SECTION 1

Registrant's Business and Operations

Item 1.01 Entry into a Material Definitive Agreement

Highlights

- ➢ Entry into "material definitive agreement"
- ➢ Can cover subsidiaries
- ➢ Does not include compensatory plans and arrangements
- ➢ Safe harbor applies
- ➢ No exhibit requirement
- ➢ "Filed" rather than "furnished"
- ➢ Special instruction for asset-backed issuers

NOTE: Item 1.01 is the one caption that can be omitted so long as the substantive disclosure is set forth in the Form 8-K.[1] This could occur if an event triggered reporting obligations under multiple 8-K Items.

When Is an Item 1.01 8-K Required?

Item 1.01 requires that a Form 8-K be filed within four business days if:

- The company (or a subsidiary if material to the company[2]) has entered into a **material definitive agreement not made in the ordinary course of its business**, or into any amendment of such an agreement that is **material to the company**.

What is a "material definitive agreement"? It is an agreement that provides for obligations that are **material to and enforceable against** the company, or rights that are **material to the company and enforceable by the company** against one or more other parties to the agreement, in each case whether or not subject to conditions (such as board approval). **This is the same standard as Regulation S-K Item 601; however, Form 8-K Item 1.01 does not apply to compensation-related matters**, which are covered under Form 8-K Item 5.02.[3] Item 601 of Regulation S-K is set forth in its entirety in Appendix 2. In the adopting release for the 2004 Form 8-K amendments, the Commission gives an example of a material definitive agreement that must be disclosed under Item 1.01—one that is enforceable despite being subject to customary closing conditions, such as the delivery of legal opinions or comfort letters, completion of due diligence or regulatory approval, despite the fact that the conditions have not yet been satisfied. The Commission went on to state, however, that if a company enters into a non-binding letter of intent or memorandum of understanding that also contains some binding, but non-material elements, such as a confidentiality agreement or a no-shop agreement, the letter or memorandum does not need to be filed because the binding provisions are not material.[4]

No disclosure required by Item 1.01 of non-binding letters of intent.

Summary of the Filing Trigger

- A material definitive agreement
- Not made in the ordinary course of business, or
- Amendment of such agreement (in fact, an amendment could result in an agreement becoming a material definitive agreement) that is material
- Is entered into (which includes an assumption or assignment other than by a merger or similar transaction).

Safe Harbor?	**The safe harbor applies.** *See supra* § GP:4.2, The Limited "Safe Harbor" for Late-Filed 8-Ks.

NOTE: Do you need to file the agreement as an exhibit to the 8-K? *No*, but the Commission encourages companies to file the definitive material agreement as an exhibit to the Form 8-K when feasible. Also, as discussed below and in section 2 Item 2.01, other disclosure obligations may require the filing of the agreement.

Disclosure Requirements

If Item 1.01 is triggered, the company would be required in the Form 8-K that is filed to disclose the following:

- The date the contract or amendment was entered into;
- The identity of the parties to the agreement or amendment;
- A brief description of any relationship between the company (or its affiliates) with any party beyond that in the reported agreement; and
- A brief description of material terms and conditions (*e.g.*, duration, each party's rights and obligations, termination provisions) of the agreement or amendment that are material to the company.

You must describe the agreement in the body of the 8-K even if the agreement is filed as an exhibit. Filing the agreement as an exhibit to the Form 8-K does not eliminate the need to provide a brief description of the agreement in the body of the Form 8-K. You can't simply say "the terms and conditions of the agreement are set forth in the agreement, a copy of which is filed as Exhibit 99.1 to this Current Report on Form 8-K."[5]

Do not forget your other filing requirements. You nevertheless have to file material definitive agreements as exhibits to the periodic report (*i.e.*, 10-Q or 10-K) for the period in which the contract (or amendment) is entered into. Also, an immaterial amendment to an otherwise material contract that previously has been filed as an exhibit, while not requiring an Item 1.01 Form 8-K, would nevertheless be required to be filed in the periodic report covering the fiscal period in which the amendment was entered into.

