

Client Alert

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SEC Proposes Rules to Update Disclosure Requirements for Mining Registrants

On June 16, 2016, the Securities and Exchange Commission (the SEC) issued a press release proposing rules to modernize disclosures for mining properties (the “Proposed Rules”), currently set forth in Item 102 of Regulation S-K (“Item 102”) under the Securities Act of 1933, as amended (the “Securities Act”), the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and Industry Guide 7.¹ The proposals are intended to provide investors with more comprehensive information by aligning disclosure with industry and global regulatory standards similar to the Committee for Mineral Reserves International Reporting Standards (“CRIRSCO”), which have been widely adopted by several foreign countries and significantly differ from Industry Guide 7.² The SEC is also proposing to rescind Industry Guide 7—which has not been updated in 30 years, during which time mining has become an increasingly globalized industry and several foreign industries have adopted mining disclosure standards that differ significantly from Industry Guide 7— and to include the Proposed Rules in a new subpart 1300 of Regulation S-K.

Item 102 requires basic disclosure for a mining registrant’s “principal” mines that are “materially important,” which are determined by using a number of quantitative and qualitative factors set forth in Regulation S-K. Registrants with “significant mining operations” are directed to more extensive disclosure required by Industry Guide 7, which sets forth the views of the staff of the Division of Corporation Finance (the “Staff”) on how to comply with disclosure requirements applicable to the registrants. Although both sources are intended to work harmoniously, the Staff has provided a significant amount of supplemental and interpretive guidance over the years through the comment letter process, creating uncertainty regarding disclosure and regulatory authority. The Proposed Rules would consolidate the current Item 102 and Industry Guide 7 into a new subpart 1300 of Regulation S-K.

The Proposed Rules are subject to a comment period that will begin 60 days after publication in the Federal Register.

The Standard for Mining-Related Disclosure

In the current mining disclosure regime, only registrants with “significant mining operations” are directed to Industry Guide 7 for disclosure guidance, in addition to Item 102, although neither defines the term “significant.” As such, the SEC has historically advised registrants to apply a benchmark of 10% of total assets to determine the materiality of a registrant’s mining operations required for disclosure.

¹ See Press Release, “SEC Proposes Rules to Modernize Property Disclosures for Mining Registrants” (June 16, 2016), available at: <https://www.sec.gov/news/pressrelease/2016-122.html>.

² See SEC Release Nos. 33-10098; 34-78086 (June 16, 2016), available at: <https://www.sec.gov/rules/proposed/2016/33-10098.pdf>.

The Proposed Rules would require the registrant to provide disclosure for mining operations that are material to its business or financial condition. “Material” would have the same meaning as under Securities Act Rule 405 and Exchange Act Rule 12b-2, which define material as a substantial likelihood that a reasonable investor would attach importance to the information in question in determining whether to buy or sell the registered securities. The Proposed Rules would further define “mining operations” to include all related activities from exploration through extraction to the first point of material external sale. In the current disclosure regime, mining operations are described on an aggregate basis in three stages, the “exploration stage,” the “development stage,” and the “production stage.” The Proposed Rules would revise the definitions of each stage to apply on a property-by-property basis. When determining the materiality of its mining operations under the Proposed Rules, a registrant would also have to:

- consider quantitative and qualitative factors in the context of the registrant’s overall business and financial condition;
- aggregate mining operations on all of its mining properties, regardless of size or type of commodity produced, including coal, metalliferous minerals, industrial materials, geothermal energy, and mineral brines; and
- include, for each property, as applicable, all related mining operations from exploration through extraction to the first point of material external sale, including processing, transportation, and warehousing.

Under the Proposed Rules, a registrant’s mining operations would be presumed material if its mining assets exceeded 10% of its total assets. However, a registrant meeting the 10% asset test could evaluate the relevant quantitative and qualitative factors to determine that its mining operations are not material nor required to be disclosed. Such factors include:

- mining operations that constitute 10% or more of some other financial measure, such as the registrant’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 registrant’s securities;
- public disclosure by the registrant discussing the importance to its operations (e.g., from an operational or competitive standpoint) of a particular property or properties;
- the unique or rare nature of the particular mineral or the importance of the mineral to the registrant’s operations;
- the actual and projected expenditures on the registrant’s mining properties as compared to its expenditures on non-mining business activities; and
- the amount of capital raised or planned to be raised by the registrant for its mining properties.

Exploration Results, Mineral Resources, and Mineral Reserves Disclosures

The current disclosure regime does not require that a mining company disclose material exploration results and prohibits disclosure of non-reserve estimates of mineral resources, subject to foreign and state law exceptions. Industry Guide 7 and Item 102 only require the disclosure of mineral reserves, but do not require that such disclosure be based on findings from qualified or experienced professionals.

