

**SECURITIES AND EXCHANGE COMMISSION**

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

**[RELEASE NOS. 33-9164; 34-63548; File No. S7-41-10]**

**RIN 3235-AK83**

**MINE SAFETY DISCLOSURE**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing 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:** Comments should be received on or before January 31, 2011.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-41-10 on the subject line; or

- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-41-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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

**SUPPLEMENTARY INFORMATION:** We are proposing to add new Item 106 to Regulation S-K<sup>1</sup>, amend Item 601 of Regulation S-K,<sup>2</sup> and amend 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.

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

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

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

F<sup>7</sup> under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>8</sup> In addition, we propose to amend 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**

Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)<sup>11</sup> requires issuers that are required to file reports with the Commission pursuant to sections 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>12</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>13</sup>

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>14</sup> which is administered by the U.S. Labor Department’s Mine

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

<sup>12</sup> Section 1503(a) of the Act.

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

<sup>14</sup> 30 U.S.C. 801 et seq.

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>15</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>16</sup> and inspections pursuant to miners’ complaints.<sup>17</sup> If violations of safety or health standards are found, MSHA inspectors will issue citations 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>18</sup>

MSHA maintains a data retrieval system on its website that allows users to examine data on inspections, violations, and accidents, as well as information about dust samplings, at specific mines throughout the United States.<sup>19</sup> The information provided by the MSHA data retrieval system is based on data gathered from various MSHA systems. For example, when citations, orders or violations are issued by MSHA to mine operators, the information about such citations, orders or violations is entered by MSHA into MSHA’s systems and subsequently reflected in the data retrieval system within a short period of time. The data retrieval system allows a user to search for information based on the identification numbers assigned to specific mines or contractors (MSHA Mine ID or Contractor ID), as well as by operator name, mine name,

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<sup>15</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>16</sup> 30 U.S.C. 813(i).

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

<sup>18</sup> 30 U.S.C. 820. See also “MSHA’s Statutory Functions” available at <http://www.msha.gov/MSHAINFO/MSHAINF1.HTM>.

<sup>19</sup> See <http://www.msha.gov/DRS/DRSHOME.HTM>.

contractor name or controller name.<sup>20</sup> In all cases, the information is displayed in the data retrieval system on a mine-by-mine basis.<sup>21</sup>

In addition, an independent adjudicative agency, the Federal Mine Safety and Health Review Commission (the “FMSHRC”), provides administrative trial and appellate review of legal disputes arising under the Mine Act.<sup>22</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.<sup>23</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>24</sup>

The disclosure requirements set forth in the Act are currently in effect.<sup>25</sup> 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>26</sup> Accordingly, we are proposing to amend our rules to implement and specify the scope and application of the disclosure requirements set forth in the Act and to require a limited amount of additional disclosure to provide context for certain items required by the Act.

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<sup>20</sup> The controller is the company or individual that MSHA’s Office of Assessments has determined to have ultimate control or ownership of the operator.

<sup>21</sup> When the disclosure requirements of Section 1503 of the Act were introduced, Senator Rockefeller noted his concern that “there is no requirement to publicly disclose safety records” of mining companies. See SA 3886 (an amendment to SA 3739 to S.3217, 111<sup>th</sup> Cong. (May 6, 2010); *Press Release: Rockefeller Requires Mining Companies to Disclose Safety Records*, May 7, 2010, available at <http://rockefeller.senate.gov/press/record.cfm?id=324768&>.

<sup>22</sup> 30 U.S.C. 815(d).

<sup>23</sup> “About FMSHRC” on <http://www.fms SRC.gov/fms SRC.html>.

<sup>24</sup> 30 U.S.C. 816.

<sup>25</sup> See Section 1503(f) of the Act.

<sup>26</sup> Section 1503(d)(2) of the Act.

Specifically, we are proposing 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 and certain additional disclosures. The disclosure requirements for Forms 10-Q and 10-K would be set forth in new Item 106 of Regulation S-K. Because the information required to be disclosed under proposed Item 106 of Regulation S-K would be set forth in an exhibit to the filing, we are proposing to amend Item 601 of Regulation S-K to add a new exhibit to Form 10-K and Form 10-Q. We are proposing to amend Forms 20-F and 40-F to include the same disclosure requirements as those proposed for issuers that are not foreign private issuers. In addition, we are proposing to add a new item to Form 8-K to implement the requirement imposed by Section 1503(b) of the Act, and to amend 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 PROPOSED AMENDMENTS**

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

As noted above, the requirements in Section 1503(a) are already in effect. We are proposing to codify the requirements into our disclosure rules in order to facilitate consistent compliance with them by reporting companies.

In order to implement the disclosure requirement set forth in Section 1503(a) of the Act, we are proposing 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. These proposed items would be identical in substance and entitled, “Mine Safety Disclosure.” As discussed in detail below, 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.

1. Scope

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 sections 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” is to have the meaning given such term in section 3 of the Mine Act.<sup>27</sup> The Act also specifies that the term “coal or other mine” is to mean a coal or other mine as defined in section 3 of the Mine Act,<sup>28</sup> that is subject to the provisions of the Mine Act.<sup>29</sup>

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<sup>27</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.

<sup>28</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>29</sup> Section 1503(e)(2) of the Act.

We are proposing to include references to these definitions in new Item 106<sup>30</sup> and Item 601(b)(95)<sup>31</sup> of Regulation S-K, the instructions to new Item 16J of Form 20-F<sup>32</sup> and the notes to new Paragraph (18) of General Instruction B of Form 40-F.<sup>33</sup> 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>34</sup> we are proposing that, for each required disclosure item discussed below,<sup>35</sup> the information would be required only for coal or other mines (as defined in the Mine Act) located in the United States. As a result, issuers that operate (or have subsidiaries that operate) mines outside the United States would not have to disclose information about such mines under the proposal. Thus, for example, an issuer that operates mines in both the United States and Canada would only be required to include information about its U.S. mines. While our proposals are limited to implementing the requirements of the Act and, therefore, do not extend to foreign mines, 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

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<sup>30</sup> See proposed Item 106 of Regulation S-K (17 CFR 229.106).

<sup>31</sup> See proposed Item 601(b)(95) of Regulation S-K (17 CFR 229.601(b)(95)).

