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SEC Proposes Revamp of its Mining Company Disclosure Requirements

On June 16, 2016, the US Securities and Exchange Commission ("SEC") issued a proposed rule (available here), which, if adopted, would result in a revamp of its disclosure requirements for mining company issuers. The proposed rule is intended to harmonize the SEC's mining property disclosure requirements with current industry and global regulatory practices and standards. The SEC is seeking comments on all aspects of the proposal. Initial comments are due 60 days after the proposed rule is published in the Federal Register.

The key changes proposed for mining companies are:

- requiring the disclosure of mineral resources (currently prohibited under SEC rules),
- requiring that every disclosure of mineral resources, mineral reserves and material exploration results reported in a company's filed registration statements and reports be based on, and accurately reflect, information and supporting documentation prepared by a "qualified person," and
- providing one standard requiring companies to disclose mining operations that are material to the company's business or financial condition and formalizing guidance that mining operations constituting 10% or more of a company's total assets are presumed material.

Summary of Proposed Rule

The current SEC mining property disclosure rules, which are set out in Item 102 of Regulation S-K and Guide 7, have not been updated for more than 30 years. Since then, a number of key mining capital jurisdictions outside the United States have adopted mining disclosure standards based on the Committee for Mineral Reserves International Reporting Standards ("CRIRSCO"), which differ in significant respects from Guide 7. The proposed revisions are intended to better harmonize SEC rules with global mining industry standards and CRIRSCO in particular.

The proposed rule would eliminate the overlapping disclosure requirements and policies of Regulation S-K and Industry Guide 7 ("Guide 7") by amending Item 102 of Regulation S-K, rescinding Guide 7 and creating a new subpart 1300 of Regulation S-K, which would contain all of the disclosure requirements for reporting companies with mining operations. Subpart 1300 of Regulation S-K would also apply to registration statements and annual reports of foreign private issuers on Form 20-F (although not to Canadian Form 40-F filers).

Materiality Standard for Mining-Related Disclosure—10% Presumption

Guide 7 currently requires mining companies to provide information on "significant" mining operations. The proposed rule seeks to clarify this standard by requiring disclosure if a company's mining operations are material to its business or financial condition. Materiality for this purpose would have the same meaning as generally under US securities laws. A company's mining operations may be presumed to be material if its mining assets constitute 10% or more of its total assets. However, a company's mining operations may be

material even if they fall short of the 10% threshold, if there are other quantitative or qualitative factors that would render the mining operations material. Such factors could include:

- mining operations that constitute 10% or more of some other financial measure, such as the company's total revenues, net income or operating income;
- evidence that disclosure of a similar property or properties has had a significant impact on the price of a company's securities;
- public disclosure by the company discussing the importance to its operations of a particular property or properties;
- the unique nature of the particular mineral or the importance of the mineral to the company's operations;
- the actual and projected expenditures on the company's mining properties as compared to its expenditures on non-mining business activities; and
- the amount of capital raised or planned to be raised for the company's mining properties.

Similarly, a company with mining operations constituting more than 10% of total assets may conclude, based on an evaluation of all relevant quantitative and qualitative factors, that the mining operations are not material and therefore not required to be disclosed. In practice, companies and their advisors may find it difficult to reach this conclusion in light of the presumption of materiality.

If a company owns multiple mining properties, none of which is individually material, under the proposed rule summary disclosure would be required in respect of its combined mining activities if they are collectively material. See "*Specific Disclosure Requirements—Summary Disclosure*" below.

The proposed rule would clarify that the mining property disclosure rules apply to vertically-integrated companies. Mining operations of vertically-integrated manufacturers may be material, and therefore require disclosure, even if such operations constitute less than 10% of total assets, if the manufacturer derives a competitive advantage from, or substantially relies upon, its ability to source that particular mineral from its mining operations.

The proposed rule would also clarify that royalty companies are subject to the mining property disclosure rules if the mining operations that generate the royalty are material to the company's operations as a whole. Similar to a producing company, a royalty company would need to assess both quantitative and qualitative factors in determining the materiality of the underlying property. Royalty companies would provide the same type and amount of disclosure as companies with mining operations, but only for those underlying properties, or portions of those underlying properties, that generate the company's royalties, and only for the reserves and production that generated its payments in the reporting period. Also, royalty companies would be required to submit a technical report for each property that is not covered by a technical report filed by the producing mine company.

Qualified Persons

The SEC is proposing to require that disclosure of mineral reserves, mineral resources and material exploration results included in a company's registration statements and reports filed with the SEC be based on the findings of a "qualified person." This proposal aligns with CRIRSCO-based codes which require that any public report about a company's exploration results, mineral resources and mineral reserves be based on and fairly reflect information and supporting documentation prepared by a "competent" or "qualified person."

As proposed, a "qualified person" would need to be a qualified professional with at least five years' experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking, as well as be a member of a recognized professional organization. The qualified person need not be independent from the reporting company.

