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LEXOLOGY
Getting the Deal Through

United States

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MINING INDUSTRY

Standing

1 | What is the nature and importance of the mining industry in your country?

Minerals continue to be a foundation to industry in the United States, contributing to the US economy at several stages including extraction, processing and manufacturing. In 2021, the estimated value of mineral non-fuel raw materials produced at mines in the United States was US$90.4 billion, a 12 per cent increase from the revised total of US$80.7 billion in 2022. In 2021, domestic raw materials and domestically recycled materials were used to produce mineral materials worth US$820 billion. Downstream industries consumed these mineral materials, producing an estimated value of US$3.32 trillion in 2021. In 2021, the value of net exports of mineral raw materials increased to US$5.3 billion from US$4 billion in 2020.

Target minerals

2 | What are the target minerals?

In 2021, US metal mine production increased by 23 per cent from 2020 production, contributing US$33.8 billion to the US economy in 2021, with copper (35 per cent), gold (31 per cent), iron ore (13 per cent) and zinc (7 per cent) being the principal contributors. Much of the growth can be attributed to higher commodity prices for minerals following the 2020 downturn in prices resulting from the covid-19 pandemic. Industrial mineral production in the United States continued to play a large role in the US economy in 2021, with crushed stone (34 per cent), cement (19 per cent) and construction sand and gravel (17 per cent) comprising the majority of the US$56.6 billion in value from industrial minerals production, including construction aggregates.

The US production of certain rare earth mineral concentrates increased in 2021 to 43,000 metric tons, up from 39,000 metric tons in 2020. However, the United States imports the most critical rare earth minerals (primarily from China), including many minerals used in battery technology and renewable energy infrastructure.

US coal production grew in 2021 from the 2020 55-year low of 539.1 million short tons and the US Energy Information Administration (EIA) estimates continued growth in 2022. US uranium production has declined precipitously since the recent peak in 2014, producing approximately 1 per cent of what the US produced in 2014, according to the EIA. Given Russia's 2022 invasion of Ukraine, there is renewed interest in reviving US uranium production.

Regions

3 | Which regions are most active?

Production of mineral commodities in the United States is most active in the western and midwestern states. Thirteen states each produced more than US$2 billion worth of non-fuel mineral commodities in 2021, led by Arizona, Nevada and Texas. Most of the value of non-fuel minerals produced in the US, including metal mine production, is generated by the western states, which produce considerably more value than the next most productive region, the midwestern states. Arizona and Nevada each far exceed production in other states, collectively producing 21.3 per cent of US total non-fuel mineral commodities in the United States.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

4 | Is the legal system civil or common law-based?

The United States has a common law-based legal system both federally and throughout the states (except the state of Louisiana, which has a civil law system). Today, however, mining in the United States is governed primarily by a system of federal, state and local laws and regulations codified over decades. Many such laws and regulations have undergone further development in the courts, and all of them remain subject to further judicial interpretation and potential legislative expansion. Additionally, there are quasi-judicial bodies within many regulatory agencies that are empowered to make policy decisions about the meaning and effect of both statutes and regulations. Therefore, one must always look not only to the applicable statute or regulation, but also to any judicial decisions (case law) or quasi-judicial administrative determinations affecting or interpreting particular statutes or regulations. In many circumstances, state and local laws may be more stringent and unfamiliar to a mining company than federal laws and should be carefully evaluated depending upon the location of any given mining project (eg, California has some of the most stringent applicable requirements in the nation).

Regulation

5 | How is the mining industry regulated?

The US mining industry is governed and regulated at federal, state and local levels. At each level, regulation is achieved primarily through enabling laws (and the requirements promulgated pursuant to them), including laws concerning mineral tenure (under which mineral exploration and exploitation rights are acquired, held and exercised) and laws concerning mining operations (governing the manner in which mining is conducted, including land use, environmental and health and safety regulations). Determining which laws apply in a given situation (federal,

state or local or more likely a combination) depends on the ownership and location of the mining property (eg, federal, state or private).

Real property on which mining is conducted in the United States may be owned by the federal government, a state or a private entity or individual or arguably a combination of all three. For any given property, the mineral rights (or mineral estate) and the surface rights (or surface estate) are distinct and separable property rights and may or may not be owned by the same entity or individual (public or private).

Where mineral rights are federally owned, mineral tenure is regulated at the federal level. Likewise, tenure regarding state-owned mineral rights is regulated at the state level. If a property's mineral rights are owned by a private entity or individual, acquiring those rights is a contractual matter between the private entity or individual and the mining company. If a private entity or individual owns the surface estate, accessing and using the surface is also a contractual matter (notwithstanding a commonly understood and applied legal tenet that the mineral estate is 'dominant' over the surface estate). Mining operations on federal, state or private lands are all subject to laws and regulations that exist at all three levels depending upon the location of the mining project.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The General Mining Act of 1872 (the General Mining Act) governs the process for acquiring and maintaining a right to develop and extract locatable minerals from mineral deposits discovered on federal lands. The Federal Land Policy and Management Act of 1976 provides the legal framework within which mining rights acquired under the General Mining Act must be exercised to prevent undue and unnecessary degradation of federal lands. A key element of this legal framework is compliance with applicable environmental laws, beginning with the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impacts of major federal actions, including the permitting of mining activities on federal lands as well as the Federal Land Policy and Management Act that requires oversight and management to prevent degradation of public lands and resources and the Mine Safety and Health Act that requires strict compliance with mandatory safety and health standards. Other key federal environmental statutes include the Federal Water Pollution Control Act (Clean Water Act), the Clean Air Act, the Endangered Species Act, the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act (also known as Superfund) (all as amended to date). Similar or corresponding legal regimes exist at the state level for mining on state and private lands, which may be more stringent than federal requirements.

