

## **SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PARTS 229, 239 and 249**

**[RELEASE NOS. 33-9286; 34-66019; File No. S7-41-10]**

**RIN 3235-AK83**

### **MINE SAFETY DISCLOSURE**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to our rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 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 Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

**DATES:** Effective Date: [insert date 30 days after publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Jennifer Zepralka, Senior Special Counsel, or Jennifer Riegel, Special Counsel, Division of Corporation Finance at (202) 551-3300, at the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are adding new Item 104 to Regulation S-K,<sup>1</sup> amending Item 601 of Regulation S-K,<sup>2</sup> and amending Forms 8-K,<sup>3</sup> 10-Q,<sup>4</sup> 10-K,<sup>5</sup> 20-F<sup>6</sup> and 40-

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<sup>1</sup> 17 CFR 229.10 et seq.

<sup>2</sup> 17 CFR 229.601.

F<sup>7</sup> under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>8</sup> In addition, we are amending General Instruction I.A.3(b) of Form S-3<sup>9</sup> under the Securities Act of 1933 (“Securities Act”).<sup>10</sup>

## **I. BACKGROUND AND SUMMARY**

On December 15, 2010, we proposed amendments to our rules and forms relating to mine safety disclosure.<sup>11</sup> We proposed these rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”).<sup>12</sup> Section 1503(a) of the Act requires issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose specified information about mine health and safety in their periodic reports filed with the Commission.<sup>13</sup> Section 1503(b) of the Act requires each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to file a current report on Form 8-K with the Commission reporting receipt of certain shutdown orders and notices of patterns or potential patterns of violations.<sup>14</sup>

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<sup>3</sup> 17 CFR 249.308.

<sup>4</sup> 17 CFR 249.308a.

<sup>5</sup> 17 CFR 249.310.

<sup>6</sup> 17 CFR 249.220f.

<sup>7</sup> 17 CFR 249.240f.

<sup>8</sup> 15 U.S.C. 78a et seq.

<sup>9</sup> 17 CFR 239.13.

<sup>10</sup> 15 U.S.C. 77a et seq.

<sup>11</sup> See Release No. 33-9164, 34-63548 (December 15, 2010) [75 FR 80374] (the “Proposing Release”).

<sup>12</sup> Pub. L. No. 111-203 (July 21, 2010).

<sup>13</sup> Section 1503(a) of the Act.

<sup>14</sup> Section 1503(b) of the Act.

As discussed in the Proposing Release, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Federal Mine Safety and Health Act of 1977 (the “Mine Act”),<sup>15</sup> which is administered by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”). Under the Mine Act, MSHA is required to inspect surface mines at least twice a year and underground mines at least four times a year<sup>16</sup> to determine whether there is compliance with health and safety standards or with any citation, order or decision issued under the Mine Act and whether an imminent danger exists. MSHA also conducts spot inspections<sup>17</sup> and inspections pursuant to miners’ complaints.<sup>18</sup> If violations of safety or health standards are found, MSHA inspectors will issue citations or orders to the mine operators. Among other activities under the Mine Act, MSHA also assesses and collects civil monetary penalties for violations of mine safety and health standards.<sup>19</sup> MSHA maintains a data retrieval system on its website that allows users to examine, on a mine-by-mine basis, data on inspections, violations, and accidents, as well as information about dust samplings, at all mines in the United States.<sup>20</sup>

In addition, an independent adjudicative agency, the Federal Mine Safety and Health Review Commission (the “FMSHRC”), provides administrative trial and appellate review of

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<sup>15</sup> 30 U.S.C. 801 et seq.

<sup>16</sup> 30 U.S.C. 813(a). Seasonal or intermittent operations are inspected less frequently. See Mine Safety and Health Administration, Program Policy Manual, Volume I, Section 103, available at <http://www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM>.

<sup>17</sup> 30 U.S.C. 813(i).

<sup>18</sup> 30 U.S.C. 813(g).

<sup>19</sup> 30 U.S.C. 820. See also “MSHA’s Statutory Functions” available at <http://www.msha.gov/MSHAINFO/MSHAINF1.HTM>.

<sup>20</sup> See <http://www.msha.gov/DRS/DRSHOME.HTM>.

legal disputes arising under the Mine Act.<sup>21</sup> Most cases deal with civil penalties proposed by MSHA to be assessed against mine operators and address whether the alleged safety and health violations occurred, as well as the appropriateness of proposed penalties. Other types of cases include miners' complaints of safety- or health-related discrimination and miners' applications for compensation after a mine has been idled by a closure order.<sup>22</sup> The FMSHRC's administrative law judges decide cases at the trial level and the five-member FMSHRC provides appellate review. Appeals from the FMSHRC's decisions are to the U.S. courts of appeals.<sup>23</sup>

The disclosure requirements set forth in Section 1503 of the Act are currently in effect.<sup>24</sup> Issuers have been providing disclosure in their periodic and current reports filed with the Commission since the effective date of Section 1503. However, the Act states that the Commission is "authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of [Section 1503]."<sup>25</sup> In order to facilitate consistent compliance with the Act's requirements by reporting companies, we proposed rule amendments that would implement the Act's requirements by codifying them into our disclosure rules and specifying their scope and application. We also proposed to require a limited amount of additional disclosure to provide context for certain items required by the Act.

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<sup>21</sup> 30 U.S.C. 815(d).

<sup>22</sup> See "About FMSHRC" on <http://www.fmshrc.gov/fmshrc.html>.

<sup>23</sup> 30 U.S.C. 816.

<sup>24</sup> See Section 1503(f) of the Act.

<sup>25</sup> Section 1503(d)(2) of the Act.

We received over 30 comment letters in response to the proposed amendments, and one letter, received prior to our proposal, relating to Section 1503 of the Act.<sup>26</sup> These letters came from investors and issuers, as well as professional and trade associations, trade unions, law firms and other interested parties. In general, the commentators supported the proposed amendments, although several commentators opposed some of the proposed amendments that would require additional disclosure to provide context to the information required by the Act. Many commentators suggested modifications or alternatives to the proposals.<sup>27</sup> As discussed in detail below, we have taken into consideration the comments received on the proposed amendments, as well as the staff's experience with the disclosure already being provided under Section 1503, and are adopting several amendments to our rules. In general, we have decided not to adopt the proposals that would have expanded the required disclosure beyond that required by Section 1503 since we are persuaded by comments asserting that the added burden of these proposed requirements likely would have outweighed the potential incremental benefits of the additional disclosure. The final rules we adopt today adhere closely to Section 1503 of the Act, and reflect changes made from the proposals in response to comments.

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<sup>26</sup> The public comments we received on the Proposing Release are available on our website at <http://www.sec.gov/comments/s7-41-10/s74110.shtml>. In addition, to facilitate public input on the Act, the Commission provided a series of e-mail links, organized by topic, on its website at <http://www.sec.gov/spotlight/regreformcomments.shtml>. The letter we received prior to publication of the Proposing Release on Section 1503 of the Act is available on our website at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml>.

<sup>27</sup> We received three comment letters noting Executive Order No. 13563 (Jan. 18, 2011), which instructs federal agencies to, among other things, minimize burdens on the private sector and simplify and harmonize their regulations. See letters from Industrial Minerals Association – North America (“IMA-NA”), National Stone, Sand, Gravel Association (“NSSGA”) and Wyoming Mining Association (“WMA”). As these commentators acknowledge, the Executive Order does not apply to the Commission. (We note that, subsequent to the submission of these comment letters, the President issued a comparable Executive Order, No. 13579 (July 11, 2011), directed to independent regulatory agencies.) However, these commentators assert that it would be within the spirit of the Executive Order if the final rules implemented Section 1503 by simply reiterating the statutory provision in the regulatory text of 17 CFR Parts 229, 239 and 249. While we are not adopting in its entirety the approach recommended by these commentators, as discussed in more detail in this release, we are modifying some of the disclosure requirements from the proposals so that the final rules adhere closely to the statutory text.

We are adopting amendments to Form 10-K, Form 10-Q, Form 20-F and Form 40-F to require the disclosure required by Section 1503(a) of the Act. We are adopting new Item 104 of Regulation S-K, which sets forth the disclosure requirements for Forms 10-Q and 10-K, and amending Item 601 of Regulation S-K to add a new exhibit to Form 10-K and Form 10-Q for provision of this information. We are also adopting 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, we are adding a new item to Form 8-K to implement the requirement imposed by Section 1503(b) of the Act, and amending Form S-3 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.

## **II. DISCUSSION OF THE AMENDMENTS**

### **A. Required Disclosure in Periodic Reports**

#### **1. Scope**

##### **a. Proposed Amendments**

Section 1503(a) of the Act mandates that specified disclosure be provided in each periodic report filed with the Commission by every issuer that is required to file reports with the Commission pursuant to Section 13(a) or 15(d) of 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 Mine Act.<sup>28</sup> The Act also

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<sup>28</sup> Section 1503(e)(3) of the Act. Section 3(d) of the Mine Act provides that an “operator” means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. 802.

specifies that the term “coal or other mine” means a coal or other mine as defined in Section 3 of the Mine Act,<sup>29</sup> that is subject to the provisions of the Mine Act.<sup>30</sup>

We proposed to include references to these definitions in new items of Regulation S-K, the instructions to a new item of Form 20-F and the notes to a new paragraph of General Instruction B of Form 40-F. The proposed rules did not provide for any other defined terms, but the Proposing Release noted our view that the definition of “subsidiary” in Item 1-02(x) of Regulation S-X<sup>31</sup> would apply to this disclosure in the absence of another definition.

The Proposing Release also explained that, because the Act’s definition of “coal or other mine” is limited to those mines that are subject to the provisions of the Mine Act, and the Mine Act applies only to mines located in the United States,<sup>32</sup> the proposed mine safety disclosure

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<sup>29</sup> Section 3(h) of the Mine Act:

(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid 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 includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

<sup>30</sup> Section 1503(e)(2) of the Act.

<sup>31</sup> Under Item 1-02(x) of Regulation S-X, a “subsidiary” of a specified person is “an affiliate controlled by such person directly, or indirectly through one or more intermediaries.” This definition is identical to the definition of “subsidiary” in Rule 12b-2 under the Exchange Act and Rule 405 under the Securities Act.

<sup>32</sup> The Mine Act covers each “coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine...” 30 U.S.C. 803. “‘Commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or

would be required only for coal or other mines (as defined in the Mine Act) located in the United States. Under the proposed rules, this disclosure would be made for each distinct mine covered by the Mine Act, and issuers would not be permitted to group mines by project or geographic region.

The proposed rules would include smaller reporting companies and foreign private issuers<sup>33</sup> within the scope of the rules implementing Section 1503(a) of the Act.

The Proposing Release requested comment on whether the special provisions of Form 10-K and Form 10-Q permitting the omission of certain information by wholly-owned subsidiaries and asset-backed issuers should apply to the proposed mine safety disclosure.

#### **b. Comments on the Proposed Amendments**

Many commentators supported the proposal to apply the disclosure requirements of Section 1503 only to mines that are subject to the Mine Act, and not to mines located outside the United States.<sup>34</sup> These commentators generally agreed with our view that references to the Mine Act in Section 1503 indicate that the statutory disclosures are required only for coal or other mines covered by the Mine Act. One commentator noted its belief that it would be impractical to apply the disclosure provisions to mines in jurisdictions other than the United States because there is no common mine safety regulatory approach across jurisdictions, and warned that an attempt to do so would yield inconsistent and confusing standards in terms of the

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between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof.” 30 U.S.C. 802(b). “‘State’ includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.” 30 U.S.C. 802(c).

<sup>33</sup> See the definition of “smaller reporting company” in 17 CFR 240.12b-2 and the definition of “foreign private issuer” in 17 CFR 240.3b-4.

<sup>34</sup> See letters from AngloGold Ashanti Limited (“AngloGold”), Barrick Gold Corporation (“Barrick Gold”), Cleary Gottlieb Steen & Hamilton LLP (“Cleary”), Davis Graham & Stubbs LLP (“DGS Law”), National Mining Association (“NMA”), New York State Bar Association (“NYSBA”) and Rio Tinto plc (“Rio Tinto”).

application of the standard both between companies and between operating locations.<sup>35</sup> Another commentator noted that, to the extent that mine safety information relating to an issuer’s non-U.S. mines is material, disclosure would be required under the Commission’s existing disclosure requirements.<sup>36</sup>

Other commentators, however, supported expanding the disclosure requirement to cover mines in all jurisdictions, noting their belief that the health and safety risks related to mines in all jurisdictions are as material to investors as health and safety concerns for U.S. mines,<sup>37</sup> and asserting that the data required to be disclosed under the Mine Act and Section 1503(a) is as readily available for an issuer’s non-U.S. mines as it is for U.S. mines.<sup>38</sup>

Several commentators supported the proposed rule that would require disclosure to be provided for each mine for which the issuer or a subsidiary of the issuer is an operator, on a mine-by-mine basis.<sup>39</sup> One commentator stated its view that the statutory language should be interpreted to be consistent with a group of operations considered a “mine” for purposes of Mine Act reporting.<sup>40</sup> Other commentators similarly noted that this is how operators report information to MSHA, so issuers would be able to prepare the required disclosure on a mine-by-mine basis without a significant administrative burden.<sup>41</sup>

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<sup>35</sup> See letter from Rio Tinto.