The definition of a qualified person under the proposed rule is more flexible than the CRIRSCO standards; CRIRSCO lists "approved" organizations while the proposed rule would not. To constitute "a recognized professional organization," the organization must be either recognized within the mining industry as a reputable professional organization or be a board authorized by U.S. federal, state or foreign statute to regulate professionals in the mining, geoscience or related field.[1]

Companies would be required to obtain a signed technical report summary from the qualified person, which must be filed as an exhibit to the relevant SEC filing when the company is disclosing for the first time mineral reserves, mineral resources or material exploration results or when there has been a material change from the last technical report filed for the property. The SEC filing must identify the qualified person who prepared the technical report summary and state whether the qualified person is an employee of the reporting company. The company would need to obtain and file a written consent of the qualified person to the use of the qualified person's name and any extracts from the technical report summary in the SEC filing. If a technical report summary is filed as an exhibit to either a Securities Act registration statement or an Exchange Act report that is incorporated by reference into a Securities Act registration statement, the qualified person would be deemed an "expert" who must provide his or her written consent as an exhibit to the filing. In such situations, the qualified person would be subject to liability as an expert for any untrue statement or omission of a material fact contained in the technical report summary under Section 11 of the Securities Act.

Material Exploration Results

To further align SEC standards with CRIRSCO standards, the proposed rule would require disclosure of material exploration results for each of a company's material properties, which is not required under current rules. "Material exploration results" is defined as data and information generated by sampling, drilling, trenching, analytical testing and other similar activities undertaken to investigate a mineral prospect that is not part of mineral resources or mineral reserves.

Required Disclosure of Mineral Resources

Currently, Guide 7 prohibits disclosure of mineral resources in SEC filings unless foreign or state law requires disclosure. In an attempt to align SEC disclosure requirements with standards in other key jurisdictions, including Canada, the proposed rule would reverse this position and require companies with material mining operations to provide summary disclosure detailing the mineral resources for each of the company's material properties.

[1] Furthermore, the organization must admit eligible members primarily on the basis of their academic qualifications and experience; establish and require compliance with professional standards of competence and ethics; require or encourage continuing professional development; have and apply disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides; and provide a public list of members in good standing.

The proposed rule defines “mineral resources” as a concentration or occurrence of material of economic interest in or on the earth’s crust in such form, grade or quality, and quantity that there are reasonable prospects for its economic extraction. Mineral resources may only be disclosed if the company’s qualified person has made the determination that a mineral deposit constitutes a mineral resource. However, there would be no requirement that a company make such an affirmative determination.

Classification of Mineral Resources

Under the proposed rule, companies would be required to classify their mineral resources as “inferred,” “indicated” or “measured” and disclose the classification. Each company’s qualified person would be required to quantify and disclose the uncertainty associated with the production estimates derived from such resources.

- The proposed rule defines “inferred mineral resource” as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of ***limited*** geological evidence and sampling.
- The proposed rule defines “indicated mineral resource” as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of ***adequate*** geological evidence and sampling.
- The proposed rule defines “measured mineral resource” as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of ***conclusive*** geological evidence and sampling.

Under the proposed rule, inferred mineral resources would not be permitted to be used as a basis to determine mineral reserves, and qualified persons would be prohibited from using inferred mineral resources in any economic analysis conducted to determine the economic viability of mineral projects or economic prospects of mineral deposits in support of SEC disclosures. This represents a deviation from the CRIRSCO standards, which allow a qualified person to make limited use of inferred mineral resources in technical and economic studies.

Initial Assessments

As proposed, disclosure of mineral resources must be based upon a qualified person’s initial assessment supporting the determination of mineral resources. “Initial assessment” would be defined in the rules as a preliminary technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources. At a minimum, the qualified person’s initial assessment must include a qualitative evaluation of modifying factors to establish the economic potential of the mining property or project (i.e., that there are reasonable prospects for economic extraction of the mineral resource). Instructions to the proposed rule provide that the initial assessment must include an estimation of the cut-off grade. The cut-off grade distinguishes between material that is going to the waste dump and material that is going to the processing plant (in surface mining) or material that is mined and material mined and processed (in underground mining).

The qualified person must consider a host of modifying factors when drafting the initial assessment and must evaluate, at minimum:

- site infrastructure,
- mine design and planning,
- processing plant,
- environmental compliance and permitting and

- any other reasonably assumed modifying factors, including socio-economic factors, necessary to demonstrate reasonable prospects for economic extraction.

The qualified person would be required to use commodity prices that are justifiable and a price model that is reasonable in the initial assessment. For exchange-traded commodities, the price would need to be based on the unweighted arithmetic average of the daily closing price for each trading day within the 24-month period preceding the last day of the fiscal year covered by the SEC filing.