As always, the regulatory requirements promulgated under each statute must also be evaluated and addressed. More recently, the US Securities and Exchange Commission (SEC) issued filing and reporting requirements applicable to mining companies in the form of final regulations governing the disclosure of resource and reserve information. The requirements are intended to apply to both US companies and foreign private issuers that file SEC reports that have mining activities considered material to their business and financial conditions.

The principal regulatory bodies responsible for administering the laws governing mining on federal lands are the US Bureau of Land Management (BLM) (an agency within the US Department of Interior) and the US Forest Service (an agency within the US Department of Agriculture). Other key federal agencies with potential regulatory authority over mining include the Environmental Protection Agency and the US Army Corps of Engineers. To implement and enforce the laws under their purview, these agencies promulgate regulations containing detailed procedures, requirements and standards for operational and environmental compliance.

Mining regulation in the United States has been in a state of flux since the beginning of the Trump administration in early 2017 when various changes to laws, regulations, agency policies and guidance documents, and even the organisational structures of some agencies such as the BLM, were considered and undertaken to reduce regulatory burdens, delays and costs to promote increased mineral development across the United States. The Biden administration, however, has taken an entirely different approach and has effectively overturned the policies and regulatory mandates of the Trump era. For example, the Biden administration's Council on Environmental Quality proposed a rule to modify its NEPA regulations to reinstate NEPA requirements from the pre-Trump era. The resulting impact is that federal agencies will once again evaluate much broader environmental impacts in NEPA evaluations and assessments. This regulatory effort will undoubtedly expand the scope of environmental issues to be considered by federal agencies in assessing NEPA's application to mining projects, such as, for example, emissions of greenhouse gases and the related climate-change impacts, with increased delays in achieving NEPA assessment approval.

Significant efforts to reduce government regulation and oversight to create positive incentives for the mining industry also occurred during the Trump administration. For instance, pursuant to an executive order from President Trump, the Interior Department identified 35 minerals as critical, including cobalt, potash, rare earth minerals, tin, uranium and many other elements that are used for achieving alternative-energy mandates. The Biden administration has continued to emphasise the need for a critical mineral supply chain with increased domestic production for advanced technologies, electric vehicles and clean energy but has not yet reconciled how to achieve the intended end result without maintaining some of the programmes instituted by the Trump administration. President Biden has also invoked the use of the Defense Production Act (a Cold War-era statute that confers presidential authority in emergencies to defend national security) for use in supporting the mining industry in achieving greater production of critical minerals. Whether these efforts will result in positive progress in ensuring a greater and more long-lasting supply of critical minerals remains to be seen, although the increased emphasis on the development of an effective and reliable supply chain of critical and rare earth minerals will seemingly continue to be a focal point for mineral development in the United States.

Of course, executive control notwithstanding, changes to agency rules and policies must wend their way through various stages of administrative procedure and public process and, in many instances, face legal challenges in the courts, for example, if promulgated without notice or public review and participation. Examples of significant policy initiatives included proposed changes by the BLM to defer to states regarding resource management plans and priorities that could affect over 80 per cent of greater sage-grouse habitat, which was part of the overall effort to streamline environmental reviews under NEPA. The Biden administration will not only abandon the prior Trump administration's sage grouse mandate but is expected to create new protections for the greater sage grouse, a species that is losing habitat in western states due to climate change and industrial development.

Classification system

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The SEC has replaced its decades-old mining property disclosure requirements found in Industry Guide 7 with new disclosure rules (codified in a new subpart 1300 of Regulation S-K (17 CFR 229.1300)), effective

as of 1 January 2021, that align US reporting requirements more closely with Committee for Mineral Reserves International Reporting Standards (CRIRSCO) and other global reporting codes. The new rules, intended to reduce the compliance burdens on disclosing companies and improve overall disclosures, apply to US companies with mining operations that are material to their business or financial condition and foreign private issuers that file reports with the SEC.

Information related to mining operations is material if there is a substantial likelihood that a reasonable investor would attach importance to such information in determining whether to purchase the security registered.