<sup>32</sup> See instructions to proposed Item 16J under Part II of Form 20-F.

<sup>33</sup> See notes to proposed Paragraph (18) of General Instruction B of Form 40-F.

<sup>34</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 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>35</sup> See Section II.A.4 below for a discussion of the proposed disclosure requirements.

Condition and Results of Operations), Item 503(c) (Risk Factors), Item 101 (Description of Business) or Item 103 (Legal Proceedings).

As proposed, we would include smaller reporting companies and foreign private issuers<sup>36</sup> within the scope of the proposed rules implementing Section 1503(a) of the Act. We 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 sections 13(a) or 15(d) of the Exchange Act.

Because foreign private issuers are not subject to Regulation S-K, we are proposing to amend Forms 20-F and 40-F to require the specified mine safety disclosure about mines subject to the Mine Act operated by a foreign private issuer (or a subsidiary of such foreign private issuer).<sup>37</sup>

Finally, we believe that the language of the Act referring to “each coal or other mine” is intended to elicit disclosure of any citations, orders or violations for each distinct mine covered by the Mine Act, and is not intended to permit disclosure by grouping mines by project or geographic region.<sup>38</sup> Although this approach may result in issuers reporting a significant volume of information in their periodic reports, this approach accords with the plain language of the Act. As noted above, information on a mine-by-mine basis is currently made publicly available through MSHA’s data retrieval system.

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<sup>36</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>37</sup> See Section IX below for the text of proposed amendments. As discussed in Section II.B.3 below, we are not proposing to require foreign private issuers to comply with Section 1503(b) of the Act by filing Forms 8-K.

<sup>38</sup> To facilitate public input on implementation of the Act, the Commission has provided a series of e-mail links, organized by topic, on its website at <http://www.sec.gov/spotlight/regreformcomments.shtml>. The public comments we received on the topic of mine safety disclosure are available on our website at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures.shtml>. We received input from a commentator suggesting that the Commission adopt a materiality standard for reporting the matters under Section 1503(a) where an issuer has numerous operations. See letter from Rio Tinto. However, because Section 1503 does not appear to contemplate materiality thresholds, we are not proposing to include such a threshold for the disclosure requirement.

## Request for Comment

- (1) Section 1503 of the Act provides definitions of the terms “operator” and “coal or other mine” but does not define the term “subsidiary.” 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,” which would apply to this disclosure in the absence of another definition. Is this definition appropriate for purposes of Section 1503, or should we include a different definition for “subsidiary” for purposes of Section 1503 disclosure? If so, how should we define that term?
- (2) In conformity with the language of Section 1503(a), we are proposing to apply the Act’s periodic report disclosure requirement only to mines that are subject to the Mine Act, and not to mines in other jurisdictions. Is this approach appropriate? Will issuers that operate (or have subsidiaries that operate) mines in the United States be at a competitive advantage or disadvantage compared to issuers that operate mines in other jurisdictions because of the lack of disclosure about non-U.S. mines? Should we instead expand the disclosure requirement to cover mines in all jurisdictions? If so, how would we address disclosure requirements for mines not subject to the Mine Act? How would we address the disclosure requirements if a jurisdiction does not have clear mine safety regulations?
- (3) Section 1503 of the Act does not contemplate an exception from disclosure for smaller reporting companies. Should the requirements apply to smaller reporting companies, as proposed, or should we exempt smaller reporting companies from the

- disclosure requirement or some portion of the disclosure requirement? Are there alternative accommodations we should consider for smaller reporting companies?
- (4) Section 1503 of the Act also does not contemplate any exception from disclosure for foreign private issuers. Should the requirements apply to foreign private issuers, as proposed? If not, why not?
- (5) As proposed, the required disclosure must be provided for each mine for which the issuer or a subsidiary of the issuer is an operator. How burdensome would such disclosure be for issuers to prepare? Could this approach produce such a volume of information that investors will be overwhelmed? Should we instead require disclosure by project or geographic region? Would this approach be consistent with Section 1503(a) of the Act?
- (6) General Instruction I to Form 10-K and General Instruction H to Form 10-Q contain special provisions for the omission of certain information by wholly-owned subsidiaries. General Instruction J to Form 10-K contains special provisions for the omission of certain information by asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed mine safety disclosure in the annual reports on Form 10-K and quarterly reports on Form 10-Q?

## 2. Location of Disclosure

The Act states that companies must include the disclosure in their periodic reports required pursuant to sections 13(a) or 15(d) of the Exchange Act. We are proposing to 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.<sup>39</sup> The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in our new rules. We are proposing this approach in order to facilitate access to the information about detailed mine safety matters without overburdening the traditional Exchange Act reports with extensive new disclosures. We note 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 discussion and analysis, inclusion of this new disclosure would not obviate the need to discuss mine safety matters as appropriate.

We are not proposing any particular presentation requirements for the new disclosure, although we encourage issuers to use tabular presentations whenever possible if to do so would facilitate investor understanding.

#### Request for Comment

(7) Because the Act states that issuers must include the mine safety disclosure in each periodic report filed with the Commission, we are proposing to require the disclosure in each filing on Forms 10-Q, 10-K, 20-F and 40-F. For issuers that file using the domestic forms (Forms 10-Q and 10-K), should we, instead only require the disclosure annually? Would such an approach be consistent with the Act?

(8) As proposed, we would not specify a particular presentation for the disclosure.

Should we require a specific presentation, tabular or otherwise? If so, please provide details on an appropriate presentation.

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<sup>39</sup> Proposed Item 4 under Part II of Form 10-Q, proposed Item 4(b) under Part I of Form 10-K, proposed Item 16J under Part II of Form 20-F and proposed paragraph B.(18) under the General Instructions to Form 40-F.

- (9) We are proposing 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. Is this approach appropriate? Should we instead require the information to be presented in the body of the periodic report?
- (10) As noted above, Section 1503(a) requires the disclosure to be included in periodic reports. Should we also require the information to be included in registration statements?
- (11) Should we require the disclosure to be provided in an interactive data format? Why or why not? Would investors find interactive data to be a useful tool to analyze the information provided and generate statistics for their own use? If so, what format would be most appropriate for providing standardized data disclosure – for example, eXtensible Markup Language (XML) or eXtensible Business Reporting Language (XBRL)? Could the use of interactive data make it possible for issuers to reduce reporting costs by using the same data that is already available through MSHA’s data retrieval system?

