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The SEC Modernizes Mining Disclosure

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In October 2018, the U.S. Securities and Exchange Commission (SEC) approved final rules (the new rules) to modernize the SEC's mining property disclosure requirements. The SEC focused on aligning the new rules with Canada's National Instrument 43-101, *Standards of Disclosure for Mineral Projects* (NI 43-101), and industry standards issued by the Committee for Mineral Reserves International Reporting Standards (CRIRSCO). The new rules, which replace the current mining disclosure requirements in Industry Guide 7 and Item 102 of Regulation S-K, will provide investors with more comprehensive and detailed information regarding a registrant's material mining properties.

The new rules level the playing field between U.S. and foreign registrants, because U.S. registrants were not previously permitted to disclose mineral resources in their SEC filings. Other key changes include requiring that disclosure of exploration results, mineral resources and mineral reserves be based on information and supporting documentation prepared by a "qualified person" and requiring both summary disclosure of a registrant's mining operations as a whole and prescribed disclosure regarding each material mining property.

Complying with the New Rules

All registrants, including foreign private issuers, with material mining operations (which include mining royalty rights) must comply with the new rules for fiscal years beginning on or after January 1, 2021; however, voluntary compliance prior to that date will be permitted once the SEC updates its EDGAR filing system. Canadian issuers that report under the multijurisdictional disclosure system (MJDS) may still comply with NI 43-101 instead of the new rules when using the SEC's MJDS registration statement and annual report forms. Although non-MJDS Canadian issuers will be required to comply with the new rules, the SEC believes that such compliance should not have a material impact on non-MJDS Canadian issuers, given that the new rules are substantially similar to those under NI 43-101. However, it remains to be seen what reconciliations the SEC will require from a MJDS issuer using a registration statement on a non-MJDS form (such as a Form F-4, used in connection with a share exchange acquisition of a U.S. domestic or non-MJDS eligible foreign issuer).

Technical Report Summary Requirements

When registrants disclose mineral reserves or mineral resources¹ on a material property in a registration statement or an annual report for the first time or when there is a material change in the mineral reserves or mineral resources, the new rules require the registrant to file a technical report summary (which is similar to a NI 43-101 technical report) as an exhibit to the relevant SEC filing. The technical report summary must be prepared by a "qualified person,"² and must summarize the information reviewed and conclusions reached by that person. The new rules do not prescribe any independence requirements for a qualified person; the SEC indicated that the requirement to disclose the qualified person's affiliated status with the registrant and the potential expert liability of the qualified person should provide adequate safeguards for investors.

Involvement of a Qualified Person in Disclosure

The written consent of each qualified person who prepared a technical report summary must be obtained to file the summary as an exhibit to the registrant's registration statement or annual report, and the written consent itself must be filed as an exhibit to the registration statement.³ If the technical report summary is included in a registration statement and the qualified person is named as an expert with his or her consent, such qualified person is subject to potential liability under section 11 of the *Securities Act of 1933* for any

material misstatements or omissions contained in the technical report summary. However, unlike NI 43-101, the new rules do not specifically require a qualified person to prepare or supervise the preparation of the scientific and technical information that forms the basis of, or to otherwise approve, the registrant's disclosure other than disclosure in a registration statement, an annual report or a technical report summary that is filed by the registrant.

Disclosure of Exploration Results

Under the new rules, disclosure of exploration results and exploration activity for a material property is voluntary and largely within the discretion of the registrant unless such activity and the accompanying results are material for investors, in which case disclosure is required. There is no obligation to file a technical report summary to support any material exploration results, but the disclosure must be based on the findings and conclusions of a qualified person. When disclosing material exploration results, a registrant must provide sufficient information to make the required disclosure not misleading and to allow for an accurate understanding of the significance of the exploration results.