<sup>36</sup> See letter from AngloGold.

<sup>37</sup> See e.g., letters from California Public Employees’ Retirement System (“CalPERS”), EARTHWORKS’ No Dirty Gold Campaign (“EARTHWORKS”), Social Investment Forum (“SIF”) and Trillium Asset Management Corporation (“Trillium”).

<sup>38</sup> See letters from SIF and Trillium.

<sup>39</sup> See letters from American Federal of Labor and Congress of Industrial Organizations (“AFL-CIO”), Barrick Gold, EARTHWORKS, John H. Estess (“Estess”) and United Mine Workers of America (“UMWA”).

<sup>40</sup> See letter from Barrick Gold.

<sup>41</sup> See letters from AFL-CIO, Barrick Gold and UMWA.

Conversely, three commentators requested that the final rules specify that issuers may group all integrated facilities of a mine site when complying with the disclosure requirements of the Act, notwithstanding the fact that some of those facilities may have been issued separate mine identification numbers by MSHA.<sup>42</sup> These commentators claimed that doing so could help promote investor understanding because the health and safety information would then be reported in a manner consistent with the company’s reporting of operating and financial data in their periodic reports.<sup>43</sup>

We received a comment requesting that we clarify that only those orders and citations issued to mines with an MSHA identification number are to be included in the disclosure.<sup>44</sup> Similarly, a few commentators requested clarification that the final rules require disclosure only of orders and citations issued directly to mine operator issuers and their subsidiaries, and not to contractors or other entities operating at the mining site, who would have their own MSHA identification numbers.<sup>45</sup>

Several commentators agreed that it is appropriate for the definition of the term “subsidiary” for purposes of Section 1503 to be consistent with the meaning of the term as defined under Item 1-02(x) of Regulation S-X, and supported our proposal not to adopt a different definition of “subsidiary.”<sup>46</sup> One of these commentators suggested that this definition

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<sup>42</sup> See letters from Freeport-McMoRan Copper and Gold Inc. (“Freeport-McMoRan”), NMA and Rio Tinto.

<sup>43</sup> See letters from Freeport-McMoRan and NMA.

<sup>44</sup> See letter from NMA.

<sup>45</sup> See letters from Barrick Gold and DGS Law.

<sup>46</sup> See letters from AngloGold, Cleary, Estess, NMA, Rio Tinto, SIF and Trillium.

should be specified in the new rules.<sup>47</sup> However, one commentator stated that the definition of subsidiary and entity under the control of the corporation must be comprehensive and should include unconsolidated equity investees and joint ventures.<sup>48</sup>

Commentators generally concurred with our proposal that smaller reporting companies should not be exempted from the disclosure requirements, generally noting that Section 1503 of the Act does not contemplate an exception from disclosure for smaller reporting companies.<sup>49</sup> Similarly, commentators generally agreed with the proposal that foreign private issuers should not be exempted from the disclosure requirement.<sup>50</sup> Many commentators expressed the view that Section 1503 of the Act does not contemplate any exception from disclosure for foreign private issuers,<sup>51</sup> while others asserted that foreign private issuers are as likely to have risks associated with worker safety issues as domestic reporting companies and therefore should be required to report the same information.<sup>52</sup>

Commentators had differing views on whether either wholly-owned subsidiaries or asset-backed issuers should be permitted to omit the proposed mine safety disclosure in accordance with the special provisions in General Instruction I to Form 10-K and General Instruction H to Form 10-Q. Two commentators argued that wholly-owned subsidiaries should be permitted to

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<sup>47</sup> See letter from Estess.

<sup>48</sup> See letter from EARTHWORKS.

<sup>49</sup> See e.g., letters from AFL-CIO, CalPERS, California State Teachers' Retirement System ("CalSTRS"), EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA. One commentator agreed that smaller reporting companies should be required to provide the disclosure, but noted concerns about the costs of compliance for smaller reporting companies and suggested the Commission consider a simpler disclosure system for such companies. See letter from Estess.

<sup>50</sup> See letters from CalPERS, CalSTRS, DGS Law, EARTHWORKS, NMA, Rio Tinto, SIF and Trillium.

<sup>51</sup> See letters from DGS Law, NMA and Rio Tinto.

<sup>52</sup> See letters from SIF and Trillium.

omit the disclosure if the information is disclosed by the wholly-owned subsidiary's parent entity.<sup>53</sup> Other commentators stated their view that the special provisions should not apply.<sup>54</sup>

### **c. Final Rule**

We are adopting the final rules as proposed, with a clarifying change to the instructions regarding the definition of the term “subsidiary.” The final rules apply only to mines in the United States. Although we have considered the views of commentators that request application of the disclosure requirement to non-U.S. mines, we continue 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. We also agree 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. Although the final rules are limited to implementing the requirements of the Act and, therefore, do not extend to foreign mines, we reiterate, as noted in the Proposing Release, that to the extent mine safety issues are material, under our current 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. We continue to believe that the disclosure of the information on a mine-by-mine basis accords with the plain language of the

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<sup>53</sup> See letters from NMA and NYSBA.

<sup>54</sup> See letters from Estess and EARTHWORKS (neither wholly-owned subsidiaries nor asset-backed issuers should be permitted to omit the information); SIF and Trillium (no reason for exemptions for asset-backed issuers); and AFL-CIO and UMWA (information of wholly-owned subsidiaries should not be excluded).

Act. We understand the concern raised by commentators about groupings of mines that may more logically be reported together but for having separate MSHA mine identification numbers. However, we note 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. MSHA has a detailed process for assigning identification numbers.<sup>55</sup> We believe it is more appropriate to require disclosure for each specific identified mine, consistent with MSHA reporting, as well as with Section 1503.

We note that orders and citations issued to independent contractors (who are not subsidiaries of the issuer) who are working at the issuer's mine site would not need to be reported by the issuer. This is consistent with the approach discussed above, under which the reporting will be for each mine that has an MSHA identification number, and is consistent with the Act's use of terms defined in the Mine Act. The definition of "operator" in the Mine Act includes independent contractors. Therefore, we note that independent contractors that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and are operators, or have a subsidiary that is an operator, of a coal or other mine would need to include the disclosure required by Section 1503 and our new rules in their reports. We recognize that the result of this approach could be some orders or citations will go unreported if the independent contractor is not a reporting company, but believe this approach is consistent with the way MSHA reports orders and citations, as well as with Section 1503. We note that if individual orders or citations, or a pattern of violations, at mines owned by an issuer but operated

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<sup>55</sup> See MSHA Program Policy Manual Volume III. 41-1. For example, for coal mines, preparation plants that receive coal from only one underground or surface mine, and are located on the same property as that mine, share the mine's identification number, but preparation plants that share mine property with a surface or underground mine, but process coal from other mines, are to be given separate identification numbers.

by an independent contractor are material to the issuer, disclosure could be required under our existing rules pursuant to the applicable items of Regulation S-K.

The final rules will include an instruction noting that “subsidiary” is as defined in Exchange Act Rule 12b-2. This definition is identical to the definition of “subsidiary” found in Securities Act Rule 405 and Regulation S-X Item 1-02(x), which apply to other elements of issuers’ periodic disclosure. As stated in Rule 12b-2, a subsidiary of a specified person is “an affiliate controlled by such person directly, or indirectly through one or more intermediaries.” Issuers are accustomed to applying this definition in connection with their periodic reporting and we do not see a benefit to adding to issuers’ compliance burden by specifying a different definition of “subsidiary” in the context of mine safety disclosure. We considered the suggestion raised by a commentator that “subsidiary” should be defined to specifically encompass unconsolidated equity investees and joint ventures. However, we believe that such an approach is inconsistent with the plain meaning of the term “subsidiary.”

The final rules do not provide special treatment to smaller reporting companies or foreign private issuers. We continue 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, we note that these issuers have been complying with the Section 1503 disclosure requirements since the effective date of that provision.

The final rules do not extend the special provisions of Form 10-K and Form 10-Q that permit the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Many commentators stated, and we agree, that such treatment is not necessary for the mine safety disclosure requirement. Section 1503 of the Act applies broadly to “each issuer that is required to file reports pursuant to” the Exchange Act, and does not appear to contemplate

special treatment for particular types of issuers. We are making technical amendments to General Instructions I and J to Form 10-K and General Instruction H to Form 10-Q to delete the references to “Item 4, Submission of Matters to a Vote of Security Holders.”

## 2. Location of Disclosure

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.

### **a. Proposed Amendments**

In order to implement the disclosure requirement set forth in Section 1503(a) of the Act, we proposed to add new Item 4 to Part II of Form 10-Q and new Item 4(b) to Part I of Form 10-K, which would require the information required by new Items 106 and 601(b)(95) of Regulation S-K; new Item 16J to Form 20-F; and new Paragraph (18) of General Instruction B of Form 40-F. As proposed, these items would be identical in substance and entitled, “Mine Safety Disclosure.” The proposed items would require issuers to provide in their periodic reports and in exhibits to their periodic reports the information listed in Section 1503(a) of the Act and certain additional disclosure designed to provide context for such information.

The proposed rules would require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in the body of the periodic report 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 would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in the proposed rules. The Proposing Release noted our view that this approach would facilitate access to the information about detailed mine safety matters without overburdening the traditional Exchange Act reports with extensive new disclosures.

We did not propose any particular presentation requirements for the new disclosure, although the Proposing Release encouraged issuers to use tabular presentations whenever possible, if to do so would facilitate investor understanding.

#### **b. Comments on the Proposed Amendments**

A broad spectrum of commentators supported the Commission's proposal to require the information to be presented in an exhibit to the periodic report, with brief disclosure in the body of the report noting that the issuer has mine safety matters to report and referring to the required exhibit.<sup>56</sup> We did not receive any comments opposing this approach, although two commentators requested that certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations, be required to be included in the body of the periodic report so that investors would be made aware of significant events without looking to the exhibit.<sup>57</sup>

The Proposing Release requested comment on whether it would be preferable, and consistent with Section 1503, to provide for annual reporting only, instead of requiring the disclosure in every periodic report. Although a few commentators stated a belief that annual reporting would be preferable to quarterly reporting,<sup>58</sup> generally the commentators agreed that Section 1503(a) requires the mine safety disclosures to be included in each periodic report filed with the Commission.<sup>59</sup>

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<sup>56</sup> See letters from AFL-CIO, AngloGold, Chevron Corporation (“Chevron”), Cleary, Freeport-McMoRan, Estess, NMA, NYSBA, Rio Tinto and UMWA.

<sup>57</sup> See letters from AFL-CIO and UMWA.

<sup>58</sup> See, e.g., letters from Chevron and NSSGA. One commentator suggested that the Form 10-Q reporting requirement could be met by allowing issuers to incorporate by reference the required information from MSHA’s data retrieval system and provide specific instructions as to how to access the information. See letter from Freeport-McMoRan.

<sup>59</sup> See, e.g., letters from Chevron, Estess and NMA.

We requested comment on whether the information required by Section 1503 should be included in registration statements, in addition to the periodic reporting requirement. Many commentators stated that the disclosure should not be included in registration statements, noting that Section 1503 specifies only that the disclosure is required in periodic reports.<sup>60</sup> However, two commentators stated their view that the disclosure should be required in registration statements.<sup>61</sup> On a related note, although we did not specifically request comment on the topic, we received a small number of comments expressing a view on whether the disclosure required under Section 1503(a) and the new rules should be filed with the Commission or instead deemed to be furnished, not filed.<sup>62</sup> Commentators who argued for the information to be “furnished” asserted that, because in their view the Section 1503 disclosure requirements are not aimed at providing investors with information material to investment decisions, Exchange Act Section 18 should not apply, the Section 1503 information should not be incorporated into any Securities Act filing, and the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 should not extend to the Section 1503 disclosures.<sup>63</sup> However, other commentators expressed their view that information about health and safety risks related to mines operated by issuers is material to investors.<sup>64</sup>

Some commentators approved of the flexibility of the proposed rules, which did not specify any particular presentation requirements for the new disclosure and permitted each issuer

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<sup>60</sup> See letters from AngloGold, Cleary, DGS Law, NMA, NYSBA and Rio Tinto.

<sup>61</sup> See letters from EARTHWORKS and Estess.

<sup>62</sup> See letters from EARTHWORKS, SIF and Trillium (filed); and Cleary, NYSBA (furnished).

<sup>63</sup> See, e.g., letter from NYSBA.

<sup>64</sup> See letters from SIF and Trillium.

the flexibility to adopt a presentation it believes is appropriate for its disclosure.<sup>65</sup> An equal number of commentators, however, expressed a preference for requiring a specific tabular presentation.<sup>66</sup> One commentator stated that a specific tabular presentation would more readily allow an investor to compare results from different owners or operators and individual mines.<sup>67</sup> Another commentator requested that we provide an example of an acceptable presentation or format, stating that a specific tabular presentation format would be helpful to ensure the required information is presented in the correct form.<sup>68</sup>

Commentators generally were of the view that the Commission should not require the information to be provided in an interactive data format.<sup>69</sup> Among the reasons cited for this view was that requiring interactive data could make the reporting more complex and add costs to the system.<sup>70</sup> Another commentator noted its view that the purpose of the Commission's existing XBRL rules is to facilitate financial analysis by investors, and therefore asserted that requiring the Section 1503 information, which is non-financial in nature, to be submitted in interactive data format would not be consistent with this purpose.<sup>71</sup> A few commentators, however, expressed a preference that the disclosure be tagged in XBRL.<sup>72</sup>

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<sup>65</sup> See letters from AngloGold, Cleary, IMA-NA, NMA and WMA.