The Proposed Rules would require that registrants with significant mining operations disclose mineral resources and material exploration results. Material exploration results would emulate CRIRSCO-based codes and be defined as data and information generated by mineral exploration programs. The definition of mineral resources would adopt the CRIRSCO-based classification of mineral resources into inferred, indicated, and measured mineral resources. The Staff has not historically objected to mineral reserve disclosure applying the U.S.

Geological Survey's (USGS) published Circular 831 and Circular 891 to classify mineral resources. However, the Proposed Rules adopting the CRIRSCO-based classification for mineral resources would run counter to the classifications of Circular 831 and Circular 891.

Under Industry Guide 7, mineral reserves are that part of a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination. The Staff has historically requested that registrants support the determination and disclosure of mineral reserves with a final feasibility study. However, the Proposed Rules would adopt a similar framework as CRIRSCO and apply modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves and permit the use of either a preliminary or final feasibility study to establish the economic viability of extraction. Mineral resource and reserve estimates also must be based on long-term price assumptions that are no higher than the average 24-month historical price.

A preliminary feasibility study differs from a final feasibility study in many respects. A preliminary feasibility study generally discusses a range of options as opposed to a particular option, has a less detailed assessment of modifying factors necessary to demonstrate extraction is economically viable, and has a less detailed financial analysis and more assumptions. The Proposed Rules will also require a "qualified person" to provide for disclosure the justification for using a preliminary feasibility study in lieu of a final feasibility study, including a number of other requirements and exceptions.

"Qualified Person" and Technical Report Summary Requirements

The Proposed Rules would require that every disclosure of mineral resources, mineral reserves, and material exploration results to be supported by an initial assessment performed and documentation prepared by a "qualified person." The registrant would be responsible for, among other things, confirming qualified person status pursuant to the new regime, obtaining a technical report summary from the qualified person on every material property (which would be filed as an exhibit to the registrant's registration statements and relevant Exchange Act reports), disclosing any affiliations with the qualified person, and obtaining written consent from the qualified person to use the information. The qualified person will have liability as an expert under Section 11 of the Securities Act for any material misstatements or omissions in the technical report summary. The Proposed Rules do not require the qualified person to be independent, but instead require disclosure of any relationship between the qualified person and the registrant.

Specific Disclosure Requirements

The Proposed Rules would require a registrant that owns one or more mining properties to provide a summary disclosure of its mining properties, which includes one or more maps showing the locations of all of its mining properties, a presentation in tabular form of certain specified information regarding its 20 largest properties by asset value, and a summary in tabular form of all mineral resources and reserves at the end of the most recently completed fiscal year. Registrants with individual properties that are material to its business or financial condition must also separately provide detailed disclosure on the individual properties. Although not required under Industry Guide 7, some registrants have included disclosure regarding their internal controls over quality assurance, exploration results, and estimates of mineral resources and reserves. The Proposed Rules would codify into Regulation S-K the requirement for disclosure of internal controls addressing quality control and assurance programs, verification of analytical procedures, and comprehensive risks inherent in estimations relating to exploration, mineral resources, and reserves.

Changes to Forms Not Subject to Regulation S-K

Form 20-F. Foreign private issuers filing registration statements on Form 20-F under Section 12 of the Exchange Act or annual and transition reports under Section 13(a) or 15(d) of the Exchange Act are generally not subject to Regulation S-K. Form 20-F is also frequently used for disclosure on registration statements filed on Forms F-1, F-3, and F-4. The Proposed Rules would amend Form 20-F and subject foreign private issuers engaged in mining

operations to refer to and provide the same mining disclosures under the new subpart 1300 Regulation S-K, including the technical report summary filing requirement.

Form 1-A. Form 1-A is the offering document used by issuers who are eligible to engage in securities offerings under Regulation A, which exempts from the registration requirements of the Securities Act certain smaller securities offerings by private (non-SEC-reporting) companies (up to \$20 million in any 12-month period for Tier 1 offerings and up to \$50 million in any 12-month period for Tier 2 offerings). The Proposed Rules would also amend instructions on Form 1-A to subject Regulation A issuers with significant mining operations to the new subpart's technical report summary filing requirement.

Affected Parties

The Proposed Rules would apply to all of the following types of companies:

- vertically-integrated companies, which are companies with material mining operations that are secondary to or in support of their main non-mining business;
- multiple property ownership, where no one mining property may be material, but in the aggregate would constitute material mining operations; and
- royalty companies and other companies holding economic interests in mining properties.

The Proposed Rules would primarily affect current and future registrants with mining activities that are subject to the disclosure requirements contained in Item 102 and Industry Guide 7. In addition to U.S. registrants, the proposed revisions would also affect foreign private issuers with mining operations that file Exchange Act annual reports and registration statements on Form 20-F and mining companies filing Form 1-A offering statements pursuant to Regulation A.

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