### 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.” Accordingly, we are proposing that each Form 10-Q would include the required disclosure for any orders, violations or citations received, penalties assessed or legal actions initiated during the quarter covered by the report.<sup>40</sup> We are also

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<sup>40</sup> As noted in Sections II.A.4.f and j below, we are also proposing 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.

proposing that each Form 10-K would include disclosure covering both the fourth quarter of the issuer's fiscal year, and cumulative information for the entire fiscal year. We believe this is consistent with Section 1503(a), since a Form 10-K covers both the fourth quarter and the entire year. For each of Forms 20-F and 40-F, the disclosure would be required for the issuer's fiscal year.

Because mine operators have the right to contest orders, violations or citations they receive through the administrative process,<sup>41</sup> there is a possibility an operator's challenge would result in dismissal of the order, violation or citation or in a reduction in the severity of the order, violation or citation below the level that triggers disclosure under Section 1503(a). One mining company<sup>42</sup> has suggested that we not require disclosure of citations that, prior to the periodic filing, have been dismissed or resolved such that they fall below the reportable level, or alternatively that the issuer be able to elaborate its position with respect to citations, such as whether the citations have been or will be challenged or if the issuer believes the severity of the citation is unwarranted. Based on the language of Section 1503(a) of the Act, we are not proposing to allow issuers to exclude information about orders, violations or citations that were received during the time period covered by the report but subsequently were dismissed or reduced. However, the proposal would not prohibit the inclusion of additional information to provide context to the required disclosure. We would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such context.

#### Request for Comment

(12) We are proposing to require the Form 10-K to include both disclosure about orders, citations, violations, assessments and legal actions received or initiated during

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<sup>41</sup> See 30 U.S.C. 815(d).

<sup>42</sup> See letter from Rio Tinto.

the fourth quarter and the aggregate data for the whole year. Is this approach consistent with Section 1503(a)? Would it be consistent with Section 1503(a) to limit the information to the fourth quarter data? Alternatively, should we require the Form 10-K to include only fourth quarter information, or only the full year information?

- (13) As proposed, issuers would be required to report all orders, violations or citations received during the period covered by the report, regardless of whether such order, violation or citation was subsequently dismissed or reduced below a reportable level prior to the filing of the periodic report. Should we instead allow such orders, violations or citations to be excluded from the disclosure?

#### 4. Required Disclosure Items

Section 1503(a) of the Act includes a list of items to be disclosed in periodic reports. We are reiterating those items in new proposed Item 106 of Regulation S-K.<sup>43</sup> In addition, we are proposing 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. In addition, in order to provide context to investors, we are proposing one additional disclosure item not required by the Act that would require issuers to briefly describe the categories of violations, orders or citations included in the other items required by Section 1503(a).

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<sup>43</sup> In this release, we reference new 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.

We discuss each disclosure item below. Under our proposal, each issuer that is required under Section 1503(a) to provide this disclosure<sup>44</sup> would be required to provide the following for each coal or other mine<sup>45</sup> for the time period covered by the report (as discussed above).<sup>46</sup>

- 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.

Section 104 of the Mine Act requires MSHA inspectors to issue various citations or orders for violations of health or safety standards.<sup>47</sup> Violations are cited by MSHA inspectors, giving the operator time for abatement of the violation. 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 a “S&S” violation).<sup>48</sup> In writing each citation or order, the MSHA inspector determines whether the violation is “S&S” or not.<sup>49</sup> The MSHA data

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<sup>44</sup> See Section II.A.1 above.

<sup>45</sup> See Section II.A.1 above.

<sup>46</sup> See Section II.A.3 above. Note that compliance with Section 1503 of the Act is currently required, regardless of whether we adopt the proposed changes to our disclosure rules.

<sup>47</sup> 30 U.S.C. 814.

<sup>48</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>49</sup> MSHA Program Policy Manual Vol. 1, p. 23.

retrieval system currently provides information about all citations and orders issued and notes which of those citations or orders are “S&S.”<sup>50</sup>

Because the language of Section 1503(a)(1)(A) 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, we are proposing to require disclosure under this item of all citations received under section 104 of the Mine Act that note an S&S violation.

#### Request for Comment

(14) Is it appropriate to limit this disclosure item to only S&S violations, or should we require disclosure of every violation under section 104 of the Mine Act?<sup>51</sup>

b. The total number of orders issued under section 104(b) of the Mine Act.

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. The proposed rule would implement the Act’s requirement to disclose this information.

c. 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.

Section 104(d) of the Mine Act covers similar violations as discussed above, except that the standard is that the violation could significantly and substantially contribute to the cause and

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<sup>50</sup> The MSHA data retrieval system can be accessed at <http://www.msha.gov/drs/drshome.HTM>.

<sup>51</sup> MSHA reports that in 2009 (preliminary), of the 175,079 citations and orders issued and not vacated, 33% were designated S&S. In 2008, of the 174,473 citations and orders issued by MSHA and not vacated, 30% were designated S&S. See U.S. Department of Labor, Mine Safety and Health Administration, Mine Safety and Health at a Glance (May 19, 2010), available at <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFACT10.HTM>.

effect of a safety or health hazard, but the conditions do not cause imminent danger, and the inspector finds that the violation is caused by an unwarrantable failure of the operator to comply with the health and safety standards. The proposed rule would implement the Act's requirement to disclose this information.

d. 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>52</sup> The proposed rule would implement the Act's requirement to disclose this information.

e. 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 this information.

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<sup>52</sup> 30 U.S.C. 820(b)(2).

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

Each issuance of a citation or order by MSHA 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>53</sup>

Because Section 1503(a) requires issuers to disclose the total dollar value of proposed assessments "for the time period covered by" the periodic report, we are proposing to require that issuers disclose the total dollar amount of assessments of penalties proposed by MSHA during the time period covered by the report. We are also proposing that the disclosure include the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. We understand that proposed assessments may remain outstanding for extended periods of time, and believe such disclosure would provide a clearer picture of the most current health and safety issues for the issuer, as well as information about the magnitude of outstanding penalty assessments.