Disclosure of Mineral Resources

The new rules require the disclosure of mineral resources to be based upon a qualified person's initial assessment, which is a preliminary technical and economic study of the economic potential of all or parts of mineralization necessary to determine if there are mineral resources in the deposit that have reasonable prospects for economic extraction. An initial assessment need not contain an economic analysis, but if a qualified person chooses to include an economic analysis, a cash flow analysis must be used.

A registrant must classify its mineral resources into inferred, indicated and measured mineral resources – in order of increasing confidence based on the level of underlying geological evidence – and disclose the classification criteria used.

- An inferred mineral resource is estimated on the basis of limited geological evidence and sampling (which is only sufficient to establish that geological and grade or quality continuity is more likely than not) and cannot be used as a basis to determine mineral reserves, which is consistent with NI 43-101.
- An indicated mineral resource is estimated on the basis of adequate geological evidence and sampling, which establishes geological and grade or quality continuity with reasonable certainty.
- A measured mineral resource is estimated on the basis of conclusive geological evidence and sampling, which is sufficient to test and confirm geological and grade or quality continuity.
- An indicated mineral resource may be converted only to a probable mineral reserve, whereas a measured mineral resource may be converted to a proven mineral reserve or a probable mineral reserve. To prevent confusion, all disclosure of mineral resources by the registrant must be exclusive of mineral reserves.

Disclosure of Mineral Reserves

The disclosure of mineral reserves by a registrant must not be based on an initial assessment, but rather on a qualified person's pre-feasibility study or feasibility study, which must include a financial analysis and evaluate applicable "modifying factors" to establish the economic viability of mineral reserves.⁴ While the new rules provide some specific examples of "modifying factors,"⁵ the number, type and specific characteristics of the modifying factors applied by a qualified person will depend upon the mineral, mine, property or project.

A qualified person is required to classify mineral reserves into probable and proven mineral reserves, in order of increasing confidence in the results obtained from the application of the modifying factors to the indicated and measured mineral resources. The new rules explain:

- For a probable mineral reserve, the qualified person's confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality is lower than what is sufficient for a classification as a proven mineral reserve, but is still sufficient to demonstrate that the extraction of the mineral reserve is economically viable.

- A probable mineral reserve can be converted from either an indicated or a measured mineral resource, whereas a proven mineral reserve can be converted only from a measured mineral resource.

Final Thoughts

The new rules are a significant improvement on the current disclosure regime and provide a regulatory framework for SEC registrants with material mining operations that is comparable to the framework for Canadian mining issuers. In drafting the new rules, the SEC was careful not to substantially deviate from the current requirements under NI 43-101 and the CRIRSCO standards. Accordingly, while the new rules may pose a minor compliance problem for Canadian issuers when not using MJDS forms (though it remains to be seen what reconciliations the SEC will require from a MJDS issuer using a registration statement on a non-MJDS form), the new rules were created to be sufficiently similar to current international mining standards so that transitioning to the new disclosure requirements should be relatively understandable and straightforward.

¹ The definitions of mineral resources and mineral reserves (and their subcategories, proven and probable mineral reserves and measured, indicated and inferred mineral resources) used in the new rules are substantially similar to those used in NI 43-101, which are incorporated from the CIM Definition Standards on Mineral Resources and Mineral Reserves.

² Under the new rules, a "qualified person" is a person who is a mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant. Unlike NI 43-101, the new rules do not set out a list of recognized professional organizations to which a qualified person must belong. Instead, the new rules provide the criteria that such organizations must satisfy.

³ If a third-party firm signs the technical report summary on behalf of the qualified person, the new rules provide that the third-party firm must provide the written consent. However, if the qualified person is an employee of the registrant, he or she must provide the written consent on an individual basis.

⁴ For a mineral reserve to be "economically viable," the qualified person must determine that extraction of the mineral reserve is economically viable under reasonable investment and market assumptions, including assumptions about the prices, exchange rates, interest and discount rates, sales volumes and costs that are necessary to determine the economic viability of the mineral reserves.

⁵ Examples of modifying factors include mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental compliance, plans, negotiations or agreements with local individuals or groups, and governmental factors.

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