<sup>66</sup> See letters from Estess, NSSGA, Rio Tinto, SIF and Trillium.

<sup>67</sup> See letter from Rio Tinto.

<sup>68</sup> See letter from Chevron.

<sup>69</sup> See letters from AngloGold, Chevron, Cleary, DGS Law, Estess, NMA, NSSGA and Rio Tinto.

<sup>70</sup> See letter from Estess.

<sup>71</sup> See letter from AngloGold.

<sup>72</sup> See letters from AFL-CIO, SIF, Trillium and UMWA.

### **c. Final Rule**

After considering comments received, we are adopting the final rules substantially as proposed, with minor technical changes. We are amending Form 10-Q to add new Item 4 to Part II and Form 10-K to add new Item 4 to Part I, which would require the information required by new Items 104 and 601(b)(95) of Regulation S-K; Form 20-F to add new Item 16H; and Form 40-F to add new Paragraph (16) of General Instruction B. As discussed in more detail below, the disclosure is required to be provided in each periodic report.<sup>73</sup>

As proposed, the amendments will require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in Part II of Form 10-Q, Part I of Form 10-K and Forms 20-F and 40-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 would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in our new rules. Many issuers have already implemented this approach in their periodic reports that contain the disclosure required under Section 1503(a). Consistent with the proposal, the final rule does 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.<sup>74</sup> We do not believe it is necessary to require this additional disclosure in order to implement Section 1503; and we reiterate, as noted in the Proposing Release, that 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

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<sup>73</sup> See Section II.A.3 below for a discussion of time periods covered.

<sup>74</sup> We note that under Section 1503(b), receipt of a notice from MSHA that a mine has a pattern of violations is a triggering event that would require disclosure on Form 8-K within four business days of receipt of the notice, as reflected in the new Form 8-K item we are adopting today.

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 amended rules, as proposed, do not specify any particular presentation requirements for the new disclosure, but we continue to encourage issuers to use tabular presentations whenever possible if to do so would facilitate investor understanding. Many issuers are currently providing the disclosure required by Section 1503(a) in tabular format in their periodic reports. We agree with commentators who suggested that the Commission’s provision of an example of a possible tabular presentation may encourage uniformity and comparability of disclosures. After considering the comments received and examining current disclosure practices, we are including the below example of a potential tabular presentation. However, we note that issuers are free to present the required information in any presentation they believe is appropriate for the disclosure.

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

The use of footnotes, accompanying narrative disclosure or additional tables may also help to clarify information provided, as appropriate. For example, issuers choosing to use a tabular presentation similar to the one above may provide the additional detail described below that our final rules require about types of legal actions<sup>75</sup> in footnotes, accompanying narrative disclosure or an additional table.

<sup>75</sup> See new Item 104(a)(3) of Regulation S-K; Item 16H(c) of Form 20-F; Paragraph 16(c) of General Instruction B of Form 40-F; and the discussion in Section II.A.4.d(3) below.

We are not adopting a requirement to 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, we believe that the added costs of imposing such a requirement would likely not be justified by the potential benefits to investors of having access to the information in interactive format.

The final rules require the disclosure in each periodic report filed with the Commission, and such disclosure will be considered “filed,” not “furnished.” We believe 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, Section 18 of the Exchange Act will apply and the disclosure is encompassed by the Exchange Act Rule 13a-14 and 15d-14 certifications. In addition, 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.

### 3. 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.”

#### **a. Proposed Amendments**

We proposed that each Form 10-Q would be required to include the required disclosure for any orders or citations received, penalties assessed, legal actions initiated or mining-related fatalities that occurred during the quarter covered by the report.<sup>76</sup> We also proposed that each

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<sup>76</sup> As noted in Sections II.A.4.b(1) and II.A.4.d(1) below, we also proposed to require disclosure of the total amounts of assessments of penalties outstanding as of the last day of the quarter and of any developments material to previously reported legal actions that occur during the quarter.

Form 10-K would be required to include disclosure covering both the fourth quarter of the issuer's fiscal year and cumulative information for the entire fiscal year. For each of Forms 20-F and 40-F, the disclosure would be required for the issuer's fiscal year.

In addition, the Proposing Release noted that, based on the language of Section 1503(a) of the Act, the proposed rule would not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently were dismissed or reduced. The proposed rules did not prohibit the inclusion of additional information, such as an explanation that certain orders or citations were dismissed or reduced.

#### **b. Comments on the Proposed Amendments**

There was support from commentators for the proposal to require an annual report on Form 10-K to include disclosures for orders, citations, assessments, legal actions and fatalities for the fourth quarter and also on an aggregate basis for the whole year.<sup>77</sup> Some of these commentators stated that it is important for investors to learn of trends in order to understand material changes in a mine's health and safety record, and that requiring the information for both the fourth quarter and the whole year would help reveal such trends.<sup>78</sup> However, other commentators expressed concerns about this aspect of the proposed rule.<sup>79</sup> These commentators argued that requiring issuers to include both fourth quarter and annual information would be unnecessary because to do so would not provide investors with additional significant information.<sup>80</sup> Some of these commentators asserted that the disclosure in the Form 10-K should

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<sup>77</sup> See letters from AFL-CIO, EARTHWORKS, Estess, SIF, Trillium and UMWA.

<sup>78</sup> See letters from AFL-CIO and UMWA.

<sup>79</sup> See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, and NMA. NYSBA and Rio Tinto.

<sup>80</sup> See, e.g., letter from Freeport-McMoRan.

cover only the fiscal year.<sup>81</sup> Others preferred that the disclosure cover only the fourth quarter, which would provide the information disclosed on Form 10-K in a comparable period to the quarterly report on Form 10-Q.<sup>82</sup>

With respect to the disclosure of orders or citations that are dismissed or reduced in severity below the level that triggers disclosure under Section 1503(a), the comments were mixed. Many of the commentators supported the Commission's proposal that issuers should not be allowed to exclude such orders or citations from the disclosure.<sup>83</sup> One commentator stated that it would be simpler for the issuer to report all orders and citations received, rather than taking on the burden of reviewing the information at a later date to remove those that were reduced or dismissed. This commentator also noted that MSHA's summary data does not account for dismissals, and raised a concern that allowing issuers to omit dismissed orders and citations could result in confusion for those who refer to MSHA's site to compare the information.<sup>84</sup>

On the other hand, other commentators requested that the final rules allow issuers to exclude from disclosure orders or citations that have been subsequently dismissed or reduced below a reportable level prior to filing the periodic report.<sup>85</sup> One commentator asserted that such an approach would be consistent with the purposes of Section 1503, which the commentator characterized as providing accurate disclosure of violations that continue to be asserted or have

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<sup>81</sup> See letters from Chevron, Freeport-McMoRan and Rio Tinto.

<sup>82</sup> See letters from Cleary, DGS Law, NMA and NYSBA.

<sup>83</sup> See letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, J. Estess, SIF, Trillium and UMWA.

<sup>84</sup> See letter from Chevron.

<sup>85</sup> See letters from Barrick Gold, DGS Law, Freeport-McMoRan, NMA, NSSGA and Rio Tinto.

been adjudicated, rather than requiring disclosure of matters that the FMSHRC has dismissed or reduced below a reportable level.<sup>86</sup> Another commentator noted that vacated citations are removed entirely from MSHA’s data retrieval system.<sup>87</sup>

Although comments were mixed on the disclosure of dismissed or reduced orders or citations, most of the commentators supported the Commission’s approach of permitting issuers to include additional information and disclosures, such as disclosure of orders or citations that the issuer is contesting or annotated disclosure providing information about the status of such orders or citations.<sup>88</sup>

### **c. Final Rule**

We are adopting the final rule with some modifications from the proposal. Consistent with the proposal, the final rule requires each Form 10-Q to include the required disclosure for the quarter covered by the report. For each of Forms 20-F and 40-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.

We are persuaded by commentators that requiring information about both the fourth quarter and the entire year in the Form 10-K would add incrementally to the burden of the rule, is not required by the Act, and may not add significant useful information to the report. We believe the approach we are adopting is consistent with the Act, which requires disclosure in each periodic report “for the time period covered by the report,” because the Form 10-K covers the

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<sup>86</sup> See letter from Freeport-McMoRan.

<sup>87</sup> See letter from DGS Law.

<sup>88</sup> See letters from AngloGold, Barrick Gold, CalPERS, CalSTRS, Chris Barnard (“Barnard”), Estess, NYSBA, Portland Cement Association (“PCA”), SIF, Trillium and UMWA.

fiscal year. While requiring both full year and fourth quarter data might provide some incremental additional useful information, we do not believe it is necessary to implement Section 1503 or that the benefits of the additional disclosure would clearly justify the burden of preparing it. Among issuers that have provided disclosure under the Act in their most recent annual report on Form 10-K, practices were mixed, with some providing the information for both the fourth quarter and the complete fiscal year, some providing the information for the complete fiscal year, and a minority providing the information for only the fourth quarter. Although we acknowledge that certain limited information is currently reported for the fourth quarter only in Form 10-K, we believe that the requirement to provide full-year information in the Form 10-K is more appropriate because it is consistent with the general Form 10-K requirement to report results as of the issuer's fiscal year-end.<sup>89</sup> We note 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.

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.<sup>90</sup> Although we understand that, because mine operators have the right to contest orders or citations they receive through the administrative process,<sup>91</sup> there is a possibility an operator's challenge would result in dismissal of the order or citation or in a reduction in the severity of the order or citation below the level that triggers disclosure under Section 1503(a), we believe the language of Section 1503(a) of the Act dictates that all orders or citations received

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<sup>89</sup> See Articles 3 and 8 of Regulation S-X (17 CFR 210.3 and 210.8).

<sup>90</sup> The final rule also does not allow issuers to exclude information about orders or citations that it is contesting. See the detailed discussion of this topic under Section II.A.4.b below.

<sup>91</sup> See 30 U.S.C. 815(d).

from MSHA be disclosed. However, as supported by most commentators, the rule does not prohibit the inclusion of additional disclosure with regard to the status of orders or citations received. As noted in the Proposing Release, we would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such information.

#### 4. Required Disclosure Items

Section 1503(a) of the Act includes a list of items required to be disclosed in periodic reports. We proposed that those items be reiterated in proposed Item 106 of Regulation S-K.<sup>92</sup> As discussed in more detail below, we also proposed instructions to certain of the disclosure items specified in Section 1503(a) to clarify the scope of the disclosure we would expect issuers to provide in order to comply with the statute's requirements and proposed one additional disclosure item not required by the Act. We discuss each proposed disclosure item below. Those disclosure items on which we received little or no comment are discussed at the end of this section.

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<sup>92</sup> In this release, we reference proposed Item 106 of Regulation S-K when discussing the proposed disclosure requirements, but note that the same analyses apply to the corresponding provisions in proposed Item 16J of Form 20-F and proposed Paragraph (18) of General Instruction B of Form 40-F, which are identical in all respects. The same approach applies to the references in this release to the final rules we are adopting as Item 104 of Regulation S-K, Item 16H of Form 20-F and Paragraph (16) of General Instruction B of Form 40-F.

- a. 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 MSHA.

### **(1) Proposed Amendments**

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.<sup>93</sup> 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).<sup>94</sup> In writing each citation or order, the MSHA inspector determines whether the violation is “S&S” or not.<sup>95</sup> The MSHA data retrieval system currently provides information about all citations and orders issued, and notes which of those citations or orders are “S&S.”<sup>96</sup>

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<sup>93</sup> 30 U.S.C. 814.

<sup>94</sup> Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1 (January 1984). See also MSHA Program Policy Manual February 2003 (Release I-13) Vol. 1, p.21, located at <http://www.msha.gov/regs/complian/ppm/PDFVersion/PPM%20Vol%20I.pdf> (“MSHA Program Policy Manual Vol. 1”) which provides guidelines for interpreting Section 104(d)(1) and (e)(1) of the Mine Act [30 U.S.C. 814(d)(1) and (e)(1)]. In determining whether conditions created by a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, inspectors must determine whether there is an underlying violation of a mandatory health or safety standard, whether there is a discrete safety or health hazard contributed to by the violation, whether there is a reasonable likelihood that the hazard contributed to will result in an injury or illness, and whether there is a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. *Id.*

<sup>95</sup> MSHA Program Policy Manual Vol. 1, p. 23.

<sup>96</sup> The MSHA data retrieval system can be accessed at <http://www.msha.gov/drs/drshome.HTM>. Vacated citations and orders are removed from the data retrieval system.

The proposed rules would require disclosure under this item of all citations received under Section 104 of the Mine Act that note an S&S violation. We requested comment on whether the final rules should instead require disclosure of all citations received under Section 104.

## **(2) Comments on the Proposed Amendments**

Most commentators supported the proposal to limit the required disclosure to S&S violations.<sup>97</sup> Commentators stated that such an approach is consistent with the explicit language of the Act, and asserted that expanding the requirement to all violations under Section 104 of the Mine Act would not be useful to investors and could detract from the information required by the Act.<sup>98</sup> However, a few commentators expressed the view that all Section 104 violations should be disclosed in order to provide full disclosure to investors.<sup>99</sup>

## **(3) Final Rule**

We are adopting the provision as proposed. We continue 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. We agree with commentators that expanding the disclosure requirement to include non-S&S violations under Section 104 of the Mine Act would expand the scope of the disclosure beyond that called for by Section 1503 of the Act and likely would not

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<sup>97</sup> See letters from AFL-CIO, AngloGold, Chevron, Cleary, NMA, NYSBA, PCA, Rio Tinto and UMWA.