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 a FMSHRC administrative law judge.<sup>54</sup> Because Section 1503(a)(1)(F) of the Act references the total dollar amount of proposed assessments from MSHA during the time period covered by the report, we are proposing that this disclosure include any dollar amounts of penalty assessments proposed during the time period that the issuer is contesting with

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<sup>53</sup> 30 U.S.C. 815(b)(1)(B).

<sup>54</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.

MSHA or the FMSHRC. However, the proposal would not prohibit the inclusion of additional information noting that certain proposed assessments of penalties are being contested to provide context to the required disclosure. We would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such context.

Request for Comment

(15) As proposed, the new rules would require disclosure of the total dollar amounts of assessments of penalties proposed by MSHA during the time period covered by the report, and also the cumulative total of all proposed assessments of penalties outstanding as of the date of the report. Is this approach appropriate?

(16) As proposed, issuers would be required to include in the total dollar amount any proposed assessments of penalties that are being contested. Should issuers be permitted to exclude proposed assessments that are being contested? Should issuers be permitted to note the contested amounts separately?

g. The total number of mining-related fatalities.

Section 1503(a)(1)(G) of the Act sets forth the requirement to disclose the total number of mining-related fatalities, and our proposed rule would set forth this requirement. We note that Section 1503(a)(1)(G) is the only provision of Act that does not specifically reference the Mine Act, a specific notice, order or citation from MSHA, or the FMSHRC. However, because, as discussed above,<sup>55</sup> the application of Section 1503 is limited to mines that are subject to the provisions of the Mine Act, we believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. MSHA regulations require the

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<sup>55</sup> See Section II.A.1 above.

reporting of all fatalities at a mine.<sup>56</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>57</sup> Since the MSHA regulations provide a comprehensive scheme of regulation, reporting and assessment for mine-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.

MSHA regulations require the operator of a mine to contact MSHA at once without delay and within 15 minutes at a toll-free number, once the operator knows or should know that an accident has occurred involving: (a) a death of an individual at the mine; (b) an injury of an individual at the mine which has a reasonable potential to cause death; (c) an entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) any other accident.<sup>58</sup> In addition, MSHA regulations require each operator to prepare and file a report with MSHA of each accident, occupational injury, or occupational illness occurring at each mine, indicating therein whether such injury or illness resulted in death.<sup>59</sup>

MSHA investigates all deaths on mine property.<sup>60</sup> Deaths that have been determined to be “non-chargeable” are not counted in the statistics MSHA uses to assess the safety

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<sup>56</sup> See 30 CFR §§ 50.10 and 50.20.

<sup>57</sup> See MSHA Accident/Illness Investigation Handbook, Chapter 2 Release 2 (February 2004) p.9 located at <http://www.msha.gov/READROOM/HANDBOOK/PH00-I-5.pdf> (“MSHA Accident/Illness Handbook”).

<sup>58</sup> 30 CFR § 50.10; see also Section 103(j) of the Mine Act [30 U.S.C. §813(j)].

<sup>59</sup> 30 C.F.R. § 50.20. See also Item 18 of Section C of MSHA Form 7000-1 located at <http://www.msha.gov/forms/70001inb.htm>.

<sup>60</sup> See MSHA Accident/Illness Handbook at p. 9.

performance of the mining industry.<sup>61</sup> These “non-chargeable” deaths include, among other things, homicides, suicides, deaths due to natural causes, and deaths involving trespassers.<sup>62</sup> In cases where it is questionable whether a death is chargeable to the mining industry, MSHA may refer the case to its Fatality Review Committee.<sup>63</sup> Each of the four members of the Fatality Review Committee conducts an independent review of the facts and circumstances surrounding the questionable death to determine whether it is chargeable to the mining industry.<sup>64</sup>

The proposed disclosure requirement encompasses all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been determined to be “non-chargeable” to the mining industry. We believe that this interpretation of the statutory language is appropriate because it will result in consistency among reporting obligations.

#### Request for Comment

(17) As proposed, we would require disclosure of mining-related fatalities only at mines that are subject to the Mine Act. However, many foreign jurisdictions already require mine operators to report mining-related fatalities.<sup>65</sup> Would it be more appropriate to instead require disclosure of mining-related fatalities at all mines operated by companies that file periodic reports with the Commission, regardless of the location of the mine? For example, under such an approach, a foreign private issuer would have to disclose all mining-related fatalities at mines in its home country

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<sup>61</sup> Id. at p. 10.

<sup>62</sup> Id. See also MSHA Fatal Injury Guideline Matrix located at <http://www.msha.gov/Fatals/Chargeability/ChargeabilityMatrix.pdf>.

<sup>63</sup> MSHA Accident/Illness Handbook at p. 10.

<sup>64</sup> Id.

<sup>65</sup> See e.g., Mines Safety and Inspection Act 1994 (Western Australia); Mine Health and Safety Act, 1996, Department of Mineral Resources Regulations, Chapter 23 – Reporting of Accidents and Dangerous Occurrences (Republic of South Africa).

or any other jurisdiction, and domestic issuers would be required to disclose mining-related fatalities at mines outside of the United States. Would this be appropriate?

How difficult would it be for issuers to compile and report this information? Would such an approach impose significant costs on issuers?

(18) Should we, as proposed, require disclosure of all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been determined to be “non-chargeable” to the mining industry? Should we add an instruction to the rule specifying this interpretation of the disclosure requirement? Would it be more appropriate to instead require disclosure of all fatalities regardless of the determination that it was “non-chargeable”? Should we provide further guidance as to the timing of reporting for fatalities that are under review by MSHA’s Fatality Review Committee?

(19) If we were to require disclosure of mining-related fatalities regardless of the location of the mine, what standard, if any, should we apply for determining whether a fatality is related or unrelated to mining activity? For example, would it be appropriate to apply the MSHA framework to non-U.S. jurisdictions, or to look to each non-U.S. jurisdiction’s mine safety regulatory scheme for guidance?

- h. 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 this information.

- i. 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>66</sup> The proposed rule would implement the Act’s requirement to disclose this information.

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<sup>66</sup> See 30 CFR 104.4.

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

The FMSHRC is an independent agency established by the Mine Act that provides administrative trial and appellate review of legal disputes arising under the Mine Act.<sup>67</sup> We are proposing that 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 be disclosed in the periodic report covering the time period during which the legal action was initiated. This disclosure would include, but not be limited to, any actions brought by the issuer or a subsidiary of the issuer before the FMSHRC to contest citations or penalties imposed by MSHA.<sup>68</sup> As proposed, the new 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.<sup>69</sup> Mine operators frequently contest proposed assessments<sup>70</sup> and we believe that information about the resolution of pending legal actions would be useful in this context.