Under the new rules, a registrant is required to disclose exploration results generated by mineral exploration programs (ie, programmes consisting of sampling, drilling, trenching, analytical testing, assaying, and other similar activities undertaken to locate, investigate, define or delineate a mineral prospect or mineral deposit), mineral resources (not defined in Industry Guide 7) and mineral reserves, based on reports prepared by a qualified person. Previously, Industry Guide 7 did not require the disclosure of mineral resources. The regulations define a 'mineral resource' 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 economic extraction. A mineral resource is a reasonable estimate of mineralisation, taking into account relevant factors such as cut-off grade, likely mining dimensions, location or continuity, that, with the assumed and justifiable technical and economic conditions, is likely to, in whole or in part, become economically extractable. It is not merely an inventory of all mineralization drilled or sampled.*

A 'mineral reserve' is an:

> *estimate of tonnage and grade or quality of indicated and measured mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project.*

The required summary disclosure rules, modelled in part on existing CRIRSCO-based codes, are intended to provide investors with a more thorough understanding of a registrant's mining properties and improve the comparability between various mining property disclosures across foreign and domestic jurisdictions. By adopting a materiality standard and removing or revising requirements that arguably disadvantaged US mining registrants when compared to mining companies governed by foreign standards (eg, reporting requirements imposed by Australia, Canada and South Africa), the SEC has aligned its rules with industry and global standards. However, the SEC's disclosure requirements are not identical to existing CRIRSCO-based codes and there are some differences with respect to terms, for example. A close examination of the relevant codes is necessary to determine whether any material differences for the registrant exist.

MINING RIGHTS AND TITLE

State control over mining rights

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Government control of mining rights varies depending on ownership of the minerals associated with a resource property. Virtually all minerals (or mineral rights) in the United States were originally owned by the federal government. Over the course of the past 150 years, mineral rights in many locations (particularly in the eastern half of the United States) have been transferred through myriad federal land grants and other mechanisms to both the states and private parties. With respect to federally owned minerals (other than mineral rights pertaining to leasable minerals (eg, coal and oil shale) or saleable minerals (eg, sand and gravel)), the General Mining Act of 1872 (the General Mining Act) provides a system by which private US citizens (including US companies) can 'locate' mining claims. The process does not transfer ownership of the minerals themselves (such ownership passes only after the minerals have been severed from the land), but rather gives the claim holder a right to develop and extract the minerals. Other systems exist at the state level enabling private parties to acquire mining rights for state-owned minerals. These systems vary from state to state, but often involve some form of leasing. For privately owned minerals, mineral rights may be acquired like any other private property right, by being leased or bought and sold according to contract and real property law.

Publicly available information and data

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency, or securities commission regulating public companies, which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

No single regulatory agency is responsible for collecting mineral assessment reports or other technical data from private parties. The US Bureau of Land Management (BLM), the US Forest Service and various state agencies do collect such information from time to time as required by the mining statutes and regulations they are charged to enforce. Some limited information and data are publicly available to private parties that wish to engage in mining activities.

For example, the BLM keeps federal land conveyance records in its offices around the country, and it maintains online records systems, such as GeoCommunicator, that contain information on topics such as land and mineral title, federal mining claims and federal land parcel mapping (including Public Land Survey System data). The BLM launched the Mineral & Land Records System in January 2021 to replace the Legacy Rehost 2000 (LR2000) case-management system, the Alaska Land Information System and official land status records. Relatedly, the US Geological Survey manages a data system (Mineral Resource Data System) that contains a collection of reports describing metallic and non-metallic mineral resources. Generally, however, any such information that contains or constitutes trade secrets or proprietary and confidential business information, including geological and

geophysical information, is not made available to the public. Such information usually must be obtained from the party that owns it.

Acquisition of rights by private parties

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence or more senior tenure? What are the requirements to convert to a mining licence?

The General Mining Act allows private parties free access to open public lands for the prospecting of minerals. Upon making a discovery of a valuable mineral deposit, the prospector may 'locate' (or stake) a mining claim on the deposit according to a specific location procedure; provided, a mining claim may be located only by US citizens or those who have declared their intent to become US citizens. The holder of a valid mining claim (sometimes referred to as an 'unpatented mining claim') is entitled to develop and extract the mineral deposit associated with the claim and, once validly located, is protected against challenges by the United States and other private parties to the claim holder's rights.

The General Mining Act also provides a process to 'patent' mining claims, through which the federal government grants the claim holder fee title (full private ownership) to the mineral property. In 1994, however, the US Congress imposed a moratorium on any new mineral patent applications. This leaves unpatented mining claims as the primary method by which new mining rights may be acquired on federal lands.

A valid mining claim cannot be established in the absence of a discovery of a valuable mineral deposit. The General Mining Act does not specify the meaning of 'valuable mineral deposit', but two definitional rules have evolved through an administrative agency (US Department of Interior) and judicial decisions, as follows:

- the prudent-man rule, which determines value based on whether, 'a person of ordinary prudence would be justified in the further expenditure of his labour and means, with a reasonable prospect of success in developing a valuable mine'; and
- the marketability rule, which requires a claimant to demonstrate a reasonable prospect of making a profit from the sale of minerals from the claim or group of contiguous claims.

The marketability rule was developed and nearly always applied by the Department of the Interior within the context of disputes between a mining claimant and the United States (as opposed to a dispute between a mining claimant and a competing claimant). However, US courts have not strictly adhered to this distinction and have applied both tests in deciding controversies between rival claimants.

After a mining claim has been located, the claimant must record a notice or certificate of location with the proper BLM office within 90 days of the date of location. A similar filing must also be made at the local county recorder's office within a time frame specified under state law (usually 90 days from the date of location, although shorter periods may apply in some states). In certain circumstances, annual assessment work may be performed to maintain an unpatented mining claim. In most cases, however, mining claims are maintained by payment of annual maintenance fees to the BLM.