<sup>98</sup> See letters from NMA and Rio Tinto.

<sup>99</sup> See letters from Estess, SIF and Trillium.

result in additional useful information being provided to investors that would justify the increased burdens on issuers.

b. The total dollar value of proposed assessments from MSHA under the Mine Act.

**(1) Proposed Amendments**

Section 1503(a)(1)(F) requires issuers to disclose, for each mine, the “total dollar value of proposed assessments from [MSHA] under the [Mine] Act.” The issuance of a citation or order by MSHA typically results in the assessment of a civil penalty against the mine operator. Penalties are assessed according to a formula that considers several factors, including a history of previous violations, size of operator’s business, negligence by the operator, gravity of the violation, operator’s good faith in trying to correct the violation promptly and the effect of the penalty on the operator’s ability to stay in business.<sup>100</sup> When any civil penalty is proposed to be assessed by MSHA, the mine operator has 30 days following receipt of the notice of proposed penalty to pay the penalty or file a contest and request a hearing before an FMSHRC administrative law judge.<sup>101</sup>

The proposed rules would require that issuers disclose the total dollar amount of assessments of penalties proposed by MSHA during the time period covered by the report. Under the proposals, the disclosure would also include the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. As proposed, this disclosure would include any dollar amounts of penalty assessments proposed during the time period that the issuer is contesting with the FMSHRC, although issuers would

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<sup>100</sup> 30 U.S.C. 815(b)(1)(B).

<sup>101</sup> See 30 CFR § 100.7. If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the FMSHRC and is not subject to review by any court or agency.

not be prohibited from including additional information noting that certain proposed assessments of penalties are being contested.

## **(2) Comments on the Proposed Amendments**

Some commentators approved of the proposal to require the total dollar amount of proposed penalties assessed by MSHA during the time period covered by the report as well as the cumulative total of all proposed assessments of penalties outstanding as of the date of the report.<sup>102</sup> However, several other commentators expressed concerns about the proposal, in particular about the proposed requirement to disclose cumulative amounts of penalties outstanding as of the date of the report.<sup>103</sup> Commentators noted that such disclosure is not required by Section 1503 and asserted that such a requirement would go beyond the scope of the Act.<sup>104</sup> Some commentators expressed concern that the requirement could lead to inquiries to reconcile period-to-period changes,<sup>105</sup> and asserted that the disclosure would not necessarily be indicative of an issuer's safety record during the reporting period, but rather the issuer's decisions to pay or contest assessments.<sup>106</sup>

Several commentators agreed with the proposal that issuers should be required to include in the total dollar amount reported any proposed assessments of penalties that are being contested.<sup>107</sup> Some commentators expressed a concern that allowing issuers to omit contested matters until they are deemed final could provide an incentive for operators to contest MSHA

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<sup>102</sup> See letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

<sup>103</sup> See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA and NYSBA.

<sup>104</sup> See, e.g., letters from Cleary, Freeport-McMoRan, NMA and Rio Tinto.

<sup>105</sup> See letters from Chevron and DGS Law.

<sup>106</sup> See letters from Chevron and Cleary.

<sup>107</sup> See letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, Estess, SIF, Trillium and UMWA.

enforcement actions, which they believe would be contrary to public policy and could increase MSHA's backlog of pending cases.<sup>108</sup> Other commentators expressed concerns about this proposed requirement, and requested that the final rules permit issuers to exclude proposed assessments of penalties that are being contested.<sup>109</sup> Among the reasons asserted in support of such an approach is the commentators' view that requiring issuers to include proposed assessments of penalties that are being contested in the total dollar amount reported could, in essence, amount to denial of due process for the issuer because reporting such information has the potential to cause reputational harm for the issuer before resolution of the matter has been reached.<sup>110</sup>

Commentators generally agreed that if contested amounts are required to be reported, issuers should be permitted to note the contested amounts.<sup>111</sup> Some of these commentators asserted that contested amounts should be permitted to be reported separately.<sup>112</sup> Others agreed with the Commission's proposal to require disclosure of one total dollar amount that encompasses both contested and uncontested amounts, but were of the view that issuers should be permitted to provide additional disclosure to explain contested amounts if they choose.<sup>113</sup>

We received two comment letters suggesting that the disclosure required by this item should be limited to those penalties proposed for the type of violations required to be disclosed

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<sup>108</sup> See letters from AFL-CIO and UMWA.

<sup>109</sup> See letters from Barrick Gold, NMA and Rio Tinto.

<sup>110</sup> See letters from Barrick Gold and NMA.

<sup>111</sup> See letters from AFL-CIO, AngloGold, Chevron, NMA, Rio Tinto and UMWA.

<sup>112</sup> See letters from AngloGold and NMA.

<sup>113</sup> See letters from AFL-CIO, Chevron, Rio Tinto and UMWA.

under Section 1503(a), rather than for all penalties proposed during the time period.<sup>114</sup> These commentators stated their view that requiring disclosure of all penalties – not only those that relate to actions that have to be reported under Section 1503 – would go beyond the requirements of the Act and increase the burdens on issuers in preparing this disclosure.

### **(3) Final Rule**

We are adopting 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 must include the dollar amount of assessments proposed by MSHA during the fiscal year.

We are not adopting 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, we are persuaded that expanding the disclosure requirement in this manner beyond the scope of the Act is not necessary and likely would not result in additional useful information being provided to investors that would justify the increased burden on issuers. We note that the cumulative total of all outstanding assessments as of the last day of the reporting period is not mandated by Section 1503 of the Act, which requires, “for the time period covered by the report...the total dollar value of proposed assessments from the Mine Safety and Health Administration under [the Mine Act].” In addition, we believe the final rule is consistent with the information many issuers are currently providing in their periodic reports to comply with the Act.

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<sup>114</sup> See letters from Oxford Resources Partners LP and Rio Tinto.

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. We acknowledge commentators' concerns about the potential for reputational harm from disclosing proposed assessments before they are final, but we believe that the language of Section 1503 requires disclosure of all such proposed assessments. In addition, we note that information about proposed assessments that are being contested is already available on MSHA's website. We note that issuers may include additional disclosure explaining the status of these orders, citations and 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.

c. The total number of mining-related fatalities.

**(1) Proposed Amendments**

Section 1503(a)(1)(G) of the Act requires issuers to disclose, for each mine, "the total number of mining-related fatalities." Under the proposed rules, the requirement to disclose mining-related fatalities would apply to fatalities at mines that are subject to the Mine Act and not to mining-related fatalities in other jurisdictions. As proposed, issuers would report all such fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be "non-chargeable" to the mining industry.<sup>115</sup>

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<sup>115</sup> See Section II.A.4.f of the Proposing Release [75 FR 80374 at 80379] for a discussion of MSHA's process for determining whether a fatality is "non-chargeable" to the mining industry.

## (2) Comments on the Proposed Amendments

Several commentators supported the proposal to require disclosure of mining-related fatalities only at mines that are subject to the Mine Act.<sup>116</sup> Many of these commentators noted that this interpretation is consistent with the scope of Section 1503(a), which by its terms applies to mines that are subject to the Mine Act.<sup>117</sup> Commentators also raised concerns that if the disclosure requirement were to be expanded to cover mining-related fatalities outside of the United States, it would be difficult to apply a standard for what constitutes a “mining-related” fatality in non-U.S. jurisdictions.<sup>118</sup>

Other commentators stated that reporting on mining-related fatalities should apply to all mines operated by an issuer (or a subsidiary of the issuer) that files periodic reports with the Commission, regardless of the location of the issuer’s mines worldwide.<sup>119</sup> Two of these commentators asserted that such information is material to investors and to the issuer.<sup>120</sup> The majority of the commentators who recommended applying the disclosure requirement to all mining-related fatalities regardless of the location of the mine also recommended that the MSHA framework should be applied to non-U.S. mining-related fatalities for reporting purposes.<sup>121</sup>

Several commentators concurred with the Commission’s proposal to require disclosure of all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been

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<sup>116</sup> See letters from AngloGold, Barrick Gold, Cleary, Estess, NMA, NYSBA and Rio Tinto.

<sup>117</sup> See letters from AngloGold, Cleary, NMA, NYSBA and Rio Tinto.

<sup>118</sup> See letters from AngloGold, Estess, NMA and Rio Tinto.

<sup>119</sup> See letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

<sup>120</sup> See letters from SIF and Trillium.

<sup>121</sup> See letters from AFL-CIO, Estess, SIF, Trillium and UMWA.

determined to be “non-chargeable” to the mining industry.<sup>122</sup> Two commentators stated that an instruction should be added to the rule specifying this interpretation of the disclosure requirement.<sup>123</sup> Two commentators also recommended that we add an instruction to the rule clarifying that fatalities are not required to be disclosed while under review by MSHA’s Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, and that if the fatality is ultimately determined to be chargeable, the issuer would include it in its next periodic report.<sup>124</sup> Similarly, other commentators asserted that it would be appropriate to require disclosure only of fatalities that, as of the last day of the reporting period, have been determined to be “chargeable” by MSHA’s Fatality Review Committee.<sup>125</sup>

Other commentators stated that all fatalities should be required to be disclosed, whether chargeable or non-chargeable,<sup>126</sup> but noted that issuers should be permitted to explain non-chargeable incidents in their reports.<sup>127</sup>

### **(3) Final Rule**

After consideration of the comments received, we are adopting the final rule as proposed, with an added instruction specifying that fatalities determined by MSHA not to be mining-related may be excluded.

The final rule requires disclosure of mining-related fatalities at mines that are subject to the Mine Act. Although we considered the views of those commentators who believe the

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<sup>122</sup> See letters from AFL-CIO, Barrick Gold, Cleary, DGS Law, Estess, NYSBA, PCA, Rio Tinto and UMWA.

<sup>123</sup> See letters from Cleary and Estess.

<sup>124</sup> See letters from Cleary and DGS Law.

<sup>125</sup> See letters from AngloGold, Chevron, MNA, NSSGA and Rio Tinto.

<sup>126</sup> See letters from EARTHWORKS, SIF and Trillium.

<sup>127</sup> See letters from SIF and Trillium.

disclosure requirement should encompass mines in all jurisdictions, we continue to believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. As we noted in the Proposing Release, Section 1503(a)(1)(G) is the only provision of the Act that does not specifically reference the Mine Act, a specific notice, order or citation from MSHA, or the FMSHRC, but we are of the view that interpreting Section 1503 as limited to mines that are subject to the provisions of the Mine Act is appropriate because it will result in consistency among reporting obligations.

MSHA regulations require mine operators to report to MSHA all fatalities that occur at a mine.<sup>128</sup> MSHA has also established policies and procedures for determining whether a fatality is unrelated to mining activity (commonly referred to as “non-chargeable” to the mining industry).<sup>129</sup> Since the MSHA regulations provide a comprehensive scheme of regulation, reporting and assessment for mining-related fatalities, we believe the disclosure required by this section is intended to include all fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be “non-chargeable” to the mining industry. The final rules specify that disclosure is required of all fatalities, unless the fatality is determined to be “non-chargeable.” We appreciate the objection raised by some commentators about requiring reporting of fatalities that are under review by MSHA’s Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, but we believe it would be more consistent with Section 1503, our treatment of other disclosure items under Section 1503 (such as the reporting of contested matters under the final rules discussed above) and MSHA’s

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<sup>128</sup> See 30 CFR 50.10 and 50.20.

<sup>129</sup> See MSHA Accident/Illness Investigation Procedures Handbook, Chapter 2 Release 1 (June 2011) p. 21 located at <http://www.msha.gov/READROOM/HANDBOOK/PH11-I-1.pdf> (“MSHA Accident/Illness Handbook”).

reporting of fatalities<sup>130</sup> to require reporting of all fatalities, other than those that have been determined by MSHA to be non-chargeable. 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 rules.

- d. Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

### **(1) Proposed Amendments**

Section 1503(a)(3) requires disclosure of “[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.” Under the proposed rules, any legal actions before the FMSHRC involving a coal or other mine for which the issuer or a subsidiary of the issuer is the operator would be disclosed in the periodic report covering the time period during which the legal action was initiated. As proposed, the rules would require the information about pending legal actions to be updated in subsequent periodic reports if there are developments material to the legal action that occur during the time period covered by such report. As proposed, the disclosure required by this item would include the date the pending legal action was instituted and by whom (e.g., MSHA or the mine operator), the name and location of the mine involved, and a brief description of the category of order or citation underlying the proceeding.

