SEC Proposes Modernized Rules for Mining Registrant Property Disclosures

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On June 16, 2016, the Securities and Exchange Commission ("**SEC**") announced a long-awaited proposed rule to modernize property disclosure requirements for mining company registrants. The proposed rule was published in the Federal Register on June 27, 2016, with an invitation for public comment on or before August 26, 2016.

Existing disclosure requirements for mining companies are found in Item 102 of Regulation S-K [1] and in Industry Guide 7.[2] Item 102 sets forth general disclosure requirements for SEC filings with respect to an issuer's "principal" mines that are "materially important." Industry Guide 7 provides guidance on the disclosure of mineral reserves and the classification of mineral reserves as "proven" or "probable."

The proposed rule would rescind Guide 7 and consolidate the revised disclosure requirements in a new subpart of Regulation S-K. Through these changes, the SEC is seeking to bring the disclosure requirements up to date with current industry and global regulatory standards and practices. The agency's goals include giving registrants greater clarity and certainty regarding their disclosure obligations and enabling investors to receive more comprehensive information regarding registrants' properties.

Mining industry participants in the United States have been seeking changes in the SEC's disclosure requirements for many years. These requirements have remained unchanged since 1982, notwithstanding significant changes in the industry since that time. Meanwhile, modern disclosure standards based on the Committee for Mineral Reserves International Reporting Standards ("**CRIRSCO**") have been adopted by regulatory agencies in Canada, Australia, South Africa, the European Union, Chile, Hong Kong, Russia and elsewhere. Public reporting in these countries under CRIRSCO-based standards has generally given investors a more consistent and comprehensive level of disclosure than has been possible in the United States under Guide 7. For example, Guide 7 requires the disclosure of "mineral reserves" but prohibits the additional disclosure of "mineral resources," which can be seen as leaving investors with a less-than-complete picture of a mining property's economic potential.

Enabling registrants to report mineral resources in addition to mineral reserves is one of many changes the SEC is looking to make under the proposed rule. In many respects, these changes may be viewed as beneficial to mining company registrants and investors alike. At the same time, some registrants (particularly those who are not already reporting under CRIRSCO-based rules in other jurisdictions) may find themselves exposed to new and/or increased reporting and cost burdens under the revised rules.

The proposed rule does not lend itself to a short or simple synopsis, but a few key issues include the following.

Requirement to Disclose Resources, Reserves and Material Exploration Results. The proposed rule requires issuers to disclose material exploration results, mineral resources and mineral reserves. Under current rules, only mineral reserves are required to be disclosed, and disclosure of mineral resources is prohibited. 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." The rule further provides for mineral resources to be categorized and reported as "inferred," "indicated" and "measured," in order of increasing geological confidence.

Revised Definition of Mineral Reserves. Currently, Guide 7 defines mineral reserves as "that part of a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination." In contrast to CRIRSCO-based codes, however, Guide 7 does not specify factors upon which a reserve determination should be made. The proposed rule alters the definition of mineral reserves by adopting the CRIRSCO framework of applying specifically defined "modifying factors" to indicated or measured mineral resources in order to convert them to mineral reserves subdivided in order of increasing geological confidence into "probable mineral reserves" and "proven mineral reserves." Consistent with CRIRSCO-based codes, the proposed rule would also permit a pre-feasibility study to serve as a basis for determining and disclosing mineral reserves rather than requiring a final or bankable feasibility study for such basis.

"Qualified Person" Requirement. The proposed revisions incorporate the CRIRSCO-based concept that every disclosure of mineral resources, mineral reserves and material exploration results reported in a registrant's registration statements and reports must be based on, and accurately reflect information and supporting documentation prepared by, a "qualified person." A "qualified person" under the proposed rules 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." In order to be a qualified person, a person also must be an eligible member or licensee in good standing of a recognized professional organization at the time the technical report is prepared. The issuer would be responsible for vetting the qualified person and must file the qualified person's technical report summary with SEC filings when a resource or reserve is first assessed or exploration results are first analyzed, and when a material change in exploration results or resource or reserve assessments occurs.

Threshold for Disclosure Requirement Applicability. The proposed rule seeks to clarify which types of properties and operations require disclosure. Item 102 and Guide 7 are inconsistent and somewhat vague on this question. Under the proposed rule, disclosure is required if a registrant's mining operations are material to its business or financial condition. "Mining operations" would continue, as now, to include all related activities from exploration through extraction to the first point of material external sale. A mining operation would be "material" if there were a substantial likelihood that a reasonable investor would attach importance to it in determining whether to buy or sell the securities registered. Mining operations that constitute 10% or more of a registrant's total assets would be presumed to be material. Additionally, the proposed rule would require issuers to consider mining properties both individually and in the aggregate for purposes of what disclosure is required. For example, a registrant with multiple properties, none of which is individually material, but which in the aggregate constitute material mining operations, would have to provide summary disclosure concerning its combined mining activities rather than providing disclosure for individual properties. The proposed rule would apply equally to domestic issuers (including companies issuing securities under Regulation A) and foreign private issuers.

View the full text of the proposed rule.

Reporting companies with mining operations may wish to comment on the proposed rules before the deadline of August 26, 2016. If you have any questions or would like to discuss the proposed rules, please contact one of the lawyers listed below.

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[1] 17 CFR 229.102.

[2] 17 CFR 229.801(g) and 229.802(g).