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 mine involved, and a brief description of the category of violation, order or citation

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<sup>67</sup> 30 U.S.C. 815(d).

<sup>68</sup> Other types of cases that would be disclosed include, for example, those relating to orders to close a mine, miners' charges of safety related discrimination or miners' requests for compensation after a mine is idled by a closure order. See "About FMSHRC" at <http://www.fmshrc.gov/fmshrc.html>.

<sup>69</sup> See Section IX below for the text of proposed amendments.

<sup>70</sup> See Number of Penalties Assessed and Percent Contested, January 2007 – July 2010 (Graphs and Charts), as of 09/09/2010, available at <http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf>. The graphs illustrate that during the time period between January 2007 through July 2010, the percent of penalties contested ranged from approximately 10% to approximately 30% of the number of penalties assessed, and the percent of penalty dollars contested ranged from approximately 30% to approximately 75% of the penalty dollars assessed.

underlying the proceeding. We believe this limited additional information is necessary to make the information more useful to investors by putting the disclosure in context.

Request for Comment

(20) As proposed, information about pending legal actions would be disclosed in the periodic report covering the period in which the action was initiated, with updates in subsequent reports for developments material to the pending action. Is this appropriate? Should we instead limit the disclosure to only those legal actions initiated during the period covered by the periodic report? Should we specifically require issuers to provide disclosure when a contested assessment has been vacated during the time period covered by the report?

(21) Is the contextual information we are proposing to require to be included for each pending legal action appropriate? Should we require any other information about pending legal actions to be disclosed?

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

Although not required by Section 1503 of the Act, we are proposing to require issuers to provide a brief description of each category of violations, orders and citations reported under new Items 106(a)(1) and 106(a)(2) of Regulation S-K<sup>71</sup> so that investors can understand the basis for the violations, orders or citations referenced. For example, we would expect that an issuer that reports receipt of an order under section 107(a) of the Mine Act would include disclosure stating that such orders are issued for situations in which MSHA determines an imminent danger exists and result in orders of immediate withdrawal from the area of the mine affected by the condition. We believe this is appropriate to provide

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<sup>71</sup> This proposed requirement would also apply to the corresponding categories of citations, orders and violations to be reported under proposed Item 16J(a) and (b) of Form 20-F and proposed Paragraph (18)(a) and (b) to General Instruction B of Form 40-F.

investors with context to the disclosure required by Section 1503(a) of the Act. We are concerned that without such a requirement, investors may be presented with disclosure that simply references the various provisions of the Mine Act, and would have to research the Mine Act and MSHA's rules to be able to assess the information.

#### Request for Comment

(22) Will the proposed disclosure providing a brief description of each category of violations, orders and citations reported be useful for investors, or would the information otherwise provided in the proposed exhibit to the periodic report be sufficient? Is there any other disclosure we should require in order to put the disclosures required by Section 1503(a) of the Act in context for investors?

#### **B. Form 8-K Filing Requirement**

##### 1. Triggering events

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>72</sup> We are proposing to revise 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>73</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

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<sup>72</sup> Section 1503(b) of the Act.

<sup>73</sup> See Section II.A.4.e. above for a description of an imminent danger order issued under section 107(a) of the Mine Act [30 U.S.C. 817(a)].

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>74</sup> or

- Written notice from MSHA of the potential to have a pattern of such violations.<sup>75</sup>

These orders and notices are also required to be disclosed under Section 1503(a) of the Act in issuers' periodic reports. We believe the plain language of Section 1503 of the Act requires such orders and notices to be reported both in issuers' Forms 8-K and their periodic reports. For example, if an issuer receives from MSHA one of the orders or notices specified above during the second quarter of the year, the issuer would file a Form 8-K reporting the receipt of the order or notice within four business days of receipt, include information about such order or notice in accordance with new Regulation S-K Item 106 in its Form 10-Q for the second quarter and include information regarding this violation in the annual cumulative total for the fiscal year in its Form 10-K for that fiscal year.

#### Request for Comment

(23) 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. Should we revise our proposal to minimize duplicative disclosure such as by not requiring repetition of information previously reported? Would such an approach be consistent with the Act? Would

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<sup>74</sup> See Section II.A.4.h. above for a description of the written notice regarding a pattern of violations under section 104(e) of the Mine Act [30 U.S.C. 814(e)].

<sup>75</sup> See Section II.A.4.i. 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)].

our proposed disclosure approach be unduly burdensome for issuers or confusing to investors?

## 2. Required disclosure and filing deadline

Section 1503(b) of the Act does not specify the disclosure that issuers should provide in the required Form 8-K filing. We are proposing that new Item 1.04 of Form 8-K require, in each case, 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.

In addition, Section 1503(b) of the Act does not specify a filing deadline for the required Form 8-K. Consistent with our approach to other Form 8-K items, we are proposing that the current report under new Item 1.04 be required to be filed no later than four business days after the triggering event. We believe that, because the triggering events are clear and do not require management to make rapid materiality judgments, the four business day deadline provides adequate time for issuers to prepare accurate and complete information.

### Request for Comment

- (24) Is there any other information that should be required to be disclosed under proposed Item 1.04 of Form 8-K? Will the information that we are proposing to require in the Form 8-K be useful for investors?
- (25) Should the filing period for a Form 8-K under proposed Item 1.04 be four business days, as proposed, or should the filing period be longer? What factors should we consider in deciding whether to make the filing period longer?

### 3. Treatment of Foreign Private Issuers

Foreign private issuers are not required to file current reports on Form 8-K.<sup>76</sup> Instead, they are required to file under the cover of Form 6-K<sup>77</sup> copies of all information that the foreign private issuer 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>78</sup> We do not propose to change these reporting requirements.<sup>79</sup> As described above,<sup>80</sup> we are proposing changes to Forms 20-F and 40-F that would require a foreign private issuer to disclose in each annual report the items described in Section 1503(a) of the Act. The proposed amendments include the same information that will be required of other issuers, including disclosure of the receipt during the foreign private issuer's past fiscal year of any imminent danger order issued under section 107(a) of the Mine Act,<sup>81</sup> 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,<sup>82</sup> or written notice from MSHA of the potential to have a pattern of such violations.<sup>83</sup>

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<sup>76</sup> See Exchange Act Rules 13a-11 and 15d-11 [17 CFR 240.13a-11 and 15d-11].