### **(2) Comments on the Proposed Amendments**

We received comment letters supporting the proposal to require disclosure about pending legal actions in the periodic report covering the period in which the action was initiated, with

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<sup>130</sup> We note that MSHA makes publicly available its reports of non-chargeable mining deaths, which include the date of the incident, the mine name and the name of the operating company on its website. See <http://www.msha.gov/Fatals/NonChargeables/NonChargeableFatalshome.asp>.

updates in subsequent reports for developments material to the pending action.<sup>131</sup> Certain commentators also stated that it was appropriate to require contextual information for each pending legal action.<sup>132</sup>

However, other commentators raised concerns about the proposed approach to this disclosure item.<sup>133</sup> Commentators found both the proposed updating requirement and the proposed requirement to include contextual information about each pending legal action to be problematic, noting that the language of Section 1503 does not require such information.<sup>134</sup> With respect to this disclosure, some commentators supported a requirement to report the number of pending legal actions,<sup>135</sup> while others supported an alternative approach that would require issuers to report the number of pending legal actions initiated during the time period covered by the periodic report.<sup>136</sup> One commentator expressed the view that it would be appropriate to allow issuers to disclose the number of matters pending before the FMSHRC, along with the number instituted and resolved in the reporting period, with a general description of the types of matters.<sup>137</sup>

Some commentators expressed concerns that a requirement to provide updating information would result in voluminous disclosure, be overly burdensome for issuers and potentially be complicated for users of the information, because legal actions would likely

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<sup>131</sup> See, e.g., letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, Estess, SIF, Trillium and UMWA.

<sup>132</sup> See letters from AFL-CIO, Estess, and UMWA.

<sup>133</sup> See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA, NSSGA and NYSBA.

<sup>134</sup> See letters from Cleary, DGS Law, NMA and NYSBA.

<sup>135</sup> See letters from Cleary and NMA.

<sup>136</sup> See letters from Chevron and NSSGA.

<sup>137</sup> See letter from Freeport-McMoRan.

overlap multiple periods prior to resolution.<sup>138</sup> Many commentators also stated that the proposed requirement for disclosure of contextual information for each pending legal action would be voluminous and unhelpful, unnecessarily burdening both the issuer and the user of the information.<sup>139</sup> Commentators also noted that, due to the strict statutory language, no materiality standard can be applied to limit the number of legal actions that must be reported, and therefore determining what constitutes a “material” development in a case that may not be material to investors under our traditional materiality analysis may be problematic for issuers.<sup>140</sup>

### **(3) Final Rule**

After considering the comments received on the proposed disclosure requirement, we are adopting a final rule that 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 FMSHRC<sup>141</sup> 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

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<sup>138</sup> See, e.g., letters from Chevron (noting its preference that disclosure be limited to pending legal actions initiated during the reporting period, but suggesting that if updates are required, they should be limited to aggregate information on final resolutions reached during the reporting period), Cleary, DGS Law and NMA.

<sup>139</sup> See letters from Chevron, Cleary, Freeport-McMoRan, NMA and NSSGA.

<sup>140</sup> See letters from DGS Law, Freeport-McMoRan and NMA.

<sup>141</sup> Other types of enforcement-related legal actions under the Mine Act may occur in federal district court or courts of appeal that do not involve FMSHRC at any stage. Although these legal actions are not within the scope of the disclosure requirement, we remind issuers of their obligation to report material legal proceedings under other provisions of our rules.

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.<sup>142</sup> These categories are:

- contests of citations and orders, which typically are filed prior to an operator’s receipt of a proposed penalty assessment from MSHA or relate to orders for which penalties are not assessed (such as imminent danger orders under Section 107 of the Mine Act). This category includes:
  - contests of citations or orders issued 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 under the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493);<sup>143</sup>
- 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;<sup>144</sup>
- complaints for compensation, which are cases under section 111 of the Mine Act that may be filed with the FMSHRC by miners idled by a closure order issued by MSHA who are entitled to compensation;<sup>145</sup>

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<sup>142</sup> See the Federal Mine Safety and Health Review Commission’s Procedural Rules, 29 CFR Part 2700 (“FMSHRC Procedural Rules”).

<sup>143</sup> See Subpart B of the FMSHRC Procedural Rules.

<sup>144</sup> See Subpart C of the FMSHRC Procedural Rules.

<sup>145</sup> See Subpart D of the FMSHRC Procedural Rules.

- complaints of discharge, discrimination or interference under section 105 of the Mine Act, which cover:
  - discrimination proceedings involving a miner’s allegation that he or she has suffered adverse employment action because he or she engaged in activity protected under the Mine Act, such as making a safety complaint, and
  - temporary reinstatement proceedings involving cases in which a miner has filed a complaint with MSHA stating that he or she has suffered such discrimination and has lost his or her position;<sup>146</sup>
- applications for temporary relief, which are applications under section 105(b)(2) of the Mine Act for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Mine Act (other than citations issued under section 104(a) or (f) of the Mine Act);<sup>147</sup> and
- appeals of judges’ decisions or orders to the FMSHRC, including petitions for discretionary review and review by the FMSHRC on its own motion.<sup>148</sup>

We are not adopting 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. We recognize that this is a departure from the proposed requirement, but we agree with commentators who pointed out that the rule as

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<sup>146</sup> See Subpart E of the FMSHRC Procedural Rules. See also “Guide to Commission Proceedings,” available at <http://www.fmsihrc.gov/guides/englishguide.htm>, Sections II.C and II.D.

<sup>147</sup> See Subpart F of the FMSHRC Procedural Rules.

<sup>148</sup> See Subpart H of the FMSHRC Procedural Rules.

proposed required information not necessary to implement Section 1503 and could result in voluminous disclosure of limited informational value. We note that Section 1503 calls for disclosure of “[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine” but does not specify what information is required to be disclosed in accordance with this disclosure item.

We believe the final rule satisfies the statutory language and will provide users of this information with a clear picture of the extent and nature of mine operators’ involvement in legal actions. Further, we believe that the requirement to provide the number of legal actions in specified categories will provide consistency in the disclosure, and provide users of this information with a general sense of the types of legal actions involving mine operators. Because all documents filed with the FMSHRC in these legal actions are served on all the involved parties, we believe that this information about legal actions is readily available to issuers. We do not believe that these requirements impose significant additional burdens on issuers.

Issuers who wish to provide additional information about pending legal actions are not prohibited from doing so under the final rules. In addition, we note 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.

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

#### **(1) Proposed Amendments**

Although not required by Section 1503 of the Act, the proposed rules would require issuers to provide a brief description of each category of violations, orders and citations

reported so that investors can understand the basis for the violations, orders or citations referenced.

## **(2) Comments on the Proposed Amendments**

Some commentators expressed the view that the information otherwise provided as required by the Act would be sufficient without requiring the brief description of each category of violations, orders and citations reported.<sup>149</sup> Commentators particularly noted concerns about the expansion of the disclosure requirement beyond what is set forth in Section 1503.<sup>150</sup> One commentator raised a concern that the requirement would result in boilerplate language.<sup>151</sup> Others noted that investors who are interested in finding more detail and descriptions of the information reported can find the information on MSHA's website<sup>152</sup> or in the Mine Act.<sup>153</sup>

Several other commentators supported the proposal to require the additional disclosure.<sup>154</sup> Some commentators expressed the view that this information would be useful to investors beyond the statistics provided under Section 1503 because it would provide context that would allow investors to weigh the significance of the reported information.<sup>155</sup> Three commentators suggested that clarification of the requirement was needed, such as a generic description or glossary developed by the Commission that could be used in each

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<sup>149</sup> See letters from NMA, Chevron, Cleary, IMA-NA and WMA.

<sup>150</sup> See letters from Cleary, IMA-NA and WMA.

<sup>151</sup> See letter from Cleary.

<sup>152</sup> See letter from Chevron.

<sup>153</sup> See letter from Cleary.

<sup>154</sup> See letters from AFL-CIO, DGS Law, EARTHWORKS, Estess, NYSBA, SIF, Trillium and UMWA.

<sup>155</sup> See letters from SIF and Trillium.

periodic report.<sup>156</sup> One commentator suggested that the basic descriptions should be provided once a year with the Form 10-K, and not be required to be included in every periodic report.<sup>157</sup>

### **(3) Final Rule**

The final rules do not require a brief description of each category of violations, orders and citations reported. After considering the comments received, we believe 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. We note that the information is not required by Section 1503, and issuers, who have been providing the required disclosure since the effective date of Section 1503, have generally not been providing this information. However, issuers may provide additional information in their periodic reports to the extent they believe it would be useful to investors. In addition, we note that if particular mine safety issues are material and required to be disclosed under our other rules, then information about the nature of the violation likely would be necessary to satisfy our other disclosure requirements.

f. Other disclosure items specified in Section 1503(a).

In addition to the disclosure items discussed above, proposed Item 106 of Regulation S-K reiterated the language of Section 1503(a) with respect to several other items required to be disclosed under the Act. The Proposing Release did not request comment specifically on these items. We did, however, receive two supporting comments on some of these items, as discussed below. We are adopting these items as proposed.

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<sup>156</sup> See letters from NMA and PCA. See also letter from Chevron (stating its opposition to inclusion of the requirement, but suggesting this approach as a potential alternative).

<sup>157</sup> See letter from DGS Law.

## **(1) Proposed Amendments**

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

Section 1503(a)(1)(B) of the Act requires disclosure of “the total number of orders issued under section 104(b) of [the Mine Act].” Under our proposal, each issuer that is required under Section 1503(a) to provide mine safety disclosure would be required to provide the total number of orders issued under Section 104(b) of the Mine Act for each coal or other mine for the time period covered by the report. Section 104(b) of the Mine Act covers violations that had previously been cited under Section 104(a) that, upon follow-up inspection by MSHA, are found not to have been totally abated within the prescribed time period, which results in the issuance of an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine.

- ii. 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.

Under Section 104(d) of the Mine Act, an inspector issues a citation if the inspector finds a violation of a mandatory health or safety standard, and also finds that, while the conditions do not cause imminent danger, the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard, and that the violation is caused by an unwarrantable failure of the operator to comply with the health and safety standards. If, in the same inspection or an inspection within 90 days, an inspector finds another violation of a mandatory health or safety standard and finds such violation to also be caused by an unwarrantable failure of the operator to comply with the health and safety standards, the inspector issues an order requiring

the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine. The proposed rule would implement the Act's requirement to disclose these citations and orders issued during the reporting period.

iii. The total number of flagrant violations under Section 110(b)(2) of the Mine Act.

Section 110(b)(2) of the Mine Act is a penalty provision that provides that violations that are deemed to be "flagrant" may be assessed a maximum civil penalty. The term "flagrant" with respect to a violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."<sup>158</sup> The proposed rule would implement the Act's requirement to disclose the total number of flagrant violations under Section 110(b)(2) of the Mine Act for the reporting period.

iv. The total number of imminent danger orders issued under Section 107(a) of the Mine Act.

An imminent danger order is issued under Section 107(a) of the Mine Act if the MSHA inspector determines there is an imminent danger in the mine. The order requires the operator of the mine to cause all persons (except certain authorized persons) to be withdrawn from the mine until the imminent danger and the conditions that caused such imminent danger cease to exist. This type of order does not preclude the issuance of a citation under Section 104 or a penalty under Section 110. The proposed rule would implement the Act's requirement to disclose the total number of imminent danger orders issued under Section 107(a) of the Mine Act during the reporting period.

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<sup>158</sup> 30 U.S.C. 820(b)(2).

- v. 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.

If MSHA determines that a mine has 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 MSHA regulations the agency is required to notify the operator of the existence of such pattern. The proposed rule would implement the Act’s requirement to disclose the receipt of such notices during the reporting period.

- vi. A list of mines for which the issuer or a subsidiary received written notice from MSHA of the potential to have such a pattern.

MSHA regulations state that MSHA will give the operator written notice of the potential to have 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.<sup>159</sup> The proposed rule would implement the Act’s requirement to disclose the receipt of such notices during the reporting period.

### **(1) Comments on the Proposed Amendments**

We received two comments supporting the proposed requirements that the total number of 104(b) orders, citations and orders for unwarrantable failures, flagrant violations and

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<sup>159</sup> See 30 CFR 104.4.

imminent danger orders be reported.<sup>160</sup> We did not receive any comments on the proposed requirements to disclose a list of mines that receive notice of a pattern or potential pattern of violations.

## **(2) Final Rule**

Consistent with the proposal, we are adopting final rules requiring each issuer that is required under Section 1503(a) to provide mine safety disclosure to provide, for each coal or other mine for the time period covered by the report:

- 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 and 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;
- 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.

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<sup>160</sup> See letters from AFL-CIO and UMWA.

## **B. 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.<sup>161</sup> We are adopting revisions to Form 8-K to add new Item 1.04 to implement this requirement.

### **2. Disclosure Requirements and Deadline**

#### **a. Proposed Amendments**

We proposed to amend Form 8-K to add new Item 1.04, which would require filing of Form 8-K within four business days of the receipt by an issuer (or a subsidiary of the issuer) of:

- An imminent danger order under Section 107(a) of the Mine Act;<sup>162</sup>
- 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;<sup>163</sup> or
- Written notice from MSHA of the potential to have a pattern of such violations.<sup>164</sup>

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<sup>161</sup> Section 1503(b) of the Act.

<sup>162</sup> See Section II.A.4.f.(1)iv. above for a description of an imminent danger order issued under Section 107(a) of the Mine Act [30 U.S.C. 817(a)].

<sup>163</sup> See Section II.A.4.f.(1)v. above for a description of the written notice from MSHA regarding a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

<sup>164</sup> See Section II.A.4.f.(1)vi. above for a description of the written notice from MSHA of the potential to have a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

For each such triggering event, we proposed that new Item 1.04 of Form 8-K require 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.