Additionally, the Form 8-K C&DIs give as an example a calendar year (and quarter) company that has a Form 8-K Item 1.01 filing requirement triggered in early April (*i.e.*, after the end of the company's first quarter but before the company is required to file its Form 10-Q for that quarter). These C&DIs highlight several possible "traps":[6]

- **Item 1.01 does not alter the requirement to file the agreement with the periodic report for that period.** First, the C&DIs reiterate that Item 1.01 of Form 8-K does not alter the existing Regulation S-K Item 601 requirements for filing exhibits under Item 601—*i.e.*, the requirement that the agreement be filed as an exhibit to the Form 10-Q for the **second** quarter (since the agreement was entered into after the close of the first quarter).
- **Which 10-Q?** Second, in one example, while not stated explicitly, the company timely files the Item 1.01 Form 8-K but does not file the agreement (to which the Item 1.01 Form 8-K relates) as an exhibit to that Form 8-K. The company

then files the agreement with the **first** quarter Form 10-Q (presumably because the agreement, while entered into in the second quarter, was entered into and available to be filed prior to the first quarter 10-Q filing date). That, however, still would not eliminate the requirement to file the agreement (which could be done through incorporation by reference) in the **second** quarter Form 10-Q.

- **More is required than simply filing the agreement with the 8-K.** Third, the Commission Staff noted that even if you are able to file the agreement as an exhibit to the Form 8-K, because Item 1.01 of Form 8-K requires "a brief description of the material terms and conditions of the agreement or amendment that are material to the company," simply incorporating the actual agreement by reference in the body of the 8-K **would not satisfy this disclosure requirement**. In some cases, the agreement may be so brief that it may make sense to disclose all the terms of the agreement into the body of the Form 8-K.

NOTE: "Ordinary" agreements may, in some circumstances, be deemed material. An agreement, even though it is of a type that "ordinarily accompanies the kind of business conducted by the company, nevertheless would be classified as a "material definitive agreement" and deemed not to be made in the ordinary course of a company's business (and, therefore, trigger a Form 8-K Item 1.01 filing) if it involves:

- **Interested parties.** Any contract to which directors, officers, promoters, voting trustees, security holders (other than compensatory plans and arrangements, which are covered by Form 8-K Item 5.02(e)) named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;
- **A contract upon which the company's business is substantially dependent.** Any contract upon which the company's business is substantially dependent, as in the case of continuing contracts to sell the major part of a company's products or services or to purchase the major part of a company's requirements of goods, services or raw materials, or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which the company's business depends to a material extent;
- **Large purchases or sales of assets.** Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15% of the fixed assets of the company on a consolidated basis; or
- **Material leases.** Any material lease under which a part of the property described in the registration statement or report is held by the company.

NOTE: Compensation-related agreements are not reportable under Item 1.01. As mentioned above, "compensation-related" agreements do not trigger an Item 1.01 8-K filing even though they fall within the definition of "material contracts" under Regulation S-K Item 601(b)(10)—instead, any 8-K disclosure requirements with respect to those agreements are set forth in Item 5.02 of Form 8-K.[7] The compensation-related

agreements that are *not* required to be disclosed (or filed) pursuant to Form 8-K Item 1.01 (and instead are potentially captured by Form 8-K Item 5.02(e)) are:

- Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the company participates; and any other management contract or any other compensatory plan, contract or arrangement in which any other executive officer of the company participates unless immaterial in amount or significance; and
- Any compensatory plan, contract or arrangement adopted (or assumed in connection with a merger or other similar transaction) without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the company) participates unless immaterial in amount or significance.

Practice Tip

Consider Termination Provisions Now!

Although not technically related to Item 1.01, when drafting new agreements, consider the default and termination provisions with a view toward how the future termination of those agreements might have to be disclosed under Form 8-K Item 1.02. For example, consider providing for a "notice of breach with a cure period" *prior* to termination versus a "notice of termination upon the occurrence of a breach."[8]

Special Instruction for asset-backed securities: Disclosure is required under Item 1.01 regarding the entry into or amendment to a definitive agreement that is material to the asset-backed securities transaction, ***even if the company is not a party*** to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB). **Note**, Appendix 8 includes excerpts of Regulation AB, including Item 1108.

