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SEC Proposes Updates to Property Disclosure Regime for Mining Registrants

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On June 16, 2016, the Securities and Exchange Commission proposed new rules to update disclosure requirements for mining registrants, principally as set forth in Item 102 of Regulation S-K ("Item 102") and in Industry Guide 7 ("Guide 7") promulgated under the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These long-awaited changes are intended to modernize the U.S. mining disclosure regime, which has fallen out-of-step with the Committee for Mineral Reserves International Reporting Standards ("CRIRSCO") that are increasingly employed by foreign countries in industry practice.

The SEC currently permits mining registrants to disclose only mineral reserves unless otherwise required by foreign or state law,[1] limiting the ability of most U.S. issuers to include material information about mineral resources and exploration. By allowing significantly more disclosure, the proposed rule changes would provide greater transparency for investors and level the playing field for mining registrants seeking access to U.S. capital markets. If adopted as proposed, however, the new rules will also create an increased compliance burden for these issuers.[2]

Proposed Changes to Disclosure Policies and Requirements

Specifically, the SEC has proposed, and seeks comment on, the following changes to its mining disclosure regime:

Rescission of Guide 7

Guide 7, which was last updated in 1982, expands the disclosure requirements in Item 102 for registrants with "significant mining operations." Since the last update, the SEC has provided additional supplemental and interpretive guidance about required disclosure through informal channels creating difficult compliance issues for registrants. In the SEC's effort to consolidate and codify all disclosure requirements for mining properties in one location, the Commission has proposed rescinding Guide 7 and expanding Regulation S-K to include a new subpart 1300 ("Subpart 1300") to host all mining disclosure provisions.

Addition of Subpart 1300 to Regulation S-K

The SEC has proposed an amendment to Item 102 clarifying that "all mining registrants" (not just those with "significant mining operations") should refer to the new Subpart 1300 for disclosure guidance.

Beyond matters of form, Subpart 1300, as proposed, would change substantively the reporting and compliance standards for companies with

mining operations that are "material to [their] business or financial condition." As described below, such changes are generally intended to bring SEC requirements into closer alignment with CRIRSCO-based codes and applicable accounting standards.

- *Exploration Results*: In the interest of providing investors with earlier information about a registrant's potential growth opportunities, the proposed rules would require disclosure of material exploration results. However, because such findings are inherently speculative, the proposed rules would preclude the use of exploration results to derive estimates of tonnage, grade, and overall economic viability.
- *Mineral Resources*: Reflecting the widespread industry belief that mineral resource estimates are material to a company and its projects, registrants with material mining operations would no longer be precluded from disclosing – and would, in fact, be required to disclose – determined mineral resources (classified as either "inferred," "indicated," or "measured" based on confidence level).[3] This proposed disclosure requirement is complemented by the SEC's introduction of a specific pricing model for resource and reserve estimates. Under the new rules, mining registrants would be required to base their estimations on a commodity price no higher than the average closing price during the 24-month period prior to the end of the last fiscal year (unless a higher price has been set by contract).
- *Mineral Reserves*: For mineral resources classified as either "indicated" or "measured," the proposed rules would require the application of relevant modifying factors (e.g., energy recovery and conversion, processing, metallurgical, economic, marketing, legal, environmental and other regulatory permits, and infrastructure) to convert such resources to proven and probable mineral reserves. Additionally, this determination of mineral reserves would need to be supported by either a pre-feasibility or feasibility study – the former contemplating a range of extraction options with less detailed assessment of modifying factors for a given approach, and the latter honing in on a specific extraction plan with greater tailoring to relevant modifying factors. While registrants have typically used a commodity price for reserve estimates based on the trailing 3-year average price, the new rules would impose the same ceiling for both reserve and resource estimates (as explained in the bullet above).
- *Qualified Person and Technical Report Summary*: Under the proposed rules, every disclosure of mineral resources, mineral reserves and material exploration results would need to be based on information/documentation prepared by an identified "qualified person" – defined as an individual, affiliated or unaffiliated with the registrant,[4] possessing a minimum of 5 years' experience in a given type of mineralization, deposit, and mining activity, who is also an eligible member or licensee in good standing of a recognized professional organization.[5] In turn, such qualified person would be required to prepare a technical report summary for each material

mining property.[6] While the proposed rules would call for "plain English principles" in the drafting of technical report summaries, the summaries themselves would be attached as exhibits to separate technical/scientific information from narrative disclosures. If the qualified person's report is filed as part of a Securities Act registration statement, the qualified person would be deemed an "expert," meaning their consent to the filing would be required, and the qualified person would be subject to liability as an expert under Section 11 of the Securities Act. [7]