**b. Comments on the Proposed Amendments**

The Proposing Release noted that the events that would trigger filing under proposed Item 1.04 are also events that are required to be disclosed in periodic reports under Section 1503(a) of the Act and our proposed Item 106 of Regulation S-K. We received comment letters supporting adoption of the rule as proposed, under which the orders and notices that trigger the Form 8-K filing requirement would also be disclosed in issuers' periodic reports.<sup>165</sup>

Commentators noted that the events that would trigger the Form 8-K filing are significant, and expressed their view that because the events are already monitored by the issuer, there would not be an extra burden in reporting them twice.<sup>166</sup> However, other commentators indicated that the proposed rule should be revised to minimize duplicative disclosure.<sup>167</sup> One commentator stated that, because these orders and notices are required to be reported in the issuer's periodic reports, the proposed Form 8-K requirement is needlessly duplicative and burdensome.<sup>168</sup> Another commentator suggested eliminating duplicative reporting by removing the Form 8-K filing requirement and allowing the information to be reported only in the issuer's periodic reports.<sup>169</sup>

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<sup>165</sup> See letters from AFL-CIO, SIF, Trillium and UMWA.

<sup>166</sup> See letters from SIF and Trillium.

<sup>167</sup> See letters from Chevron, Estess, NMA and NSSGA.

<sup>168</sup> See letter from NSSGA.

<sup>169</sup> See letter from Chevron.

Commentators that expressed a view were generally supportive of the information proposed to be required in Item 1.04 of Form 8-K.<sup>170</sup> Commentators also indicated that no additional information beyond what was proposed should be required to be disclosed.<sup>171</sup>

Some commentators supported the proposed four business day filing period for a Form 8-K under proposed Item 1.04.<sup>172</sup> Others suggested different filing deadlines for the Form 8-K. Three commentators supported longer filing deadlines, such as seven or ten business days, in order to allow issuers to conduct analysis and provide more detail or complete information about the event.<sup>173</sup> One commentator, drawing a distinction between the type of information required to be disclosed under Section 1503 and other material items covered by Form 8-K, recommended that the Form 8-K be required once a year, allowing issuers to provide aggregate information about any such orders or notices received during the year.<sup>174</sup> In addition, one commentator requested clarification of the filing requirement for an order or notice vacated by MSHA prior to the filing deadline for the Form 8-K,<sup>175</sup> and another commentator recommended that the final rule provide that if the order triggering the Form 8-K filing is vacated, dismissed or reduced below a reportable level during the reporting period, the Form 8-K filing is not required.<sup>176</sup>

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<sup>170</sup> See letters from Estess, SIF and Trillium.

<sup>171</sup> See letters from Chevron, Cleary and Estess.

<sup>172</sup> See letters from Estess, SIF and Trillium.

<sup>173</sup> See letters from NMA (suggesting seven business day deadline), Chevron (suggesting ten business day deadline) and PCA (suggesting ten calendar day deadline).

<sup>174</sup> See letter from NSSGA.

<sup>175</sup> See letter from DGS Law (noting that vacated citations are removed entirely from the MSHA data retrieval system).

<sup>176</sup> See letter from NMA.

### **c. Final Rule**

After considering the comments, we are adopting new Item 1.04 to Form 8-K as proposed. 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 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 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. 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 we have considered the views of commentators that the disclosure is duplicative, we believe 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 note that issuers generally seem to have been complying with these requirements since Section 1503(b) became effective. We have also considered commentators' views 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, 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.

We understand 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. However, as discussed above with respect to reporting of dismissed, reduced or contested matters,<sup>177</sup> we believe the language of Section 1503(b) of the Act dictates that the “receipt” of the specified orders or notices must be disclosed. We note that issuers may include additional disclosure explaining the status of these orders and notices if they choose to do so.<sup>178</sup>

### **3. Treatment of Foreign Private Issuers**

#### **a. Proposed Amendments**

Our proposed rule would not extend the requirement to file current reports on Form 8-K to foreign private issuers. The Proposing Release noted that foreign private issuers are not required to file current reports on Form 8-K.<sup>179</sup> Instead, a foreign private issuer is required to furnish under the cover of Form 6-K<sup>180</sup> copies of all information that it makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange, or otherwise distributes to its security holders.<sup>181</sup>

#### **b. Comments on the Proposed Amendments**

Several commentators agreed with our proposed approach not to apply the current reporting requirements of Section 1503(b) of the Act to foreign private issuers. These commentators noted that this approach is consistent with the statutory text of Section 1503(b),

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<sup>177</sup> See Sections II.A.3 and II.A.4.b above.

<sup>178</sup> We note that between the effective date of Section 1503(b) and November 30, 2011, there have been 116 Form 8-Ks filed to comply with this provision, and only five of them report that the order was vacated within four business days of issuance of the order.

<sup>179</sup> See Exchange Act Rules 13a-11 and 15d-11 [17 CFR 240.13a-11 and 15d-11].

<sup>180</sup> Referenced in 17 CFR 249.306.

<sup>181</sup> See Exchange Act Rule 13a-6 [17 CFR 240.13a-16].

which refers only to Form 8-K, and with the Commission’s current framework of reporting for foreign private issuers.<sup>182</sup> Other commentators indicated that foreign private issuers should be required to file a Form 8-K to disclose information about the receipt of the specified orders and notices.<sup>183</sup> One of these commentators expressed the view that the reporting requirements should be as equal as possible for all issuers so that U.S. issuers are not placed at a disadvantage.<sup>184</sup>

### **c. Final Rule**

After considering the comments, we have determined not to apply the new Form 8-K reporting requirement to foreign private issuers and are adopting the requirement as proposed. Although we are 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, we continue 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, and the Commission’s current framework of reporting for foreign private issuers.<sup>185</sup>

Although they will not be subject to the Form 8-K requirement, foreign private issuers will not be able to avoid disclosure of the orders and notices specified in Item 1.04 of Form 8-K. As described above, we are adopting amendments to Forms 20-F and 40-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

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<sup>182</sup> See letters from AngloGold, Cleary, NMA, NYSBA, and Rio Tinto. See also advance comment letter from Rio Tinto.

<sup>183</sup> See letters from Estess, SIF and Trillium.

<sup>184</sup> See letter from Estess.

<sup>185</sup> This approach is consistent with the manner in which the Commission implemented Sections 306 and 406 of the Sarbanes-Oxley Act of 2002. See *Insider Trades During Pension Fund Blackout Periods*, SEC Release No. 34-47225 (Jan. 22, 2003) [68 FR 4338], and *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, SEC Release No. 33-8177 (Jan. 23, 2003) [68 FR 5110].

receipt during the foreign private issuer’s past fiscal year of any imminent danger order issued 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, and written notice from MSHA of the potential to have a pattern of such violations.

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

#### **a. Proposed Amendments**

Under our existing rules, the untimely filing on Form 8-K of certain items does not result in loss of Form S-3 eligibility, so long as Form 8-K reporting is current at the time the Form S-3 is filed. Our 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.<sup>186</sup> We proposed to amend General Instruction I.A.3.(b) of Form S-3 to provide that an untimely filing on Form 8-K regarding new Item 1.04 would not result in loss of Form S-3 eligibility. We did not propose to include new Item 1.04 in the list in Rules 13a-11(c) and 15d-11(c) under the Exchange Act of Form 8-K items eligible for the limited safe harbor from liability.

#### **b. Comments on the Proposed Amendments**

Commentators generally supported our proposal to amend General Instruction I.A.3(b) of Form S-3 to add proposed Item 1.04 to the list of items on Form 8-K with respect to which an issuer’s failure timely to file the Form 8-K will not result in the loss of Form S-3 eligibility.<sup>187</sup>

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<sup>186</sup> Rules 13a-11(c) and 15d-11(c) each provides that “[n]o failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8-K shall be deemed a violation of” Section 10(b) of the Exchange Act or Rule 10b-5 thereunder.

<sup>187</sup> See, e.g., letters from Chevron, Cleary, DGS Law, NMA, NYSBA, SIF and Trillium. One commentator noted with approval that, as a consequence, failure to file a Form 8-K with Section 1503(b) disclosure would not result in status as an “ineligible issuer” pursuant to Rule 405 under the Securities Act. See letter from Cleary.

One commentator indicated that proposed Item 1.04 is similar to the existing exceptions provided in Form S-3, and expressed its view that, but for the statutory requirement to file current reports, for a diversified company engaging in mining operations, an individual shutdown or notice would not be material to the company and shareholders.<sup>188</sup> Similarly, another commentator noted that when compared to other items that have been specified as not affecting Form S-3 eligibility, Item 1.04 would be no more significant than the other items, particularly in light of the absence of a materiality threshold for the reporting obligation under the proposed item and the range of issues, particularly under 107(a) of the Mine Act, that can trigger the disclosure requirement.<sup>189</sup> One noted that a delay in reporting information that is typically not material to the issuer should not affect the issuer's Form S-3 eligibility.<sup>190</sup>

We received some support for our proposal not to include Item 1.04 in the list of items in Rules 13a-11(c) and 15d-11(c) with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5.<sup>191</sup> However, other commentators indicated that the Commission should add Item 1.04 to the safe harbors.<sup>192</sup> One commentator noted that such information will be made public by the MSHA data retrieval system.<sup>193</sup> Others noted that disclosures regarding mine safety are typically immaterial events

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<sup>188</sup> See letter from Chevron.

<sup>189</sup> See letter from DGS Law.

<sup>190</sup> See letter from NMA.

<sup>191</sup> See, e.g. letters from SIF and Trillium.

<sup>192</sup> See letters from AngloGold, Chevron, Cleary, NMA and NYSBA.

<sup>193</sup> See letter from AngloGold.

and the failure to timely report them on Form 8-K should not be considered a violation of Section 10(b) or Rule 10b-5.<sup>194</sup>

### **c. Final Rule**

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. Commentators were supportive of this approach, which we continue to believe is appropriate. Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8-K. In addition, as noted in the Proposing Release, in the past when we have adopted new disclosure requirements that differed from the traditional periodic reporting obligations of companies, we have 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.<sup>195</sup>

Although we are mindful of commentators' concerns, we are not including Item 1.04 in the list of items in Rules 13a-11(c) and 15d-11(c) with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5. We continue to believe, as we expressed when we adopted the limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act for certain Form 8-K items, that the safe harbor is appropriate if the triggering event for the Form 8-K requires management to make a rapid materiality determination.<sup>196</sup> The filing of an Item 1.04 Form 8-K is triggered by an event that

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<sup>194</sup> See letters from Chevron and NMA.

<sup>195</sup> See *Selective Disclosure and Insider Trading*, SEC Release No. 33-7881 (Aug. 15, 2000) [65 FR 51715]; *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, SEC Release No. 33-8400 (March 16, 2004) [69 FR 15594] (the "Additional Form 8-K Disclosure Release").

<sup>196</sup> See Additional Form 8-K Disclosure Release at 69 FR 15607.

does not require management to make a rapid materiality determination, and we continue to believe that it is not necessary to extend the safe harbor to this new item.

### **III. PAPERWORK REDUCTION ACT**

#### **A. Background**

Certain provisions of the final amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>197</sup> We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments and we submitted these requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>198</sup> The titles for the collection of information are:

- (A) “Regulation S-K” (OMB Control No. 3235-0071);
- (B) “Form 10-K” (OMB Control No. 3235-0063);
- (C) “Form 10-Q” (OMB Control No. 3235-0070);
- (D) “Form 8-K” (OMB Control No. 3235-0060);
- (E) “Form 20-F” (OMB Control No. 3235-0288); and
- (F) “Form 40-F” (OMB Control No. 3235-0381).

These regulations and forms were adopted under the Securities Act and the Exchange Act. They set forth the disclosure requirements for periodic and current reports filed by companies to inform investors.<sup>199</sup> The hours and costs associated with preparing disclosure,

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<sup>197</sup> 44 U.S.C. 3501 *et seq.*

<sup>198</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>199</sup> Forms 20-F and 40-F may also be used by foreign private issuers to register a class of securities under the Exchange Act. In addition, Form 20-F sets forth many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

filing forms and retaining records constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

## **B. Summary of the Final Rules**

As discussed in more detail above, we are adopting new rule and form amendments to implement Section 1503 of the Act. Section 1503(a) 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 Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from MSHA.

We are adopting new Items 104 and 601(b)(95) of Regulation S-K and amending Forms 10-Q, 10-K, 20-F and 40-F under the Exchange Act to implement the disclosure requirement set forth in Section 1503(a) of the Act. We are adopting new Item 1.04 of Form 8-K to implement the requirement of Section 1503(b) of the Act. In addition, we are amending General Instruction I.A.3(b) of Securities Act Form S-3.

Issuers are currently required to comply with the provisions of Section 1503 of the Act; therefore, the Act has already increased the burdens and costs for issuers by requiring the disclosure set forth in Sections 1503(a) and (b) of the Act. We note that Section 1503 of the Act imposed the disclosure requirements set forth in Sections 1503(a) and (b) of the Act, regardless of whether the Commission adopts rules to implement those provisions. Our amendments incorporate the Act's requirements into Regulation S-K and related forms.