Reliance on Circulars

The SEC is proposing that companies rely on CRIRSCO-based mineral resource classification schemes instead of relying on the United States Geological Survey Circular 831 and Circular 891, as the use of those Circulars for resource classification would be inconsistent with the proposed rules.

Treatment of Mineral Reserves

The proposed rule would adopt the CRIRSCO framework of applying modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves and would permit either a pre-feasibility study or a feasibility study to provide the basis for determining and reporting mineral reserves.

Framework for Determining Mineral Reserves

The proposed rule would establish a framework for mineral reserves determination based on the following definitions:

- "Mineral reserves" would be defined as an estimate of tonnage and grade or quality of indicated or measure mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project.
- "Economically viable" means that a qualified person has determined, using a discounted cash flow analysis, or has otherwise analytically determined, that the extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.
- "Probable mineral reserves" would be defined as the economically mineable part of an indicated and, in some cases, a measured mineral resource.
- "Proven mineral reserves" would be defined as the economically mineable part of a measured mineral resource.
- "Modifying factors" would be defined as the factors that a qualified person must apply to mineralization or geothermal energy and then evaluate in order to establish the economic prospects of mineral resources or the economic viability of mineral reserves.

In addition to these definitions, the proposed rule includes a series of accompanying instructions regarding the conversion of mineral resources to mineral reserves.

The mineral reserves definition deviates from the definition of mineral reserves under the CRIRSCO standards, which includes diluting materials in reserves estimates.

Type of Study Required to Support a Reserve Determination

The proposed rule would require either a preliminary feasibility study or a feasibility study in support of a determination of mineral reserves. A "preliminary feasibility study" (or "pre-feasibility study") would be defined as a comprehensive study of a range of options for the technical and economic viability of a mineral project that has advanced to a stage where a qualified person has determined an effective method of mineral processing and an effective plan to sell the product in addition to either a preferred mining method (in the case of

underground mining) or a pit configuration (in the case of surface mining). The preliminary feasibility study would have to include a financial analysis that demonstrates the economic viability of the project. While a pre-feasibility study is less comprehensive and results in a lower confidence level than a feasibility study, a pre-feasibility study is more comprehensive and results in a higher confidence level than an initial assessment. The proposed rule would include a set of instructions intended to reduce the degree of uncertainty involved in using a pre-feasibility study.

As proposed, a feasibility study is a comprehensive technical and economic study of the selected development option for a mineral project, which may serve as the basis for a final decision by a proponent or financial institution to proceed with, or finance, the development of the project. Unlike a preliminary feasibility study, a feasibility study focuses on one particular development option instead of focusing on a range of options and includes a more detailed financial analysis.

Specific Disclosure Requirements

Summary Disclosure

The proposed rule would require companies that own two or more mining properties to provide summary disclosure of their mining operations. The disclosure would include a presentation in tabular form of certain specified information about the company's 20 properties with the largest asset values. The disclosure would include maps of the mining properties, a detailed description of the mining properties and a summary of the mineral reserves and mineral resources for each property that contains 10% or more of the company's total mineral reserves or 10% of more of the company's combined measured and indicated mineral resources.

Individual Property Disclosure

Each reporting issuer would be required to provide more detailed information for each of its individual properties that is material to its business or financial condition. Among other things, this would include a detailed description of the property, history of previous operations, encumbrances on the property and the present condition of the property. These proposed items are similar to the items required under the current rules, but the proposed rule would also require companies to disclose material royalty interests in properties and a comparison of its mineral resources and reserves as of the end of the last fiscal year and as of the previous fiscal year. In addition, instructions to the proposed rule would require companies to disclose material assumptions and criteria used to determine mineral reserves and mineral resources estimates.

Technical Report Summaries

The proposed rule would require companies to file a technical report summary as an exhibit instead of including it within the narrative disclosure. The technical report summary would be used to support the disclosure of mineral resources, mineral reserves or material exploration results for each material property. The technical report summary would include, along with extensive descriptive information about the property, the scientific and technical information that forms the basis for the disclosure.

Internal Controls Disclosure

Under the proposed rule, companies would also be required to describe the internal controls, such as quality control and quality assurance measures, that they use to make certain their mining property disclosure is accurate.

Form 20-F and Form 40-F

The proposed rules would apply equally to foreign private issuers and domestic companies. Accordingly, Item 4.D of Form 20-F would be removed, and foreign private issuers would be required to comply with the new mining property disclosure rules contained in subpart 1300 of Regulation S-K.

However, the proposed rules would not affect Canadian issuers who are eligible to file annual reports on Form 40-F. Such Canadian issuers are not subject to the SEC's mining disclosure requirements.

Request for Comments

Initial comments are due 60 days after the proposed rule is published on the Federal Register. This will be followed by a second round of comments, responding to issues raised in the initial comment period. Comments may be submitted on the SEC's website.

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