STAFF GUIDANCE ON FORM 8-K ITEM 1.01

Agreement must be material at time it was originally entered into in order to trigger an Item 1.01 Form 8-K filing. If an agreement was not material at the time the company entered into it but it becomes material at a later date, the company need not file a Form 8-K under Item 1.01. The company, however, must file the agreement as an exhibit to the periodic report relating to the reporting period in which the agreement becomes material if, at any time during that period, the agreement was material to the company. In this regard, the company would apply the requirements of Item 601 of Regulation S-K to determine if the agreement must be filed with the periodic report.[9]

Placement agency and underwriting agreements; omission of names of underwriters in order to comply with Securities Act Rule 135c. The company, using established standards of materiality and with reference to Instruction 1 to Item 1.01, must determine whether specific placement agency or underwriting agreements are material. If the company determines that such an agreement is required to be filed under Item 1.01, irrespective of the requirement to disclose the names of the parties, the company nevertheless may, as under Form 8-K Item 3.02, omit the identity of the underwriters from the disclosure in the Form 8-K to remain within the safe harbor of Rule 135c.[10]

Automatic renewal is not the entry into a new contract that would require an Item 1.01 Form 8-K filing. In guidance primarily addressed to terminations of contracts that require Item 1.02 Form 8-K filings, the Staff indicates that automatic renewal of a contract (*i.e.*, "this agreement shall automatically renew on [date] unless prior timely notice of non-renewal is given") in accordance with the terms of the agreement (in other words, when no non-renewal notice is sent) would not require an Item 1.01 Form 8-K.[11]

Contracts containing options to renew—exercise of an option to renew when the other party may reject the renewal may require Item 1.01 Form 8-K. In additional guidance primarily addressed to terminations of contracts that require Item 1.02 Form 8-K filings, the Staff indicates that an Item 1.01 Form 8-K *would* be required if one party sent a renewal notice that was not rejected. This Item 1.01 Form 8-K filing would be triggered by the passage of the rejection deadline, not the sending of the renewal notice.[12]

Item 1.02 Termination of a Material Definitive Agreement

Highlights

- ➢ Termination of a "material definitive agreement"
- ➢ Can cover subsidiaries
- ➢ Does not include compensatory plans and arrangements
- ➢ Safe harbor applies
- ➢ No exhibit requirement
- ➢ "Filed" rather than "furnished"
- ➢ Special instruction for asset-backed issuers

Practice Tip

Regularly review the "material contracts" that are listed in the Annual Report on Form 10-K and remove those that are not material. The listed agreements are presumptively "material" and if one is terminated, the company might feel obligated to file an Item 1.02 Form 8-K for what, in reality, is not a material contract.

When Is an Item 1.02 8-K Required?

Item 1.02 requires that a Form 8-K be filed within four business days if:

- A material definitive agreement which was not made in the ordinary course of business of the company and which the company **(or a subsidiary if material to the company[13])** is a party is terminated **otherwise than by expiration of the agreement on its stated termination date, or as a result of all parties completing their obligations** under such agreement, and such termination of the agreement is material to the company.

Item 1.02 has the same standard for materiality as in Form 8-K Item 1.01. For purposes of Item 1.02 of Form 8-K, the term "material definitive agreement" has the same meaning as set forth in Item 1.01(b) of Form 8-K. Also note that termination of certain compensatory plans and arrangements might trigger disclosure under Form 8-K Item 5.02(e).

Summary of the Filing Trigger

- Material definitive agreement
- Not made in the ordinary course of business
- Is terminated *other than as a result of expiration or completion* (this can mean the date notice of termination is given (see Staff Guidance below))
- Termination is material to the company.