The process of acquiring mining rights to state-owned minerals varies from state to state, but mineral leasing systems are commonly used. The acquisition of privately owned mining rights (whether acquiring the minerals themselves or the right to exploit them) is a matter of contract with the mineral owner with issues of surface ownership always to be evaluated and considered especially if the mineral and surface estates are split.

Renewal and transfer of mineral licences

11 What is the regime for the renewal and transfer of mineral licences?

Mining claims on federal lands are maintained on an annual basis by payment of maintenance fees to the BLM (or, in some cases, performing a certain amount of assessment work each year). Such claims are freely transferable without the requirement of government approval, although transfer documents must be filed with the proper county and BLM offices within 90 days of the transfer.

The regime for renewal and transfer of mining rights to state-owned minerals varies from state to state but notice and approval requirements often apply. The requirements of each individual state in which mining is conducted should be evaluated. Mining rights in respect of privately owned minerals may be transferred according to applicable state contract and real property laws.

Duration of mining rights

12 What is the typical duration of mining rights? Is there a requirement to relinquish a portion of the mining rights to the government after a certain number of years?

A mining claim on federal lands may continue indefinitely if it is supported by a discovery of a valuable mineral deposit and is properly maintained through required annual maintenance fees or assessment work. A mining claim on federal land is subject to forfeiture to the United States for failure to follow claim location requirements, failure to prove a valid discovery or failure to pay annual maintenance fees or perform annual assessment work.

The duration of mining rights to state-owned minerals varies from state to state. Mining rights are commonly granted by lease for a finite term (eg, five years, 10 years), subject to renewal for additional terms or to continuation for the duration of mineral production. State mining rights may be subject to termination for a variety of reasons, such as failure to make lease payments, violation of state laws or regulations or lease requirements or failure to commence or to continue diligent exploration or mining operations.

Mining rights in respect of privately owned minerals, including those acquired by patent from the federal government, continue indefinitely as the property of their owner, and may be freely leased, traded, assigned or sold.

Acquisition by domestic parties versus acquisition by foreign parties

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Pursuant to the General Mining Law, mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a domestic business entity organised under the laws of any state is considered a US citizen without regard to shareholder citizenship. Otherwise, there is generally no distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties. Regarding mining activity on privately held land, no citizenship requirements or foreign investment restrictions exist as such. Generally, non-US citizens and residents can own real property in the United States.

It is important to note that restrictions do exist regarding non-US entities acquiring and owning an interest in US mining entities. To protect national security interests, the Committee on Foreign Investment in the United States has the authority to review and evaluate national security concerns regarding the investment by a foreign entity in a US company

performing mining operations and to recommend to the President who has the ultimate decision-making authority to facilitate or prohibit the investment and, additionally, if and when warranted to reverse or unwind an investment previously approved.

Protection of mining rights

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights, like any other real property interests, are protected under US law, including the protective requirements of due process of law. Mining rights holders may seek the protection of their interests in the independent judicial system of the United States, either in federal or state courts (and sometimes after required administrative proceedings at the regulatory agency level) depending on the identity of the parties and the nature of the dispute. Foreign arbitration awards are freely enforceable in the United States pursuant to the New York Convention 1958, incorporated into US law under Chapter 2 of the Federal Arbitration Act.

Surface rights

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests or does the holder of the mineral tenure have priority over surface rights use?

Generally, if there is a split in the mineral and surface estates, the mineral estate is dominant over the surface estate and the holder of a valid mining claim has the 'exclusive right of possession and enjoyment' of the surface area within the boundaries of the claim, subject to several important qualifications. First, the claimholder's uses of the surface are limited to exploration, mining and processing and uses reasonably incident thereto. In addition, the claimholder's surface rights are subject to the federal government's right to manage and dispose of vegetative resources and other surface resources not reasonably required for mining as well as other uses by the United States and persons authorised by the United States that do not materially interfere with the claimholder's mineral operations. Finally, the claimholder's use of the surface is subject to compliance with federal surface management regulations that emphasise advance planning for surface resource protection and surface reclamation.

The nature and extent of surface rights on state lands varies from state to state, but requirements for multiple use accommodation, surface resource protection and surface reclamation akin to those on federal lands may be expected in most jurisdictions. Privately owned surface rights are a matter of private contract (surface use agreement), but typically involve surface damage payments, environmental indemnities and reclamation guarantees in favour of the surface owner.

Participation of government and state agencies

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

No government or state agency in the United States has a right to participate in mining projects. There is no specific local listing requirement, although mining claims on federal lands may be located and held only by US citizens (including business entities organised under the laws of any state) or those who have declared their intent to become US citizens.

Government expropriation of licences

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There is no provision in US law dealing specifically with government expropriation of mineral rights. Federal, state and local governments, in general, may take private property for a public purpose through their power of eminent domain, but the property owner must be afforded due process of law and paid just compensation.

Protected areas

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits to mineral exploration or mining, or specially regulated?