<sup>77</sup> Referenced in 17 CFR 249.306.

<sup>78</sup> See Exchange Act Rule 13a-6 [17 CFR 240.13a-16].

<sup>79</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]. See also letter from Rio Tinto.

<sup>80</sup> See Section II.A. above for a description of all the proposed disclosure requirements to Forms 20-F and 40-F.

<sup>81</sup> See Section II.A.4.e. above.

<sup>82</sup> See Section II.A.4.h. above.

<sup>83</sup> See Section II.A.4.i. above.

## Request for Comment

- (26) Should we require foreign private issuers to file disclosure about the receipt of imminent danger orders or notices of a pattern or potential pattern of violations within four days under cover of Form 8-K, Form 6-K or a special report on Form 20-F? Should we otherwise require a foreign private issuer to promptly disclose the receipt of such order or notices? Does a divergent treatment of U.S. issuers and foreign private issuers in connection with current reporting disadvantage U.S. issuers? Should this be addressed in our rules, and if so, how? To what extent, if any, would foreign private issuers have additional burdens or costs associated with reporting these events on a current basis?

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

We are proposing 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. 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. We believe that it is appropriate to add proposed Item 1.04 to the list of Form 8-K items in General Instruction I.A.3.(b) of Form S-3.

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>84</sup> We note that Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8-K. Therefore, we are proposing to provide that untimely filing of the new Item 1.04 Form 8-K would not result in the loss of Form S-3 eligibility.

We are not proposing 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 a limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act.<sup>85</sup> In 2004, when we adopted the limited safe harbor, we noted our view that the safe harbor is appropriate if the triggering event for the Form 8-K requires management to make a rapid materiality determination.<sup>86</sup> The filing of an Item 1.04 Form 8-K is triggered by an event that does not require management to make a rapid materiality determination, and we believe that it is not necessary to extend the safe harbor to this new item. We solicit comment below on whether this treatment is appropriate for proposed Item 1.04.

#### Request for Comment

(27) Should we, as proposed, 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?

Why or why not? If we were to adopt a current reporting requirement for foreign

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<sup>84</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>85</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>86</sup> Additional Form 8-K Disclosure Release at 69 FR 15607.

private issuers for the information covered by Section 1503(b) of the Act, should we approach Form F-3 eligibility in the same manner?

(28) As proposed, we would not include proposed 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.

Should we instead add proposed Item 1.04 to the safe harbor? Why or why not?

### **III. GENERAL REQUEST FOR COMMENT**

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

### **IV. PAPERWORK REDUCTION ACT**

#### **A. Background**

Certain provisions of the proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).<sup>87</sup> We are submitting the proposed amendments to the Office of Management and Budget (OMB) for review in accordance with the PRA.<sup>88</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);

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<sup>87</sup> 44 U.S.C. 3501 *et seq.*

<sup>88</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

- (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>89</sup> The hours and costs associated with preparing disclosure, 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.

As discussed in more detail above, the proposed rule and form amendments would 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 proposing to add new Items 106 and 601(b)(95) to Regulation S-K and amend Forms 10-Q, 10-K, 20-F and 40-F under the Exchange Act to implement and, to a limited degree, enhance the disclosure requirement set forth in Section 1503(a) of the Act. We are also proposing to add new Item 1.04 to Form 8-K to implement the requirement of Section 1503(b) of the Act. In addition, we are proposing to amend General Instruction I.A.3(b) of Securities Act Form S-3.

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<sup>89</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.

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. Most of the information called for by the new disclosure requirements is publicly disclosed by MSHA and readily available to issuers, who receive the notices, orders and citations directly from MSHA and can also access the information via MSHA's data retrieval system. Further, the proposed disclosure item for periodic reports requiring disclosure of mining-related fatalities is already subject to a collection of information under MSHA regulations.<sup>90</sup> Our proposed amendments would incorporate the Act's requirements into Regulation S-K and related forms, and would require certain additional disclosure to provide context to the disclosure items required by the Act.

We anticipate that the proposed new Items 106 and 601(b)(95) of Regulation S-K would increase existing disclosure burdens for annual reports on Form 10-K and quarterly reports on Form 10-Q by requiring disclosure about certain mine health and safety violations designated by the Act. Because Regulation S-K does not apply directly to Forms 20-F and 40-F,<sup>91</sup> we propose to amend those forms to include the same disclosure requirements as those proposed for issuers that are not foreign private issuers.<sup>92</sup> We anticipate that new Item 1.04 of Form 8-K would increase the existing disclosure burden 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.

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<sup>90</sup> 30 CFR §§ 50.10 and 50.20.

<sup>91</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 ("MJDS").

<sup>92</sup> Proposed Item 16J under Part II of Form 20-F and proposed paragraph (18) to General Instruction B of Form 40-F.

Compliance with the proposed amendments would be mandatory. Responses to the information collections would not be kept confidential, and there would be no mandatory retention period for the information disclosed.

### **B. Burden and Cost Estimates Related to the Proposed Amendments**

We anticipate that the proposed rule and form amendments, if adopted, would increase the burdens and costs for issuers that would be subject to the proposed amendments. For purposes of the PRA, we estimate the total annual increase in paperwork burden for all affected companies to comply with our 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 include the time and the cost of implementing disclosure controls and procedures, preparing and reviewing disclosure, filing documents and retaining records. In deriving our 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;<sup>93</sup> 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.

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<sup>93</sup> The \$400 per hour cost for outside legal services is the same estimate used by the Commission for these services in the proposed consolidated audit trail rule: Exchange Act Release No. 62174 (May 26, 2010): 75 FR 32556 (June 8, 2010).

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 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 the information via MSHA's publicly available data retrieval system.