The disclosure requirement of Section 1503(a)(1)(G) of the Act, which requires disclosure of mining-related fatalities, overlaps to some extent with a disclosure requirement under MSHA rules. MSHA requires mine operators to report immediately any death of an individual at a mine,<sup>200</sup> which MSHA then makes available to the public through its data retrieval system on its website, [www.msha.gov](http://www.msha.gov). MSHA's disclosure requirement applies to all mine operators under MSHA's jurisdiction, while the disclosure requirement of Section 1503(a)(1)(G) of the Act requires reporting by a subset of that group, specifically, issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators (or have a subsidiary that is an operator) of a coal or other mine. We note that, while there is some overlap, the disclosure requirement of Section 1503(a)(1)(G) of the Act is currently in effect by operation of the statute, and the amendments we are adopting simply incorporate the Act's requirements into our rules and forms. We believe our rules must incorporate this provision of the Act in order to be consistent with the Act.

Most of the information called for by the new disclosure requirements is publicly disclosed by MSHA and readily available to issuers, who receive notices, orders and citations directly from MSHA and can also access the information via MSHA's data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, as noted above, the disclosure item for periodic reports requiring disclosure of mining-related fatalities is already subject to a collection of information under MSHA regulations,<sup>201</sup> and fatality information also is made public via MSHA's data retrieval

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<sup>200</sup> See 30 CFR 50.10.

<sup>201</sup> 30 CFR 50.10 and 50.20.

system. Our amendments incorporate the Act's requirements into Regulation S-K and related forms.

We anticipate that new Items 104 and 601(b)(95) of Regulation S-K will increase the disclosure burdens for annual reports on Form 10-K and quarterly reports on Form 10-Q that existed prior to enactment of the Act. Because Regulation S-K does not apply directly to Forms 20-F and 40-F,<sup>202</sup> we are amending those forms to include the same disclosure requirements as those applicable to issuers that are not foreign private issuers, and therefore we anticipate that the disclosure burdens that existed prior to the enactment of the Act for annual reports on Forms 20-F and 40-F will increase.<sup>203</sup> We anticipate that new Item 1.04 of Form 8-K will increase the disclosure burden that existed prior to enactment of the Act for current reports on Form 8-K by requiring issuers to file a Form 8-K upon receipt of three types of notices or orders from MSHA relating to mine health and safety concerns and specifying the information required about the orders or notices required to be disclosed.

Compliance with the amendments by affected issuers will be mandatory. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

### **C. Summary of Comment Letters and Revisions to Proposals**

In the Proposing Release, we requested comment on the PRA analysis. We received one comment letter that addressed our overall burden estimates for the proposed amendments.<sup>204</sup>

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<sup>202</sup> While Form 20-F may be used by any foreign private issuer, Form 40-F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System.

<sup>203</sup> See new Item 16H under Part II of Form 20-F and paragraph (16) to General Instruction B of Form 40-F.

<sup>204</sup> See letter from Rio Tinto.

The commentator stated its belief that the estimates included in the Proposing Release were on the low end of the scale. The commentator noted its view that, due to the number and variety of operations that must be included in the reports and the corporate structure and segregation of responsibilities that are required in a multinational organization with a number of individual operating subsidiaries, the estimate of burden hours to manage, assemble, track, verify and prepare the reports should be higher. In the commentator's experience, the necessary internal procedures and controls to accurately assemble, track and report the Section 1503 mine safety information and the actual hourly burden alone would be 10 to 15 times the estimate made by the Commission, and the outside professional burden would likewise be several orders of magnitude greater than the estimate.

After consideration of the comment received, we have increased the hours and costs from the proposal, although we have not increased such estimates by the magnitude suggested by the commentator, taking into account several substantive modifications we have made to the proposed amendments. We are adopting final rules that in some respects are less burdensome than the proposals. We have simplified the reporting of information with respect to proposed assessments of penalties and pending legal actions, and we are not adopting the proposed additional disclosure item. We also have changed the time period requirement for periodic reporting in a manner that will lessen the burden for issuers by requiring disclosure only for the period covered by the report. Therefore, we have adjusted our estimates to reflect a decrease in hours and costs from the proposal, but also reflecting an increase in hours and costs based on the comment received.

#### **D. Revisions to PRA Reporting and Cost Burden Estimates**

We anticipate that the rule and form amendments will increase the burdens and costs for issuers subject to the amendments. For purposes of the PRA, in the Proposing Release we estimated the total annual increase in paperwork burden for all affected companies to comply with the proposed collection of information requirements to be approximately 1,677 hours of company personnel time and approximately \$263,500 for the services of outside professionals. These estimates included the time and the cost of implementing disclosure controls and procedures, preparing and reviewing disclosure, filing documents and retaining records. As discussed above, as a result of the changes we have made from the proposals, and taking into consideration the comment received, we are increasing the total PRA burden and cost estimates that we originally submitted to OMB in connection with the proposed amendments. We estimate the annual incremental paperwork burden for all companies to prepare the disclosure required under our rule amendments to be approximately 5,775 hours of company personnel time and approximately \$1,090,000 for the services of outside professionals.

In deriving our new estimates, we assume that:

- For Forms 10-K, 10-Q and 8-K, an issuer incurs 75% of the annual burden required to produce each form, and outside firms, including legal counsel, accountants and other advisors retained by the issuer, incur 25% of the annual burden required to produce the form at an average cost of \$400 per hour; and
- For Forms 20-F and 40-F, a foreign private issuer incurs 25% of the annual burden required to produce each form, and outside firms retained by the issuer incur 75% of the burden required to produce each form at an average cost of \$400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

We have based our new burden hour and cost estimates of the effect that the adopted rule and form amendments would have on those collections of information primarily on our understanding that the information required to be disclosed is readily available to issuers, and that therefore the burden imposed by the disclosure requirements is mainly in formatting the information in order to comply with our disclosure requirements and ensuring that appropriate disclosure controls and procedures are in place to facilitate reporting of the information. In this regard, we note that mine operators receive the relevant notices, citations and similar information directly from MSHA, and that issuers could also access such information via MSHA's publicly available data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. In preparing the burden hour and cost estimates, we took into consideration the number of issuers that filed reports with the Commission including information required under Section 1503 since its effective date.

### **1. Regulation S-K**

While the rule and form amendments make revisions to Regulation S-K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Forms 10-K and 10-Q. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we are retaining an estimate of one burden hour to Regulation S-K for administrative convenience.

## **2. Form 10-K**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 13,545 Form 10-Ks filed annually, approximately 100 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore will be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 10-K, and that preparation of the Form 10-K disclosure would involve gathering the information for the fourth quarter of the fiscal year, consolidating it with information reported in the prior quarters of the fiscal year, and formatting the information for inclusion in the annual report. We estimate that the rule and form amendments would add 20 burden hours to the total burden hours required to produce each Form 10-K.

## **3. Form 20-F**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 942 Form 20-F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 20-F. We estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 20-F.

#### **4. Form 40-F**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 205 Form 40-F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 40-F. As with Form 20-F, we estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 40-F annual report.

#### **5. Form 10-Q**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 32,462 Form 10-Qs filed annually, approximately 300 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments.<sup>205</sup> For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in each Form 10-Q. We further estimate that the rule and form amendments would add 15 burden hours to the total burden hours required to produce each Form 10-Q.

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<sup>205</sup> We estimate that approximately 100 companies with a Form 10-Q filing obligation would be affected by the proposed rule and form amendments. Each such company would file three quarterly reports on Form 10-Q per year. 100 companies x 3 Forms 10-Q per year=300 Forms 10-Q.

## **6. Form 8-K**

We estimate that companies annually file 116,860 Form 8-Ks. Only companies that are not foreign private issuers and are operators, or have subsidiaries that are operators, of mines subject to the Mine Act are required to comply with the new Form 8-K requirement. For purposes of the PRA, we estimate that there will be approximately 100 Form 8-K filers under new Item 1.04, which is based on our estimate of the number of Form 10-K filers that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. In addition, we understand that the triggering events for Form 8-K filing set forth in Section 1503(b)(2) – the receipt of written notice from MSHA that the coal or other mine has a pattern of violations or the potential to have such a pattern – are relatively rare, while the triggering event set forth in Section 1503(b)(1) – the receipt of an imminent danger order – is more common.<sup>206</sup> For purposes of this calculation, we assume that each potential filer under Item 1.04 of Form 8-K would file four Forms 8-K per year under new Item 1.04 and we estimate that the amendments to Form 8-K would add 2 burden hours to the total burden hours required to produce each Form 8-K.

### **E. Summary of Changes to Annual Compliance Burden in Collection of Information**

The table below illustrates the total incremental annual compliance burden of the collection of information in hours and in cost under the amendments for annual reports, quarterly reports and current reports on Form 8-K under the Exchange Act (Table 1). There is no change to

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<sup>206</sup> See U.S. Department of Labor, Office of Inspector General, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority*, Report Number 05-10-005-06-001 (Sept. 29, 2010). According to data available on MSHA's website, 549, 630 and 562 imminent danger orders under Section 107(a) were issued during fiscal 2011, 2010 and 2009, respectively. See *Violations Data Set* (as of December 9, 2011), available at <http://www.msha.gov/OpenGovernmentData/OGIMSHA.asp> (on file with the Division of Corporation Finance). Note that this number includes all imminent danger orders issued to all companies subject to MSHA's jurisdiction, not only to reporting companies that are subject to the disclosure requirements of Section 1503 of the Act.

the estimated burden of the collection of information under Regulation S-K because the burdens that Regulation S-K imposes are reflected in our revised estimates for the forms. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the new disclosure requirements.

Form	Current Annual Response	Current Burden Hours	Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs (\$)	Increase in Professional Costs (\$)	Proposed Professional Costs (\$)
<b>10-K</b>	13,545	21,361,898	1,500	21,363,398	2,848,253,000	200,000	2,848,453,000
<b>20-F</b>	942	622,871	150	623,021	743,047,230	180,000	743,227,230
<b>40-F</b>	205	21,884	150	22,034	26,260,500	180,000	26,440,500
<b>10-Q</b>	32,462	4,559,793	3,375	4,563,168	607,972,400	450,000	608,422,400
<b>8-K</b>	116,860	502,839	600	503,439	67,045,200	80,000	67,125,200

#### IV. COST-BENEFIT ANALYSIS

##### A. Introduction

We are adopting the rule and form amendments discussed in this release to implement the disclosure requirements set forth in Section 1503 of the Act. 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 Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

As discussed in detail above, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Mine Act and administered by MSHA. MSHA inspectors issue citations, orders and decisions directly to mine operators during the course of inspections and MSHA assesses and collects civil

monetary penalties for violations. Mine operators receive the relevant notices, citations and similar information directly from MSHA, and this information is publicly available on MSHA's data retrieval system on its website on a mine-by-mine basis.<sup>207</sup> Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. Therefore, we believe most of the information required to be disclosed under Section 1503 of the Act and our final rules is readily available to issuers. Further, because the disclosure requirements set forth in Section 1503 are currently in effect, we assume that issuers have already developed the necessary controls and procedures to review and prepare the information required by Section 1503 of the Act for filing with the Commission.

We are adopting amendments to Form 10-K, Form 10-Q, Form 20-F and Form 40-F to provide for the disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S-K, new Item 16H of Form 20-F and new Paragraph (16) of General Instruction B of Form 40-F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S-K sets forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under Item 104 of Regulation S-K. We are also adopting amendments to Form 8-K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S-3 to add new Form 8-K Item 1.04 to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

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<sup>207</sup> See <http://www.msha.gov/DRS/DRSHOME.HTM>.

We did not receive any comment letters addressing the cost-benefit analysis included in the Proposing Release. The Commission is sensitive to the costs and benefits that will be imposed by the rule and form amendments. The discussion below focuses on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Act, rather than the costs and benefits of the mandates of the Act itself. However, to the extent that the Commission helps achieve the benefits intended by the Act, the two types of benefits are not entirely separable.

The final rule adheres closely to the statutory mandate, which is already in effect. We have determined not to adopt the proposed requirements to provide additional disclosure in periodic reports addressing the categories of violations, orders or citations disclosed in response to the Section 1503(a) disclosure requirement, or total dollar values of proposed penalty assessments from MSHA outstanding as of the end of a reporting period. We are adopting a requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted and the number resolved during the reporting period, and the numbers of such legal actions in specified categories, rather than the more burdensome proposed requirement to provide more detailed descriptions of legal actions pending before the FMSHRC and developments material to previously reported pending legal actions. As a consequence, we believe that the vast majority of the costs and benefits of our final rules are attributable to the provisions of Section 1503.

## **B. Benefits**

The amended rules we are adopting today are intended to implement the requirements of Section 1503 of the Act. Our Regulation S-K and form amendments implement the requirements

of the Act by reiterating the disclosure items listed in Section 1503, which are currently in effect. Our rule and form amendments specify for issuers how, in what form, and when to report the mine safety information required by the Act. These rules are designed to facilitate compliance with the new statutory requirements. We believe this should simplify the disclosure obligation, promote comparability and consistency of disclosure across issuers and time periods, and make the information more accessible for users, which will benefit investors in their consideration of information about issuers' mine health and safety matters.

We believe that the requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted, the number resolved during the reporting period and the numbers of legal actions in specified categories will provide useful information to users about overall developments in legal actions and the extent of the mine operators' involvement in legal actions.

Our amendment to Form 8-K requires additional disclosure beyond that specifically designated by Section 1503(b) of the Act by specifying the information required about the orders or notices required to be disclosed, and specifying a four business day filing deadline for Forms 8-K filed under new Item 1.04. Our amendment to Form 8-K specifying that the form is to be filed within four business days of receipt of the order or notice designated under Section 1503(b) of the Act will provide issuers and investors with certainty about the timing of that disclosure requirement.