There are several categories of protected state and federal lands where mining may be heavily regulated if not entirely prohibited. On federal lands, mining claims may not be located in areas closed to mineral entry by a special act of Congress, regulation or public land order. These areas, 'withdrawn' from mineral entry, include, without limitation, national parks, national monuments, tribal reservations, military reservations, scientific testing areas, most reclamation project areas of the US Bureau of Reclamation and most wildlife protection areas managed by the US Fish and Wildlife Service. Mining claims are also prohibited on land designated by Congress as part of the National Wilderness Preservation System or designated as a wild portion of a Wild and Scenic River. Federal land withdrawn for power development may be subject to mining claim location only under certain conditions. Categories of protected state lands must be determined on a state-by-state basis, but may include, for example, wildlife management areas, state parks, scientific and natural areas and recreation areas.

DUTIES, ROYALTIES AND TAXES

Duties, royalties and taxes payable by private parties

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The US mining industry is not exempted from taxes and does not enjoy any type of tax holiday regardless of whether mining is conducted by domestic or foreign parties. Taxes may be imposed at the federal, state and local levels, although there is no federal tax specific to minerals extraction. Nothing at the federal level of government requires a private party mining on federal lands to pay duties, taxes or royalties as such, although federal mining claims are subject to payment of annual maintenance fees or performance of assessment work. In general, however, private parties conducting mining in the United States must address the full panoply of taxes, including, without limitation, federal and state income taxes, state severance taxes (where applicable), ad valorem property taxes, sales taxes, use taxes, payroll taxes and the like. State income taxes and respective rates vary among the 50 states, with certain states not imposing any income tax at all. The requirements of each separate state where mining is conducted should be separately evaluated.

The federal and state income taxes tend to be profit-based since numerous deductions and credits can often be applied to reduce tax liability. However, the United States imposes an alternative minimum tax designed to extract a minimal amount of income tax, even if tax liability might otherwise be reduced due to certain deductions or credits. What, if any, efforts may be made by the Biden administration and Congress to modify the system of federal taxes remains to be determined, but it is

clear that the debate has started within Congress to determine whether reforms to the General Mining Law should be made and also whether increased fees and royalties should be assessed for the right to mine on federal land.

Tax advantages and incentives

20 What tax advantages, tax credits and incentives are available to private parties carrying on exploration and mining activities?

No specific tax advantages or initiatives exist for private parties carrying on mining in the United States. Private parties carrying on mining activities have the same opportunity as other taxpayers to utilise applicable deductions and credits to reduce federal and state taxes in association with mining activities.

Tax stabilisation

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Tax stabilisation and related beneficial arrangements are often offered in developing nations. In the United States, however, no legislation exists at the state or federal level to provide for tax stabilisation for mining activities. Similarly, no tax stabilisation agreements are authorised by US law regardless of whether the mining party is domestic or foreign.

Carried interest

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No entitlement exists under US law for the federal government at any level to obtain a carried interest or a free carried interest in mining projects. Similarly, no states in the United States allow for such entitlement.

Transfer taxes and capital gains

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of a mining licence is not subject to any transfer tax or capital gains tax as such at the federal level. States may apply a transfer tax or fee for such a transfer, and accordingly, the individual state where the mining rights are located or the transaction is structured should be evaluated on a case-by-case basis.

Distinction between domestic parties and foreign parties

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

The United States does not distinguish between domestic and foreign parties regarding the payment of taxes pertaining to mining activities as such, but recall that mining claims on federal lands pursuant to the General Mining Law may be located and held only by US citizens or those who have declared their intent to become US citizens. Generally, tax rates, deductions for business expenses, available credits, deductions and the like apply equally to domestic and foreign parties. Note, however, that the Federal Foreign Investment in Real Property Tax Act of 1980 (section 1445 of the Internal Revenue Code) was enacted to ensure that foreign sellers pay taxes on the sale of real property in the United States, which has been defined to include mining properties. In any such transaction, tax withholding is determined based on whether participating parties are domestic or foreign. Generally, a foreign party that sells or distributes a US real property interest must withhold tax equal to 35 per cent of the gain it recognises on the sale. A domestic corporation must deduct and withhold a tax equal to 15 per cent of the total amount realised by a foreign person or entity on disposition of pertinent property after 17 February 2016 (10 per cent previously).

Acquisitions by foreign parties of a controlling interest in a US entity involved in mining operations will likely be subject to formal oversight and evaluation by the Committee on Foreign Investment in the United States. If the Committee determines that a threat to national security is presented by the acquisition, conditions can be imposed on the potential transaction or the transaction may be blocked altogether by the President, who has the ultimate decision-making authority. Even transactions previously approved may be re-evaluated and unwound after the fact.

BUSINESS STRUCTURES

Principal business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Private parties have significant flexibility in choosing business structures to carry on mining activities in the United States. Principal business structures may include sole proprietorships, corporations, limited liability companies, general and limited partnerships and certain forms of joint venture.

Local entity requirement

26 Is there a requirement that a local entity be a party to the transaction?

There is no requirement for a local entity to be a party to a mining transaction in the United States. However, mining claims on federal lands may be located and held only by US citizens (including business entities organised under the laws of any state in the United States) or those who have declared their intent to become US citizens.

