefore disclosable in other portions of periodic reports – for a host of entities working in the mining industry, whether or not these entities qualify as mine operators, and whether or not their activities are conducted in the U.S.

Specifically, a public company in the mining industry should take care that its annual report on Form 10-K adequately addresses mine safety and health issues to the extent material or otherwise necessary for an understanding by investors of such company's operations, business, challenges, costs, and risks. The areas where these disclosures might appear in an annual report on Form 10-K or, as applicable, in a quarterly report on Form 10-Q include:

- In the Business section, details of the environmental, safety and health laws and regulations and proposed regulations applicable to the issuer, and the necessary permits, approvals and internal safety framework the issuer must maintain to comply with such regulations and operate a competitive and safe organization.
- In the Risk Factors section, details on the potential impact on the issuer's operations and financial performance based upon the costs of compliance with safety and health laws, actual safety and health violations, injuries or fatalities, and potential citations by MSHA and other regulating bodies.
- In the Legal Proceedings section, details of significant legal actions related to mine safety and health.
- In the Management's Discussion and Analysis section, details on the costs of compliance with safety and health regulations, including the costs of violations, assessments, and settlements and the losses related to injuries and fatalities.

Please note that unlike Section 1503, generally *materiality* does inform disclosure in connection with respect to these items.

Indeed, the SEC routinely scrutinized the disclosure of companies in the mining industry, well before the Dodd-Frank Act. Common SEC comments to mining companies prior to the effective date of Section 1503 related to requests for more detailed disclosures on:

- **The actual or potential losses, whether from fine, settlement or production delay, as a result of MSHA or other safety and health violations.**
- **The nature and extent of capital expenditures, safety programs, and statistical or other measures (including those reported to MSHA or other regulatory bodies) utilized by the issuer to monitor compliance with safety and health regulations.**
- **If providing statistics on safety and health, or claims of a positive safety performance, the related actual safety data and information from its facilities underlying such statistics or claims (including, for example, man-hours, fatalities, lost time, and reportable injuries broken out by facility or facility type) and any benchmarks or targets used in measurement.**
- **If operating internationally, comparisons of safety performance statistics reported to MSHA vs. other jurisdictions in which the issuer operates.**

Summary

In Section 1503 of the Dodd-Frank Act, Congress added more specific disclosure obligations in an effort to make mine safety and health statistics for operators of U.S. and U.S. territorial mines more transparent to the public. Almost four years on, affected companies appear to have adapted well to the additional disclosure requirements – with little challenge to the SEC and little difficulty in following the rules.

Beyond Section 1503, mine safety and health issues are important to the operations and, therefore, the financial performance of companies operating in the mining industry. As a result, an understanding of these issues is important for investors, and compliance with Section 1503 alone is not the only disclosure consideration for issuers. Mine operators should not only follow the clear requirements of Section 1503, but also continue to consider how their safety and health record, costs of compliance, losses from violations and other incidents have an impact on their business and financial results, and make thoughtful disclosures accordingly.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.