- *Summary/Individual Property Disclosure and Tabular Presentation*: In addition to the individual (i.e., property-by-property) disclosures for material mining properties, the new rules would require that registrants owning multiple mining properties provide summary disclosure of their mining operations, including maps of property locations, a tabular presentation of material information about the 20 properties with the largest asset values, and a summary of all mineral resources and reserves at the end of the most recently completed fiscal year. If no individual mining property is itself deemed "material," then a summary presentation is all that would be required of registrants. The new rules would still require separate tabular disclosure for individual material properties, further clarifying that such disclosure requirements are also applicable to entities holding a royalty or similar interest in a mining venture.
- *Materiality Standard*: Under Subpart 1300, the standard for "materiality" would be the same as set forth in Securities Act Rule 405 and Exchange Act Rule 12b-2, and would apply equally to vertically integrated companies, royalty (or similar) companies, and on an individual and aggregated basis for companies with multiple properties. The proposed rules would further instruct that a registrant's mining operations are presumed to be material if its mining assets constitute 10% or more of its total assets, but that issuers must also consider other quantitative and qualitative factors in making a materiality determination.
- *Internal Control Disclosures*: Just as the proposed rules would require a technical report summary to substantiate the scientific basis for disclosures, registrants would also be required to describe the quality control and assurance protocols used in the disclosure of exploration results and resource/reserve estimates. Such internal control disclosures would be required for both summary and individual property disclosures.
- *Definition of Exploration, Development and Production Stages*: Instead of applying these definitions only to a company as a whole, the proposed rules would also classify individual material properties by mining stage.

Conforming Certain Forms Not Subject to Regulation S-K

- *Form 20-F*: At present, Form 20-F, rather than Regulation S-K, provides the primary non-financial disclosure requirements for foreign private issuers.[8] The proposed rules would refer Form 20-F filers to Subpart 1300 and remove any inconsistent instructions.

- *Form 1-A*: Form 1-A was amended in March 2015 to require that Regulation A issuers adhere to "business" disclosure guidelines codified as disclosure items under Regulation S-K. Proposed amendments to Form 1-A would extend the obligation for such adherence to the description of property. Thus, Regulation A issuers with material mining operations would be subject to all of the disclosure requirements in Subpart 1300.

Request for Comments

In the proposing release, the SEC lists a number of specific questions and requests for comment regarding the rule changes now under consideration. Comments on the SEC's proposal are due by August 26, 2016, and can be submitted via the SEC's Internet submission form or by sending an e-mail to rule-comments@sec.gov. If you wish to track comments from other industry stakeholders during this period, they will be available on the SEC website.

The entirety of the proposed rules can be found here.

If you have questions about the SEC's proposed mining disclosure release, please contact any Member of Holland & Hart's Mining and Securities & Capital Markets teams.

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[1] Because only Canada has adopted its mining code as a matter of law, see NI 31-101, the enjoyment of this "foreign or state law" exception for disclosure of non-reserves in SEC filings has been limited to Canadian registrants.
[2] A number of the SEC's proposed revisions would align more closely with Canada's NI 43-101 than with other CRISCO-based standards. Accordingly, in terms of compliance burden, the SEC estimates that Canadian registrants currently providing disclosure pursuant to NI 43-101 are likely to be less significantly affected than non-Canadian registrants.
[3] A determination of mineral resources would need to be accompanied by a qualified person's "initial assessment," or preliminary technical and economic study of mineralization, to support disclosure. This initial assessment would be less rigorous than the feasibility studies required for mineral reserves, and narrower than a "preliminary economic assessment" as defined in Canada's NI 43-101.
[4] Most CRIRSCO-based codes permit a qualified person to be an employee or other affiliate of the registrant as long as the registrant discloses its relationship with the qualified person. A limited exception to this exists in Canada, which requires a registrant to file a technical report summary prepared by an *independent* qualified person in certain circumstances (e.g., first time registering or reporting mineral resources or reserves; or reporting a 100% or greater change in the total mineral resources or reserves on a material property, when compared to the last disclosure). See NI 43-101 pt. 5.3.
[5] Canada's NI 43-101 also uses this standard, although it does not enumerate the factors to assess when determining which organizations are reputable. See NI 43-101 pt 1.1 (defining "professional association").

[6] The proposed requirements of the technical report summary would be similar in most respects to the information required for the summary report under the Canadian mining disclosure provisions in NI 43-101. See Form 43-101F1. However, the SEC's proposed rules would also include sections about hydrogeology and geotechnical data, which are not included in NI 43-101.

[7] Unlike Canada's NI 43-101, the proposed rules would not permit a qualified person to include a disclaimer of responsibility if he or she relies on a report, opinion, or statement of another expert in preparing the technical report summary.

[8] Canadian registrants are currently able to provide disclosure of resources as well as reserves calculated in accordance with NI 43-101 under the "foreign or state law" exception included in Item 102, Guide 7, and Form 20-F. The proposed rules would eliminate this exception, leaving Canadian issuers that report pursuant to the Multijurisdictional Disclosure System ("MJDS") as the sole group of registrants that could continue using Canadian disclosure requirements.

Kenyon Redfoot is a Summer 2016 Clerk, and co-author of this article.