Safe Harbor?	**The safe harbor applies.** *See supra* § GP:4.2, The Limited "Safe Harbor" for Late-Filed 8-Ks.

Special Instruction for asset-backed securities: Disclosure is required under Item 1.02 regarding the termination of a definitive agreement that is material to the asset-backed securities transaction (otherwise than by expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement), even if the company is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB).

Disclosure Requirements

If Item 1.02 is triggered, the company would be required in the Form 8-K that is filed to disclose:

- The date of termination of the agreement;
- The identity of the parties to the agreement;
- A brief description of any material relationship between the company (or its affiliates) and any party beyond that in the reported agreement;
- A brief description of material terms and conditions of the agreement;
- A brief description of material circumstances surrounding the termination; and
- Any material termination penalties incurred.

No disclosure, however, required "solely by reason of Item 1.02":

- During negotiations or discussions regarding termination *unless a termination occurs*.
- If the company believes in good faith that the agreement has not been terminated and the company has not received (or given) notice of termination (see Staff Guidance below dealing with situations in which the company may be challenging a termination).

NOTE: Be aware of other disclosure obligations. The "solely" exception to the disclosure requirement simply means that *Form 8-K Item 1.02* does not require disclosure in the circumstances indicated. There nevertheless could be some other requirement, such as the requirement to disclose known trends and uncertainties in Management's Discussion and Analysis of Financial Condition and Results of Operations in a Form 10-Q or 10-K.

STAFF GUIDANCE ON FORM 8-K ITEM 1.02

Continuing negotiations and beliefs regarding renewal do not overcome actual notice of termination thereby requiring Item 1.02 Form 8-K filing. Consistent with the discussion set forth above, if the counterparty to a material definitive agreement that contains a provision requiring a 180-day advance notice of termination delivers to the company advance notice of termination, an Item 1.02 Form 8-K will be required even if the company intends to negotiate with the counterparty and believes in good faith that the agreement will ultimately not be terminated. The Staff referred to Instructions 1 and 2 to Item 1.02 that provide that no disclosure is required solely by reason of that item in certain circumstances and pointed out that Instruction 2 clarifies that, once notice of termination pursuant to the terms of the agreement has been received, the Item 2.02 Form 8-K is required, notwithstanding the company's continued efforts to negotiate a continuation of the contract.[14]

Contracts containing automatic renewals—triggering event is *notice* of termination (or non-renewal) as opposed to the later termination itself. If a material definitive agreement expires on, for example, June 30, but automatically renews for successive one-year terms unless one party sends a non-renewal notice during a thirty-day window period beginning six months before the automatic renewal (*i.e.*, during January), and one party sends the required notice of non-renewal, the sending (and also the receipt) of this type of notice triggers Form 8-K Item 1.02 disclosure. The Staff noted that the triggering event is the sending of the notice in January, not the termination of the agreement on June 30. The Staff indicated, however, that automatic renewal in accordance with the terms of the agreement (in other words, when no non-renewal notice is sent) would not require an Item 1.01 Form 8-K (*entry into* a material definitive agreement).[15]

Contracts containing options to renew—no triggering event occurs (and therefore no Item 1.02 Form 8-K is required) if option is not exercised and agreement simply expires in accordance with its terms. If a material definitive agreement expires on, for example, June 30, but provides that either party may renew the agreement for another one-year term ending on June 30 of the following year if that party sends a renewal notice to the other party during January, and the other party does not affirmatively reject that notice on or before the end of February, no Item 1.02 Form 8-K filing is required if neither party sends a renewal notice during January and the agreement terminates on June 30 (its stated termination date) in accordance with its terms. The Staff also indicated, however, that an Item 1.01 Form 8-K (*entry into* a material definitive agreement) would be required if one party sent a renewal notice that is not rejected. The Item 1.01 Form 8-K filing would be triggered by the passage of the rejection deadline on February 28—not the sending of the renewal notice in January.[16]

Item 1.03 Bankruptcy or Receivership

Highlights

- ➢ Two distinct filing triggers
- ➢ Safe harbor **DOES NOT** apply
- ➢ Specific exhibit requirement
- ➢ "Filed" rather than "furnished"
- ➢ Special instruction for asset-backed issuers

Item 1.03 actually has two elements; one (Item 1.03(a)) relating to initiation of insolvency proceedings and the second (Item 1.03(b)) relating to final confirmation of plans. Each will be discussed separately below.

