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SEC Proposes Rules to Modernize Property Disclosures for Mining Registrants

On June 16, 2016, the Securities and Exchange Commission (the “SEC”) announced proposed rules to modernize the property disclosure requirements for mining registrants, with the objective of aligning standards with current industry and global regulatory practices. If adopted, the rules would rescind the SEC’s Industry Guide 7 (“**Guide 7**”) and Item 102 of Regulation S-K, the SEC’s existing rules regarding mining disclosure, and create new Regulation S-K subpart 1300, which would govern disclosure for registrants with mining operations. The proposed rules would apply to both domestic registrants and foreign private issuers. However, Canadian registrants that file reports pursuant to the Canada-U.S. Multijurisdictional Disclosure System could continue to prepare mining disclosure in accordance with Canadian disclosure requirements.

Background

The rule proposal reflects the SEC’s recognition of the significant changes that have taken place in the mining industry since the SEC last updated Guide 7 over 30 years ago. During this period, mining has become an increasingly globalized industry, and several foreign countries have adopted mining disclosure standards based on the Committee for Mineral Reserves International Reporting Standards (“**CRIRSCO**”), which feature significant differences from Guide 7. The SEC noted in its release that the proposed rules are intended to more closely align with CRIRSCO based standards, such as the Canadian Securities Administrators’ National Instrument 43-101 *Standards of Disclosure for Mineral Project* (“**NI 43-101**”). The SEC noted that the adoption of the new rules would place U.S. mining registrants on a level playing field with non-U.S. mining companies that are subject to CRIRSCO-based standards. One of the key changes in the proposed rules would be to require mining registrants to disclose estimates of mineral resources that have been determined based upon information and supporting documentation by one or more qualified persons, in addition to estimates of mineral reserves. In contrast, under Guide 7 disclosure of mineral resources is generally prohibited.

Proposed Rules

The SEC’s proposed rules represent a significant update to its disclosure rules for properties owned or operated by mining companies and introduce a number of new disclosure obligations. Among other things, the proposed rules:

- apply where a registrant’s mining operations are material to its business or financial condition, with such operations being presumed material if a registrant’s mining assets constitute 10% or more of its total assets;¹

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- define “mining operations” to include all related activities from exploration through extraction to first point of material external sale;
 - provide that individual properties must be identified as either “exploration”, “development” or “production” stage on a property-by-property basis, as well as applying such designations to the registrant as a whole;²
 - require a registrant to disclose mineral resources and material exploration results in addition to its mineral reserves;
 - adopt the CRIRSCO-based classification of mineral resources and require a registrant to classify its mineral resources into inferred, indicated and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence;³
 - revise the definition of mineral reserves to align it generally with the definition under the CRIRSCO-based standards; based on the definitions of “mineral reserves,” “probable mineral reserves,” “proven mineral reserves,” and “modifying factors”;⁴
 - require disclosure of mineral resources and mineral reserves to be based on either a preliminary feasibility study or a final feasibility study which, in either case, must include a technically and economically feasible life of mine plan;⁵
 - require that every disclosure of mineral resources, mineral reserves and material exploration results be based on documentation prepared by a “qualified person”, defined as a person who is both (1) a mineral industry professional with at least five years of relevant experience and (2) a member or licensee of a recognized professional organization;⁶
 - require a registrant to file a technical report summary prepared by a qualified person for each material property, setting forth scientific and technical information and conclusions reached concerning material mineral exploration results, initial assessments used to support disclosure of mineral resources, and preliminary or final feasibility studies used to support disclosure of mineral reserves; such technical report summary must be signed and dated by the qualified person who prepared the report and a consent must be filed as an exhibit to the associated SEC filing (rather than in the body of the annual report or registration statement) in order to separate the underlying scientific and technical information in the technical report summary from the narrative disclosure concerning the registrant’s operations;⁷
 - with respect to pricing models for determining mineral resources and mineral reserves, require that the commodity prices used in reserve and resource estimations not be higher than the average closing price during the 24-month period prior to the end of the registrant’s last fiscal year, with the exception that registrants can use a higher price if set by contractual arrangements;⁸

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- require summary disclosure in tabular form of certain specified information about the registrant's 20 properties with the largest asset values (or fewer, if the registrant has an economic interest in fewer than 20 mining properties), as well as a summary, in tabular form, of all mineral resources and reserves at the end of the registrant's most recently completed fiscal year;⁹
 - require royalty companies and similar companies to provide all applicable mining disclosure if the mining activities that generate the royalties or other payments are material to such company's operations as a whole; and
 - require disclosure of internal controls used in developing exploration and mineral resource and reserve estimates, including disclosure that addresses quality control and quality assurance programs, verification of analytical procedures and comprehensive risks inherent in the estimation.¹⁰

Comments

The SEC is requesting comments on the proposed rules from interested parties, which must be received on or before August 15, 2016.

The full text of the proposed rules is available at: <https://www.sec.gov/rules/proposed/2016/33-10098.pdf>

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ See Instruction 2 to proposed Item 1301(b) of Regulation S-K. Registrants whose mining assets are below the 10% threshold are required to consider other qualitative and quantitative factors to determine whether their mining operations are material. In determining materiality, mining operations would be considered in the aggregate as well as on an individual property basis.
 - ² See proposed Item 1301(d) of Regulation S-K.
 - ³ See proposed Item 1301(d)(14)(i) of Regulation S-K.
 - ⁴ See proposed Items 1301(d)(13)(1), 1301(d)(15), 1301(d)(18)(i) and 1301(d)(21)(i) of Regulation S-K.
 - ⁵ See proposed Item 1302(d) of Regulation S-K.
 - ⁶ See proposed Item 1301(d)(22) of Regulation S-K. The proposed rules do not require qualified persons to be independent of the registrant.
 - ⁷ See proposed Item 601(b)(96)(i) of Regulation S-K. The proposed rules do 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. In contrast, NI 43-101 permits the qualified person to include a disclaimer of responsibility if he or she relies on a report, opinion, or statement of another expert who is not a qualified person in preparing the technical report summary.
 - ⁸ This is different from other CRIRSCO-based codes, including NI 43-101, which allow a qualified person to use any reasonable and justifiable price which is based on the qualified person's or management's view of long term market trends.
 - ⁹ See proposed Items 1303(b)(2) and 1303(b)(3) of Regulation S-K.
 - ¹⁰ See proposed Item 1305 of Regulation S-K.