Bilateral investment and tax treaties

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Foreign entities are generally comfortable relying on the laws and court systems within the United States to protect their contract and property rights and do not commonly structure their US mining operations through bilateral investment treaties. In certain circumstances, a foreign entity might take advantage of a multilateral investment treaty, but mining projects are not typically structured around any such treaty. Of particular importance in North America is the United States–Mexico–Canada Agreement (USMCA), which became effective on 1 July 2020, and replaced the North American Free Trade Agreement (NAFTA). Notably, Canada has not consented to the investor-state dispute settlement provisions of the USMCA and, as a result, US investors cannot bring arbitration claims under the USMCA against Canada, and Canadian investors cannot bring such claims against the United States.

The United States has also entered into tax treaties with most of its major international trading partners. Under these treaties, residents of foreign countries may be taxed at a reduced rate, or be exempt from US taxes, on certain items of income they receive from sources within the United States. These reduced rates and exemptions vary among countries and among specific items of income and therefore must be evaluated on a country-by-country basis. Examples of tax treaties on

which foreign entities often rely for tax relief in connection with their US mining operations include treaties that the United States has made with Canada, Mexico and the United Kingdom.

FINANCING

Principal sources of financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Specific financing requirements or investment directives do not exist as such pursuant to mining laws in the United States, given that the United States operates as a free-market economy. Mining endeavours are funded through a multitude of conventional and alternative financing mechanisms with no specific roadmap for success. From a conventional standpoint, equity and debt alternatives are typically used, whether through private or public sources, but these alternatives have been more difficult to achieve in a depressed mining market over the past several years. Financings of mining deals in the United States through equity sources (domestic or foreign exchanges, private placements and initial public offerings) and debt financings (investment or commercial bank loans and bonds), are still occurring, although at a less frequent rate over the past few years. The fact is that less capital funding is being raised through the domestic securities market exchanges in the United States in contrast to exchanges in Canada and London. More recently, creative alternative structures of financing are being increasingly used, including convertible debt, royalty financings, off-take arrangements and streaming mechanisms, which offer less dilution than equity at depressed prices.

Because of the increased challenges of securing mine financing, the volatility and expense of initial public offerings and the typically lengthy development time frames for mining projects, particularly in the United States, new means of raising finances have been utilised. For example, alternatives involving special purpose acquisition companies (SPACs), which are new companies formed for the purpose of raising capital but with no particular, identifiable operations, have been increasingly utilised in the industry. Funding is raised through an initial public offering with the intention of purposing the funding to a target entity that may not even be known or identified at the time the funds are raised. Special purpose vehicles (SPVs) are used similarly for securing financing for mine projects. The SPV, unlike the SPAC, is created for a specific purpose and is typically a limited liability subsidiary of a parent entity that is formed for the express purpose of focusing on one particular project for funding. The ability to use the SPV to reduce risks that may be posed by a multi-operational mining company and limit potential liabilities makes it attractive to investors and lenders.

Careful consideration of US securities laws regarding mine financings is essential along with the regulatory requirements imposed by the US Securities and Exchange Commission (SEC), which have mandated certain disclosure obligations related to the mining industry. For years, Regulation S-K and Industry Guide 7, published by the SEC, have required publicly traded companies to disclose information regarding proven and probable mineral reserves. These requirements were amended in a final rule adopted by the SEC to require, among other things, that a mining registrant with material mining operations disclose certain information in its SEC-related filings regarding mineral resources in addition to mineral reserves. The new rule titled Disclosure by Registrants Engaged in Mining Operations (Rule S-K 1300) became effective in January 2021 (17 CFR Subpart 229.1300). Rule S-K 1300 is the US counterpart to Canada's National Instrument 43-101, which prior to the new SEC rule was the standard that was often voluntarily used as an effective financing benchmark in the United States.

Direct financing from government or major pension funds

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No government or regulatory agency in the United States provides direct financing to or for mining projects. No US law or regulation allows or authorises such financing to occur. Pension funds are neither expressly authorised nor prohibited from investing in mining projects. In the United States, in contrast to Canada, pension-fund financing of mining projects is not as common.

Security regime

30 Please describe the regime for taking security over mining interests.

Typically, mining interests may be used as security or collateral and can be mortgaged and pledged just like any other asset or real property. Security interests in mining properties, eg, a mortgage, may be recorded in local clerk and recorder's offices in each individual county of each state like any other security interest in real property. Often, the approval of the grantor or lessor of the mining interest may be required, whether that party is the federal or state government or a private party. State and individual county requirements should be carefully evaluated in the jurisdictions in which mining is conducted.

RESTRICTIONS

Importation restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Currently, there are no particular restrictions as such with regard to the importation of machinery and equipment or services required in connection with mining exploration and extraction activities, but the Trump administration extended certain import tariffs on aluminium and steel and the Biden administration is placing additional restrictions on certain commodities from Russia. Future import tariffs may be effected by the Biden administration on some or all imports, which is a matter to be determined in 2022, particularly with regard to machinery and equipment from China. According to the US Department of Commerce, which would otherwise have authority and control over any import restrictions, the United States is still the world's largest producer of mining and construction equipment and machinery. Whether a merchandise processing fee may be assessed in individual states and accordingly the state in which exploration and extraction occur should be separately researched and considered.