When Is an Item 1.03(a) 8-K Required?

Item 1.03(a) requires that a Form 8-K be filed within four business days if:

- A receiver, fiscal agent or similar officer has been appointed for a company or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other pro-

ceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the company or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession (*i.e.*, "debtor in possession") but subject to the supervision and orders of a court or governmental authority.

When Is an Item 1.03(b) 8-K Required?

Item 1.03(b) requires that a Form 8-K be filed within four business days if:

- An order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the company or its parent.

Summary of the Filing Triggers (1.03(a) and 1.03(b))

- Appointment of a receiver, fiscal agent or similar officer in a proceeding
  - under U.S. bankruptcy law; or
  - under state or federal law in which court or governmental authority assumes jurisdiction over all of the company's assets or business (including leaving existing management in possession but under the supervision of the court or governmental authority); or
- An order is entered by a court or governmental authority that has jurisdiction over substantially all of the company's assets or business confirming a plan of reorganization, arrangement or liquidation.

Safe Harbor?	**The safe harbor DOES NOT apply.** *See supra* § GP:4.2, The Limited "Safe Harbor" for Late-Filed 8-Ks.

Item 1.03(a) Disclosure Requirements

If Item 1.03(a) is triggered, the company would be required in the Form 8-K that is filed to disclose the following:

- Name or other identification of the proceeding;
- Identity of the court or governmental authority;
- Date that jurisdiction was assumed by the court or governmental authority; and

- Identity of the receiver, fiscal agent or similar officer and the date of his or her appointment.

Item 1.03(b) Disclosure Requirements

If Item 1.03(b) is triggered, the company would be required in the Form 8-K that is filed to disclose:

- The identity of the court or governmental authority;
- The date that the order confirming the plan was entered by the court or governmental authority;
- A summary of the material features of the plan and, pursuant to Item 9.01 (Financial Statements and Exhibits), a copy of the plan as confirmed;
- The number of shares or other units of the company or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers; and
- Information as to the assets and liabilities of the company or its parent as of the date that the order confirming the plan was entered, or a date as close thereto as practicable. **NOTE:** This information may be presented in the form in which it was furnished to the court or governmental authority.

Specific exhibit requirement: If disclosure is required by Item 1.03(b) of Form 8-K, the required disclosures include a summary of the material features of the plan (similar to the summary of the material terms of material definitive agreements under Item 1.01 of Form 8-K). Unlike Item 1.01, however, Item 1.03(b) requires that a copy of the plan, as confirmed, be filed as an exhibit to the Form 8-K.[17] Any such plan would be designated as Exhibit number "2" or some derivative (*e.g.*, "2.1").

Special Instruction for asset-backed securities: With respect to asset-backed securities, disclosure also is required under Item 1.03 if the depositor (or servicer, if the servicer signs the Annual Report on Form 10-K of the issuing entity) becomes aware of any instances described in paragraph (a) or (b) of Item 1.03 with respect to the sponsor, depositor, servicer contemplated by Item 1108(a)(3) of Regulation AB, trustee, significant obligor, enhancement or support provider contemplated by Items 1114(b) or 1115 of Regulation AB, or other material party by Item 1101(d)(1) of Regulation AB. Terms used in this Special Instruction have the same meaning as in Item 1101 of Regulation AB.[18]

Item 1.04 Mine Safety—Reporting of Shutdowns and Patterns of Violations

Highlights

- ➢ Only one portion of the safe harbor applies—no effect on S-3 eligibility
- ➢ No exhibit requirement
- ➢ "Filed" rather than "furnished"

When Is an Item 1.04 8-K Required?

