

## **Mine Operators Face Additional Challenges, Burdens, Under New Specialized SEC Disclosure Regime**

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Think beyond compliance. Providing the right information will enable smart operators to shape the message existing and potential investors receive under the new specialized SEC disclosure regime.

Mine operators who are public companies have recently become subject to additional Securities & Exchange Commission ("SEC") disclosure burdens. These obligations extend to *all* mine operators – coal and metal / non-metal. The passage of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank"), specifically section 1503 therein, imposes a series of specialized disclosure obligations for securities issuers who are mine operators or who have subsidiaries who are mine operators. Prior to Dodd Frank, Mine Operators had substantially greater discretion as to what information must be disclosed in their periodic reporting. At that time, the central principle was that information that investors would find material to the total mix of information available must be disclosed. With the enactment of these specialized disclosure requirements, operators' discretion to decide what information is material has been lost.

In the abstract, the obligation to report this information is not terribly alarming. However, the new disclosure regime ignores several realities in the relationship between the Mine Safety and Health Administration ("MSHA") and mine operators. Disclosure of the required information alone, discussed below, does not account for the fact that a substantial proportion of MSHA's enforcement actions are subsequently reduced or vacated. The SEC has explicitly stated that violations must still be disclosed, even if they are subsequently reduced or vacated.

Dodd Frank Section 1503 became effective August 20, 2010. Now every operator subject to the periodic reporting requirements of the Securities Exchange Commission ("SEC") must, in every regular periodic reporting disclose "for each coal or other mine" the following information for that reporting period:

1. Any pending legal action before the Federal Mine Safety and Health Review Commission
2. The total number of S&S citations
3. The total number of 104(b) withdrawal orders
4. The total number of 104(d) unwarrantable failures

5. The total number of 110(b)(2) flagrant violations
6. The total number of 107(a) imminent danger orders
7. The total dollar value of proposed assessments from MSHA
8. The total number of mining related fatalities
9. A list of mines that:
  1. are placed on a “pattern of violations”
  2. receive notice from MSHA that they will potentially be placed on a pattern of violations

While the statute imposing this obligation have been in effect since August 2010, the SEC recently released a proposed rule clarifying the disclosures necessary for compliance and imposing additional reporting burdens as well.

In addition to now being required to disclose information about a mine’s citation history and compliance record in its regular quarterly and annual reporting, the occurrence of certain events will trigger an obligation to file a Form 8-K supplemental report. This report must be submitted to the SEC within four days of the triggering event. The issuance of a 107(a) imminent danger withdrawal order, receipt of a potential pattern of violations letter, or placement on a pattern of violations all require an operator to file an 8-K within 4 days of their occurrence.

There are several causes for concern. Between the designations of gravity, S&S, unwarrantable failure, and negligence, all citations have a great deal of subjectivity built in. The new disclosure regime requires operators to provide quarterly and annual totals for the different categories of citations. Most troubling, and perhaps even misleading to the investors these disclosures are intended to inform, is that even if a citation is subsequently reduced, modified or vacated, the SEC has stated that such citations must still be reported. Similarly, one of the required disclosures for each period is the cumulative dollar amount of penalties assessed against the operator; the SEC has stated that this amount must include all citations that are being contested.

Although these disclosure obligations are imprecise and can do damage to an operator’s reputation and stock price, there are ways this damage can be mitigated. The SEC has stated that while certain information *must* be provided, operators *may also provide additional information*. It is up to the Operator to provide the additional information necessary to ensure that the information provided to investors accurately represents the enforcement relationship. For example, operators are required to provide cumulative totals of S&S and unwarrantable failure violations for each reporting period. Per the SEC’s guidance, these totals must include citations that are subsequently modified or vacated. Disclosing this information without further explanation will give investors information that is inaccurate and is likely more negative than in reality.

As discussed above, in addition to the disclosures required in operators’ regular quarterly and annual reporting, the occurrence of certain events trigger an obligation to file a Form 8-K supplemental report within four days. One of these triggering events is the issuance of a 107(a) imminent danger order. Like many enforcement actions, 107(a) orders are sometimes

improperly issued and subsequently vacated. Under the new disclosure regime, the damage will be done long before any expedited hearing could come before the Federal Mine Safety and Health Review Commission. In such situations, providing the right information is critical to ensure that investors understand the operator's position and ongoing commitment to safe mining operations.

These new burdens impose additional challenges in an already complex industry. By being proactive, operators can ensure that they are equipped to provide investors with the accurate, comprehensive information needed to make the right investment decisions.