Standard conditions and agreements

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No particular set of standard conditions or agreements is predominant in the United States regarding equipment supplies. FIDIC contracts are often referred to as the international standard, although both FIDIC and Orgalime forms may be used. Whether conditions or agreements are friendlier to the supplier or buyer is typically a negotiated contract matter in the United States, given the country's emphasis on free-market principles. No basis currently exists on which to predict any US trend regarding dispute resolution of equipment supply agreements,

given that the matter ultimately depends on the nature of and terms and conditions in applicable agreements.

Mineral restrictions

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

As a general rule, currently, no restrictions exist with regard to the export or sale of hard rock or metallic minerals. Certain restrictions may be placed on and applied regarding the export or sale of critical and strategic minerals by certain US federal executive departments as the matter is continually being evaluated in Congress and likely will be as well by the Biden administration. The US Department of Homeland Security (Homeland Security) and the US State Department clearly possess the authority to characterise the export or import of minerals or metals to be a national security risk, but such sweeping authority has not yet been exercised or threatened. It is likely that export restrictions will increase regarding metals and minerals trading, given supply-chain concerns and uncertainties regarding critical or strategic minerals that will likely lead to future trade disputes. For example, although US exports of minerals and metals generally increased, there was a decrease in exports to China due to regulations that became effective in 2018. The rules restrict the types of scrap- and waste-metal products that can be imported into China. More restrictions may be instituted in the future as concerns grow over critical and strategic minerals and metals supply chains.

Import of funds restrictions

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Currently, no restrictions exist regarding the import of funds for exploration and extraction activities or the use of proceeds from the export or sale of minerals. However, the export of funds from the United States is subject to laws of general application that are administered by, among others, the US Department of Treasury and Homeland Security. It is also conceivable that certain financings from imported funds may be subject to review by the Committee on Foreign Investment in the United States (CFIUS), which is the federal body responsible for reviewing and investigating foreign direct investment in US entities and any related potential impact on national security. Homeland Security is a member of CFIUS.

ENVIRONMENT

Principal applicable environmental laws

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Numerous federal environmental statutory and regulatory requirements and programmes apply to mining in the United States along with state counterpart requirements and programmes that in many instances are required to be no less stringent than the federal requirements and programmes. Local requirements in certain jurisdictions may also apply and should be separately evaluated. Among the primary federal programmes that regulate environmental matters pertaining to the mining industry are the following:

- the National Environmental Policy Act (NEPA) (comprehensive interdisciplinary approach for major federal actions);
- the Federal Land Policy and Management Act (degradation of federal lands);
- the Surface Mining Control and Reclamation Act (coal operations);
- the Clean Air Act as amended (air quality standards);
- the Federal Water Pollution Control Act (the Clean Water Act) (protection of surface water);
- the Safe Drinking Water Act (drinking water quality and underground injection);
- the Resource Conservation and Recovery Act, as amended (RCRA) (solid and hazardous waste control);
- the Endangered Species Act (protection of threatened or endangered animals and plants);
- the Migratory Bird Treaty Act (strict liability protection of species of birds);
- the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA or Superfund) (hazardous substance release and site clean-up by removal or remediation);
- the Toxic Substances Control Act (regulation of risky chemicals);
- the Rivers and Harbors Act (impact on rivers);
- the Indian Mineral Development Act of 1982 (mining on Native American land);
- the National Historic Preservation Act (historic sites and landmarks);
- the Federal Mine Safety Health Act of 1977 (promote mine health and safety);
- the Occupational Safety and Health Act of 1970 (occupational worker health and safety);
- the Mine Improvement and New Emergency Response Act of 2006; and
- the Emergency Response Act of 2006 (improve miner safety and health).

Some of the federal agencies with authority over mining include, without limitation, the following:

- the US Environmental Protection Agency (EPA);
- the US Bureau of Land Management (BLM);
- the US Forest Service;
- the US Army Corps of Engineers;
- the Bureau of Indian Affairs;
- the Bureau of Reclamation;
- the Mine Safety and Health Administration (MSHA); and
- the Occupational Safety and Health Administration.

Environmental requirements in states and local jurisdictions in which mining activity is undertaken should always be specifically researched and evaluated. Often, states have counterpart programmes to those that exist at the federal level that are mandated to be no less stringent than federal requirements. Some states may also be more stringent in environmental control than the federal government (eg, California).

Environmental review and permitting process

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The environmental review and permitting process for a mining project in the United States is somewhat dependent on the state in which it occurs and also whether the project is located on private, state or federal land. Typically, however, the process is highly complex, time-consuming and expensive. The process for a mining project may also be made more difficult and time-consuming if the project is on or even adjacent to federal or tribal land.

If on or adjacent to federal land, NEPA is triggered by significant federal action requiring a detailed and time-consuming environmental analysis regarding whether the project will individually or cumulatively have a significant impact or effect on the human environment, which then requires the public to be informed of the potential impacts and effects. That analysis can be required in the form of an environmental assessment or a full environmental impact statement (with increased analysis). If so, any mining project will be substantially delayed for years while environmental impacts and reasonable alternatives are considered in the context of either an environmental assessment or an environmental impact statement. A lead agency with primary authority over the NEPA process will coordinate with numerous other federal and state agencies to oversee the process, coordinate government and public comments and responses and ensure public review and input. The process is measured in years and not months and can lead to various legal challenges during the course of the effort that can substantially alter, delay or even kill mining projects.