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

While the proposed rule and form amendments would 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 proposing to retain 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 violations in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 13,545 Form 10-Ks filed annually, approximately 95 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 proposed

rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in its Form 10-K. We further estimate that the proposed rule and form amendments would add 5 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 violations 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 proposed rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in its Form 20-F. As with Form 10-K, we estimate that the proposed rule and form amendments would add 5 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 violations 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 proposed rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to

include in its Form 40-F. As with Forms 10-K and 20-F, we estimate that the proposed rule and form amendments would add 5 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 violations in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 32,462 Form 10-Qs filed annually, approximately 285 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 proposed rule and form amendments.<sup>94</sup> For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in each Form 10-Q. We further estimate that the proposed rule and form amendments would add 5 burden hours to the total burden hours required to produce each Form 10-Q.

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

We estimate that companies annually file 115,795 Form 8-Ks. Only companies that are operators, or have subsidiaries that are operators, of coal or other mines (as defined in the Mine Act, and subject to the Mine Act) are required to comply with the proposed new Form 8-K requirement. For purposes of the PRA, we estimate that there will be approximately 95 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 proposed rule and form amendments. In addition, we understand that

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<sup>94</sup> We estimate that approximately 95 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. 95 companies x 3 Forms 10-Q per year=285 Forms 10-Q.

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 very rare, while the triggering event set forth in Section 1503(b)(1) – the receipt of an imminent danger order – is more common.<sup>95</sup> For purposes of this calculation, we assume that each potential filer under proposed Item 1.04 of Form 8-K would file three Forms 8-K per year under new Item 1.04 and we estimate that the proposed amendments to Form 8-K would add 1 burden hour to the total burden hours required to produce each Form 8-K.

### **C. Summary of Proposed 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 proposed amendments for annual reports, quarterly reports and current reports on Form 8-K under the Exchange Act (Table 1). There is no change to 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 proposed disclosure requirements.

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<sup>95</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, 631 and 562 imminent danger orders under Section 107(a) were issued during fiscal 2010 and 2009, respectively. See Violations Data Set (as of Nov. 12, 2010), 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.

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	21,363,548	356	21,363,904	2,848,473,000	47,500	2,848,520,500
<b>20-F</b>	942	622,907	19	622,926	743,089,980	22,500	743,112,480
<b>40-F</b>	205	21,884	19	21,903	26,260,500	22,500	26,283,000
<b>10-Q</b>	32,462	4,559,793	1,069	4,560,862	607,972,400	142,500	608,114,900
<b>8-K</b>	115,795	493,436	214	493,650	65,791,500	28,500	65,820,000

#### **D. Request for Comment**

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of

Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-41-10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7- 41-10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE, Washington DC 20549-0213. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

## **V. COST-BENEFIT ANALYSIS**

### **A. Introduction and Objectives of Proposals**

We are proposing the rule and form amendments discussed in this release to implement the disclosure requirements set forth in Section 1503 of the Act and to require limited additional disclosure to provide context for certain items required by that Section. 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. Information on a mine-by-mine basis about inspections, violations, and accidents is publicly available on MSHA's data retrieval system on its website.<sup>96</sup> Therefore, we believe the information required to be disclosed under Section 1503 of the Act and our proposed 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 begun to develop the necessary controls and procedures to review and prepare the information required by Section 1503 of the Act for filing with the Commission, such that the additional incremental disclosure we are proposing to provide context for certain items required by that Section will not require issuers to implement additional controls and procedures.

We are proposing 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 and certain additional disclosures. New Item 106 of Regulation S-K, new Item 16J of Form 20-F and new Paragraph (18) of General Instruction B of Form 40-F would detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the proposed amendment to Item 601 of Regulation S-K would set forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under proposed Item 106 of Regulation S-K. We are also proposing 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 propose to amend 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>96</sup> See <http://www.msha.gov/DRS/DRSHOME.HTM>.

The Commission is sensitive to the costs and benefits that would be imposed by the proposed 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 cost 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.

## **B. Benefits**

The proposed rulemaking is intended to implement the requirements of Section 1503 of the Act. Our proposed Regulation S-K and form amendments would implement the requirements of the Act by reiterating the disclosure items listed in Section 1503, which are currently in effect. We are also proposing to require limited additional disclosure in periodic reports addressing:

- brief descriptions of the categories of violations, orders or citations disclosed in response to the Section 1503(a) disclosure requirement;
- total dollar values of proposed penalty assessments from MSHA; and
- descriptions of legal actions pending before the FMSHRC and developments material to previously reported pending legal actions.

In addition, our proposed amendment to Form 8-K would require 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 proposed Item 1.04.

We believe the enhanced disclosures in periodic reports about the categories of violations will improve the ability of investors to understand the statutorily required information about mine safety violations without having extensive knowledge of the Mine Act and the violations,

orders and citations referenced therein. We believe that investors would also benefit from the proposed disclosure in periodic reports of the total dollar value of the assessments and the description of legal actions and developments relating to legal actions because it would place the required disclosures in context.

Our proposed 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 would provide issuers and investors with certainty about the timing of that disclosure requirement.

Our proposed rule and form amendments also 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.

### **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 is readily available to issuers via MSHA's data retrieval system. The primary costs to result from this rulemaking are costs associated with the formatting and filing of the information and certain additional disclosures we are proposing: the description of the incidents, total dollar value of the proposed penalty assessments and the description of legal actions, as noted above. Given that this information should be readily available to issuers and the additional information does not require a substantial amount of additional disclosure, we believe that these costs would be small.<sup>97</sup>

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<sup>97</sup> For purposes of the PRA, we estimate the total cost of the disclosure to be approximately 1,677 hours of company personnel time and approximately \$263,500 for the services of outside professionals. However, this amount includes the costs associated with the disclosure requirement of Section 1503 of the Act, as well as our proposed additional disclosure. As discussed above, the proposed additional disclosure is only a small portion of the burden

#### **D. Request for Comment**

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

#### **VI. 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>98</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>99</sup> of the Securities Act and Section 3(f)<sup>100</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.

Our proposed amendments would implement the requirements of Section 1503 of the Act. We have proposed a few additional disclosure requirements to provide investors with context for the information required to be disclosed under Section 1503. We believe the

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of the disclosure requirement; therefore, we believe the costs of the additional disclosure would be a small fraction of the total amount disclosed for PRA purposes.

<sup>98</sup> 15 U.S.C. 78w(a).

<sup>99</sup> 15 U.S.C. 77b(b).