### **C. Costs**

The vast majority of the costs resulting from the disclosures required by Section 1503 of the Act arise whether or not we adopt rules to implement the Section. Moreover, the information

required to be disclosed under Section 1503 is already subject to an extensive recordkeeping regime under MSHA and, for the most part, is readily available to issuers via MSHA's data retrieval system. Certain information, such as information regarding pending legal actions and mining-related fatalities, is known to issuers, although they may have had to adopt new procedures to capture and report the information in order to comply with Section 1503. The primary costs to result from this rulemaking are costs associated with the formatting and filing of the information. We believe that there are no significant incremental costs imposed as a result of our codification of the Section 1503 requirements.<sup>208</sup>

## **V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION**

Section 23(a)(2) of the Exchange Act<sup>209</sup> requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b)<sup>210</sup> of the Securities Act and Section 3(f)<sup>211</sup> of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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<sup>208</sup> For purposes of the PRA, we estimate the total cost of the disclosure to be approximately 5,775 hours of company personnel time and approximately \$1,090,000 for the services of outside professionals. However, this amount reflects the costs associated with the disclosure requirement set forth in Section 1503 of the Act. We do not believe our rules, which implement Section 1503, impose any additional costs beyond those imposed by the statute.

<sup>209</sup> 15 U.S.C. 78w(a).

<sup>210</sup> 15 U.S.C. 77b(b).

<sup>211</sup> 15 U.S.C. 78c(f).

We did not receive any comment letters addressing the discussion of these issues included in the Proposing Release. The amendments we are adopting will implement the requirements of Section 1503 of the Act, which imposed the substance of the disclosure requirements set forth in our new rules. We are not imposing any additional requirements in our rulemaking that will impose a burden on competition or have a significant impact on capital formation.

We believe that the rule and form amendments we are adopting will provide direction and consistency as to how, in what form, and when to report the relevant information. We believe that the specifications in the rulemaking will improve the efficiency of the reporting process for issuers and provide for a more efficient and effective review of the information by investors.

The loss of eligibility by an issuer to use Form S-3 could restrict the ability of the company to raise capital or increase an issuer's costs relating to capital raising, and may be a disproportionately large negative consequence of an untimely filing of a Form 8-K. To address this potential burden, we are revising the eligibility rules under Form S-3 so that an untimely filing of a report under new Item 1.04 of Form 8-K would not result in a loss of eligibility to use that form.

## **VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS**

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.<sup>212</sup> It relates to revisions to Regulation S-K and forms under the Securities Act and the Exchange Act regarding disclosure about mine safety.

### **A. Reasons for, and Objectives of, the Proposed Action**

We are adopting rule amendments to implement the disclosure requirements set forth in Section 1503 of the Act. Section 1503(a) of the Act requires issuers that are operators, or that

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<sup>212</sup> 5 U.S.C. 601.

have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from MSHA.

### **B. Significant Issues Raised by Public Comments**

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Analysis (“IRFA”), including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed amendments, the nature of the potential impact of the proposed amendments on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commentators addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, several commentators stated their belief that smaller companies should not be exempted from all or part of the amendments,<sup>213</sup> while only one commentator urged that we adopt a modified reporting system for smaller companies.<sup>214</sup>

### **C. Small Entities Subject to the Final Amendments**

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”<sup>215</sup> The Commission's rules define “small business” and “small

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<sup>213</sup> See letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA.

<sup>214</sup> See letter from Estess.

<sup>215</sup> 5 U.S.C. 601(6).

organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157<sup>216</sup> and Exchange Act Rule 0-10(a)<sup>217</sup> define a company, other than an investment company, to be a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year. The new rules will affect small entities that (i) are required to file reports under Section 13(a) or 15(d) of the Exchange Act and (ii) operate, or have a subsidiary that operates, a coal or other mine that is subject to the Mine Act, and therefore are required to provide mine safety disclosure under Section 1503 of the Act. We estimate that there are approximately 25 companies that would currently be required to provide the Section 1503 disclosure and that may be considered small entities. We note that there are a significant number of small entities that are exploration stage mining companies that would be required to provide the Section 1503 disclosure if such companies were to become operators, or have subsidiaries that become operators, of coal or other mines subject to the Mine Act.

#### **D. Reporting, Recordkeeping, and other Compliance Requirements**

The disclosure requirements are intended to implement the disclosure requirements set forth in Section 1503 of the Act. These amendments require small entities that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms.

Small entities will be required to include the disclosure in their annual report on Form 10-K, Form 20-F or Form 40-F and, if applicable, quarterly report on Form 10-Q and current report on Form 8-K. We are amending Form 10-K, Form 10-Q, Form 20-F and Form 40-F to require the

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<sup>216</sup> 17 CFR 230.157.

<sup>217</sup> 17 CFR 240.0-10(a).

disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S-K, new Item 16H of Form 20-F and new Paragraph (16) of General Instruction B of Form 40-F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S-K sets forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under new Item 104 of Regulation S-K. We are also adopting amendments to Form 8-K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S-3 to add new Form 8-K Item 1.04 to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

#### **E. Agency Action to Minimize Effect on Small Entities**

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the disclosure amendments, we considered the following alternatives:

- (1) Establishing differing compliance or reporting requirements or timetables which take into account the resources available to smaller entities;
- (2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;
- (3) The clarification, consolidation, or simplification of disclosure for small entities; and
- (4) Use of performance standards rather than design standards.

Section 1503 of the Act requires all entities, including small entities, that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms. These requirements apply without regard to whether we adopt rules to implement them.

The amendments implement the disclosure requirements set forth in Section 1503 of the Act. Given the statutory disclosure requirements in Section 1503 of the Act, the Act does not appear to contemplate separate compliance or reporting requirements for smaller entities.

Our amendments would require clear and straightforward disclosure of the information required by Section 1503 of the Act. We generally have used design rather than performance standards in connection with the amendments. By specifying in the Act the disclosure required, Congress appears to have contemplated that consistent, comparable disclosure would be provided. We believe that the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies that operate, or have a subsidiary that operates, a coal or other mine. Further, based on our past experience, we believe that specific disclosure requirements for this information would be more useful to investors than would a performance standard. However, we note that, although we encourage tabular presentation, we are not adopting a particular presentation requirement for the disclosure, so that each issuer has flexibility to adopt a presentation it believes is appropriate for its disclosure. We proposed additional disclosure requirements that would have given greater context to the information required to be disclosed by Section 1503. After further consideration, we are not requiring such additional disclosure, but issuers are permitted to include additional disclosure if they choose to do so.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S-K and the amendments would not affect these requirements. The disclosure requirements will apply to small entities to the same extent as larger issuers. We do not believe these disclosures will create a significant new burden, and we believe this approach is consistent with the requirements of the Act.

## VII. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15 and 23 of the Exchange Act and Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

### List of Subjects

17 CFR Parts 229, 239 and 249

Reporting and recordkeeping requirements, Securities.

### TEXT OF THE AMENDMENTS

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

#### **PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K**

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

2. Section 229.104 is added to read as follows:

**§ 229.104 (Item 104) Mine safety disclosure.**

(a) A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine shall provide the information specified below for the time period covered by the report:

(1) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) 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 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) 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 such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

Instruction to Item 104(a)(1)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

Instruction to Item 104(a)(1)(vii): Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(2) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) 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 such Act (30 U.S.C. 814(e)); or

(ii) The potential to have such a pattern.

(3) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to Item 104(a)(3): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and

orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

(b) *Definitions.* For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

(3) The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

Instructions to Item 104:

1. The registrant must provide the information required by this Item as specified by § 229.601(b)(95) of this chapter. In addition, the registrant must provide a statement, in an appropriately captioned section of the periodic report, that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in exhibit 95 to the periodic report.

2. When the disclosure required by this item is included in an exhibit to an annual report on Form 10-K, the information is to be provided for the registrant's fiscal year.

\* \* \* \* \*

3. Amend § 229.601 by revising paragraphs (a)(36) through (a)(98) in the exhibit table in paragraph (a), and adding paragraph (b)(95), to read as follows:

**§ 229.601 (Item 601) Exhibits.**

(a) \* \* \*

**Exhibit Table**

\* \* \* \* \*

<b>EXHIBIT TABLE</b>													
Securities Act Forms									Exchange Act Forms				
	<u>S-1</u>	<u>S-3</u>	<u>S-4</u> <sup>1</sup>	<u>S-8</u>	<u>S-11</u>	<u>F-1</u>	<u>F-3</u>	<u>F-4</u> <sup>1</sup>	<u>10</u>	<u>8-K</u> <sup>2</sup>	<u>10-D</u>	<u>10-Q</u>	<u>10-K</u>

\* \* \* \* \*

(36) through (94) [Reserved]	N/A												
(95) Mine Safety Disclosure Exhibit												X	X
(96) through (98) [Reserved]													

<sup>1</sup> An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S-4 or F-4 to provide information about such company at a level prescribed by Form S-3 or F-3; and (2) the form, the level of which has been elected under Form S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

<sup>2</sup> A Form 8-K exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

\* \* \* \* \*

(b) \* \* \*

(95) Mine Safety Disclosure Exhibit. A registrant that is an operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information required by Item 104 of Regulation S-K (§ 229.104 of this chapter) in an exhibit to its Exchange Act annual or quarterly report. For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

\* \* \* \* \*

#### **PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

4. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll(d), 77mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 404 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

5. Amend Form S-3 (referenced in § 239.13) by revising General Instruction I.A.3.(b) to read as follows:

**Note: The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM S-3**  
**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**GENERAL INSTRUCTIONS**

**I. Eligibility Requirements for Use of Form S-3 \* \* \***

A. Registrant Requirements. \* \* \*

3. \* \* \*

(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K (§ 249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b-25(b) (§ 240.12b-25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

\* \* \* \* \*

**PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934**

6. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

7. Amend Form 20-F (referenced in § 249.220f) by adding Item 16H, and adding Instruction 16 to the Instructions as to Exhibits, of Form 20-F, to read as follows:

**Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 20-F**

\* \* \* \* \*

**Item 16H. Mine Safety Disclosure**

If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) 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 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) 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 such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

Instruction to Item 16H(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

Instruction to Item 16H(a)(vii): Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) 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 such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instructions to Item 16H(c): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

\* \* \* \* \*

### **Instructions to Item 16H**

1. Item 16H only applies to annual reports, and not to registration statements on Form 20-F.
2. The exhibit described in this Item must meet the requirements under Instruction 19 as to Exhibits of this Form.
3. For purposes of this Item:
  - a. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

- b. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).
- c. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

\* \* \* \* \*

### INSTRUCTIONS AS TO EXHIBITS

\* \* \* \* \*

16. The mine safety disclosure required by Item 16H.

A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information specified in Item 16H in an exhibit to its annual report on Form 20-F.

17 through 99 [Reserved]

\* \* \* \* \*

8. Amend Form 40-F (referenced in § 249.240f) by adding Paragraph (16) to General Instruction B to read as follows:

\* \* \* \* \*

(16) Mine safety disclosure. If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection

Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) 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 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) 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 such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

Instruction to paragraph (16)(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

Instruction to paragraph (16)(a)(vii) Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) 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 such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to paragraph (16)(c): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in

Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

\* \* \* \* \*

***Notes to Paragraph (16) of General Instruction B:***

For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

4. Instruction B(16) only applies to annual reports, and not to registration statements on Form 40-F.

\* \* \* \* \*

9. Amend Form 8-K (referenced in § 249.308) by adding Item 1.04 under the caption "Information to Be Included in the Report" after the General Instructions to read as follows:

**Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form 8-K**

\* \* \* \* \*

## General Instructions

\* \* \* \* \*

### Information to Be Included in the Report

\* \* \* \* \*

#### **Item 1.04 Mine Safety – Reporting of Shutdowns and Patterns of Violations.**

(a) If the registrant or a subsidiary of the registrant has received, with respect to a coal or other mine of which the registrant or a subsidiary of the registrant is an operator

- an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a));
- a written notice from the Mine Safety and Health Administration that the coal or other mine has 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 such Act (30 U.S.C. 814(e)); or
- a written notice from the Mine Safety and Health Administration that the coal or other mine has the potential to have such a pattern,

disclose the following information:

- (1) The date of receipt by the issuer or a subsidiary of such order or notice.
- (2) The category of the order or notice.
- (3) The name and location of the mine involved.

*Instructions to Item 1.04.*

1. The term “coal or other mine” means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term “operator” has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

\* \* \* \* \*

10. Amend Form 10-Q (referenced in § 249.308a) by revising General Instruction H.2.b to delete the reference to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part II to read as follows:

**Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-Q**

\* \* \* \* \*

**PART II**

\* \* \* \* \*

**Item 4. Mine Safety Disclosures\* \* \***

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S-K (17 CFR 229.104) is included in exhibit 95 to the quarterly report.

\* \* \* \* \*

11. Amend Form 10-K (referenced in § 249.310) by revising General Instructions I(2)(c) and J(1)(e) to delete the references to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part I to read as follows:

**Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM 10-K**

\* \* \* \* \*

**PART I**

\* \* \* \* \*

**Item 4. Mine Safety Disclosures \* \* \***

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S-K (17 CFR 229.104) is included in exhibit 95 to the annual report.

\* \* \* \* \*

By the Commission.

Kevin M. O'Neill  
Deputy Secretary

December 21, 2011