Item 1.04 requires that a Form 8-K be filed within four business days if:

- The company or a subsidiary has received, with respect to a coal or other mine of which the company or a subsidiary of the company is an operator:
  - an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977[19] (FMSHA);
  - a written notice from the Mine Safety and Health Administration (MSHA) 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 the FMSHA; or
  - a written notice from the MSHA that the coal or other mine has the potential to have such a pattern.

What is a "coal or other mine" and "who is an 'operator'"? Those terms are defined by reference to the FMSHA.[20] In particular, note that "operator" is broader than simply the entity that technically "operates" the mine and includes any **independent contractor performing services or construction at the mine.**

Summary of the Filing Trigger

- Receipt of an imminent danger order under section 107(a) of the FMSHA;
- Receipt of written notice from MSHA that the mine has a pattern of violations that could contribute significantly and substantially to the cause and effect of mine hazards under section 104(e) of the FMSHA; or

- Receipt of written notice from MSHA that the mine has the potential to have such a pattern of violations.

Safe Harbor?	**The safe harbor DOES apply . . . well, sort of:** Item 1.04 has "safe harbor" protection only with respect to S-3 eligibility—it is *not* exempt from Rule 10b-5 liability.

Disclosure Requirements

If Item 1.04 is triggered, the company would be required in the Form 8-K that is filed to disclose the following:

- The date of receipt by the issuer or a subsidiary of the order or notice;
- The category of the order or notice; and
- The name and location of the mine involved.

Practice Tip

Consider Going Beyond the Required Disclosures

Form 8-K Item 1.04 disclosures typically give the resolution of the notice, such as "ACME Cement Company received an order at its cement plant located in Anytown, USA on February 7, 2017 issued by the Mine Safety and Health Administration under section 107(a) of the Federal Mine Safety and Health Act of 1977. The order stated that a mine worker was observed working on the edge of a pit with fall protection equipment that was being used improperly. No one was injured in the cited incident, and the practice immediately ceased. This order was terminated the same day."

Notes

1. *See supra* § GP:2, Filing Mechanics.
2. *See* Form 8-K C&DI Question 101.02 (Apr. 2, 2008).
3. *See* discussion below and Appendix 2.
4. *See* Exchange Act Release No. 34-49424 (Mar. 16, 2004) n.39 and accompanying material.
5. *See* Form 8-K C&DI Question 102.03 (Apr. 2, 2008).
6. *See* Form 8-K C&DI 202.01 (Apr. 2, 2008). *See also* Form 8-K C&DI Question 102.03 (Apr. 2, 2008).
7. *See infra* section 5 Item 5.02.
8. *See infra* section 1 Item 1.02.
9. Form 8-K C&DI Question 102.01 (Apr. 2, 2008).
10. Form 8-K C&DI Question 102.02 (Apr. 2, 2008).
11. Form 8-K C&DI Question 103.02 (Apr. 2, 2008).
12. Form 8-K C&DI Question 103.03 (Apr. 2, 2008).
13. *See* Form 8-K C&DI Question 101.02 (Apr. 2, 2008).
14. *See* Form 8-K C&DI Question 103.01 (Apr. 2, 2008).
15. Form 8-K C&DI Question 103.02 (Apr. 2, 2008).
16. Form 8-K C&DI Question 103.03 (Apr. 2, 2008).
17. *See* Form 8-K Item 9.01 and Item 601(b)(2) of Regulation S-K.
18. 17 C.F.R. § 229.1101. Note that Appendix 8 includes excerpts of Regulation AB, including Item 1101.
19. Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801–966 (1974).
20. Definitions for purposes of Form 8-K Item 1.04: The term "coal or other mine" means a coal or other mine, as defined in section 3 of the FMSHA (30 U.S.C. § 802), that is subject to the provisions of such Act—specifically:

    > (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 [the FMSHA], the Secretary [of Labor] 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.

    The term "operator" has the meaning given the term in section 3 of the FMSHA (30 U.S.C. § 802)—specifically: "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."