<sup>100</sup> 15 U.S.C. 78c(f).

additional disclosure will improve the ability of investors to understand the statutorily required information about mine safety violations without having extensive knowledge of the Mine Act and the orders, citations and violations referenced therein.

We do not believe that the additional disclosure we have proposed in our rulemaking would impose a burden on competition. Section 1503 of the Act imposed the substance of the disclosure requirements set forth in our proposals. The additional disclosure that we have proposed to require is not substantial, but rather brief descriptions to place the mine safety disclosures in context. In addition, we believe the additional information should be readily available to issuers. Accordingly, since the additional disclosure is designed to provide context to the information required to be disclosed by Section 1503 of the Act, and does not place a significant burden on the issuer, we believe that it will not impose a burden on competition. Likewise, we do not expect that the additional disclosure we are proposing to require would have a significant impact on capital formation.

We believe that the proposed clarifications to the mine safety information required by the Act 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 significantly restrict the ability of a company to raise capital and may be a disproportionately large negative consequence of an untimely filing of a Form 8-K. To address this potential burden on capital formation, we are proposing to revise 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.

We request comment on whether the proposed amendments would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view to the extent possible.

## **VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT**

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)<sup>101</sup> we solicit data to determine whether the proposed rule amendments constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

## **VIII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS**

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.<sup>102</sup> It relates to proposed revisions to Regulation S-K and forms under the Securities Act and the Exchange Act regarding disclosure about mine safety.

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<sup>101</sup> 5 U.S.C. 603.

<sup>102</sup> 5 U.S.C. 601.

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

We are proposing rulemaking to implement the disclosure requirements set forth in Section 1503 of the Act and to require limited additional disclosure to provide context for certain items required by 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 MSHA.

### **B. Legal Basis**

We are proposing the amendments pursuant to 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.

### **C. Small Entities Subject to the Proposed Action**

The proposed amendments would 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>103</sup> The Commission's rules define “small business” and “small organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157<sup>104</sup> and Exchange Act Rule 0-10(a)<sup>105</sup> define a company, other than an investment company, to be a “small business” or “small

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<sup>103</sup> 5 U.S.C. 601(6).

<sup>104</sup> 17 CFR 230.157.

<sup>105</sup> 17 CFR 240.0-10(a).

organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We believe that our proposals would affect small entities that (i) are required to file reports under Sections 13(a) or 15(d) of the Exchange Act and (ii) operate, or have a subsidiary that operates, a coal or other mine, 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 we are proposing today are intended to implement the disclosure requirements set forth in Section 1503 of the Act and to require additional disclosure to provide context for certain items required by the Act. These amendments would require small entities that are required to file reports under Sections 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 would 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 proposing 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 and certain additional disclosures. New Item 106 of Regulation S-K, new Item 16J of Form 20-F and new Paragraph (18) of General Instruction B of Form 40-F would detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the proposed amendment to Item 601 of

Regulation S-K would set forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under proposed Item 106 of Regulation S-K. We are also proposing 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 propose to amend 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. Duplicative, Overlapping, or Conflicting Federal Rules**

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 proposed 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 companies to report immediately any death of an individual at a mine,<sup>106</sup> which MSHA then makes available to the public through its data retrieval system on its website, [www.msha.gov](http://www.msha.gov).

#### **F. Significant Alternatives**

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 proposed 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;

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<sup>106</sup> See 30 CFR 50.10.

- (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 Sections 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 proposed amendments implement the disclosure requirements set forth in Section 1503 of the Act, and require additional disclosure to provide context for certain items required by 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. We nevertheless solicit comment on the propriety of a complete or partial exemption from the requirements for smaller entities.

Our proposed amendments would require clear and straightforward disclosure of the information required by Section 1503 of the Act. We have used design rather than performance standards in connection with the proposed 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 proposed amendments would 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.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S-K and the proposed amendments would not affect these

requirements. The proposed disclosure requirements would 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.

### **G. Solicitation of Comments**

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities that may be affected by the proposed amendments;
- The existence or 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.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

## **IX. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED 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 proposes to amend 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.

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2. Section 229.106 is added to read as follows:

#### **§ 229.106 (Item 106) 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 106(a)(1)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of 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.

(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) For each violation, order or citation disclosed in response to (a)(1) and (a)(2) above, a brief description of category of violation, order or citation.

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

Instruction to Item 106(a)(4): The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report.

Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

(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).

Instructions to Item 106:

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 fourth quarter of the registrant’s fiscal year, as well as for the entire fiscal year.

\* \* \* \* \*

3. Amend § 229.601 by revising 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 (97) [Reserved]	N/A												
(95) Mine Safety Disclosure Exhibit												X	X

\* \* \* \* \*

(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 106 of Regulation S-K (§ 229.106 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).

#### **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 16J, and adding Instruction 19 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 16J. 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 16J(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of 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.

(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) For each violation, order or citation disclosed in response to (a) and (b) above, a brief description of the category of violation, order or citation.

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

Instructions to Item 16J(d): 1. Item 16J 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. The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report. Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

\* \* \* \* \*

#### **Instruction to Item 16J**

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).

\* \* \* \* \*

#### **INSTRUCTIONS AS TO EXHIBITS**

\* \* \* \* \*

19. The mine safety disclosure required by Item 16J.

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 16J in an exhibit to its annual report on Form 20-F.

20 through 99. [Reserved]

\* \* \* \* \*

8. Amend Form 40-F (referenced in § 249.240f) by adding Paragraph (18) to General Instruction B. to read as follows:

\* \* \* \* \*

(18) 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 (18)(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of 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.

(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) For each violation, order or citation disclosed in response to (a) and (b) above, a brief description of the category of violation, order or citation.

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

Instruction to paragraph (18)(d): The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report. Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

\* \* \* \* \*

***Notes to Paragraph (18) 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. Instruction B(18) 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) A brief description of the category of 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 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. Specialized 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 106 of Regulation S-K (17 CFR 229.106) is included in exhibit 95 to the quarterly report.

\* \* \* \* \*

11. Amend Form 10-K (referenced in § 249.310) by adding paragraph (b) to 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. Specialized Disclosures \* \* \***

(b) 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 106 of Regulation S-K (17 CFR 229.106) is included in exhibit 95 to the annual report.

\* \* \* \* \*

By the Commission.

Elizabeth M. Murphy  
Secretary

December 15, 2010