Historically, mining on and near tribal lands occurred with minimal input from tribes, despite congressional legislation passed in 1891 that created federal laws enabling mining companies to lease minerals on tribal lands. Nearly 2 million acres of tribal lands are now subject to mineral leases administered by the US Department of the Interior. Until the early 1970s, tribal mineral owners were passive leaseholders with little authority over mining operations, but tribal authorities have become more adept at controlling environmental, health, safety and other matters on tribal lands. If the effects of mining are likely to be significant, the EPA requires NEPA to be followed and solicits the participation of the tribal government as a 'cooperating agency' when the project's impacts or effects may affect tribal lands and people or other tribal areas.

Activities on tribal lands and areas often require a greater level of NEPA involvement than the same activities in non-tribal areas when mining activities are planned to occur on tribal lands held in trust by the federal government. The Department of the Interior, Bureau of Indian Affairs is the primary entity involved in NEPA enforcement in tribal areas.

Sustainability

37 | Do government agencies or other institutions in your jurisdiction provide incentives or publish environmental and social governance (ESG) guidelines for green projects?

Regulators in the United States have two means available for altering mining practices and increasing consciousness of ESG issues. They can use traditional command-and-control regulatory approaches mandated by the federal environmental statutes and regulatory programmes and are typically implemented and enforced by the states (eg, creating and effecting either specific control technologies or performance- or technology-based standards), or they can attempt to provide and use economic incentives or market-based policies that rely on market forces to correct or encourage alternative behaviour. Over the years, after applying command and control requirements, various types of economic incentives and voluntary initiatives have evolved and been extensively considered, discussed and published to achieve and encourage greater environmental and social reforms. Efforts in the near future, however, are likely to be more formally mandated.

For example, the US Securities and Exchange Commission has created a task force within its enforcement division to identify and investigate ESG-related matters pertaining to climate change risks and has announced a proposed rulemaking to address risk disclosure requirements for corporate entities. In a companion effort, the Biden administration issued an Executive Order on Climate-Related Financial Risk (https://www.federalregister.gov/documents/2021/05/25/2021-11168) that is intended to 'advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk' and 'to mitigate that risk and its drivers, while accounting for and addressing disparate impacts on disadvantaged communities and communities of color'. The Order further directs the Secretary of the Treasury to assess climate-related financial risk to the country's financial system.

The EPA has published several non-regulatory approaches that rely on voluntary initiatives to achieve improvements in such things as emissions controls and management of environmental hazards. These programmes are usually not intended as substitutes for formal regulation but instead act as important complements to existing statutory and regulatory controls. Many of the EPA's voluntary programmes encourage polluting entities to go beyond what is mandated by existing laws. Others have been developed to improve environmental quality in areas that policymakers expect may be regulated in the future but are currently not regulated, such as greenhouse gas emissions and non-point source water pollution, which increasingly may be the subject of court actions.

The EPA has recommended environmental best practices for federally funded projects to address such things as water management, green remediation, reduction in diesel emissions and smarter energy practices. But the recommendations are not applicable outside the federal sphere of activity and certainly not on a broader-based scale to the mining industry as a whole. However, with increasing expectations for mining companies to operate in an environmentally and socially conscious way, ESG incentive plans are increasingly being considered effective ways to reinforce positive actions now and in the future for mining projects. In the United States, however, such plans are generally implemented on a voluntary basis in contrast to Canada, for instance, and generally in the form of economic and social incentives.

More recently, state and local governments have recognised the importance of achieving ESG goals and have been more proactive in mandating practices that promote such goals than the federal government. For example, California has been at the forefront of utilising and integrating ESG elements into the state's retirement programmes for teachers and public employees. This approach of mandating sustainable investments in pension programs has been followed in numerous other states as well, although not yet in the states that primarily support the mining industry. In addition, various cities and counties in these states have also generated the same requirements for local public pensions.

Closure and remediation process

38 | What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

For the most part, the closure and remediation process for a mining project is guided and determined as a matter of state law during the permitting process, with potentially stringent reclamation and financial assurance requirements that must be met in some form during and at the end of the mining project. The exception, of course, relates to mining projects on federal lands that must meet requirements imposed by federal agencies, such as the BLM and the US Forest Service, which in most respects are similar to state-mandated requirements. All states in which mining occurs require reclamation of mined areas to facilitate closure, re-vegetation and restoration of areas that have been adversely impacted and to ensure control of water runoff and rehabilitation of impacted land areas and natural habitats.

Federal and state laws also typically allow several different alternatives to be met in providing financial assurance designed to ensure the availability of funds for ongoing work or future work to be undertaken either by the mining party itself or in lieu thereof by the government, including performance bonds, insurance or surety arrangements,

letters of credit, trust funds and cash collateral. Some flexibility is provided through these alternatives to ensure adequate funds are available for the reclamation of impacted areas and natural resources at the appropriate time. Mining projects may also be required to undertake more than reclamation and may have to meet more rigid and expensive requirements to remediate mining-impacted sites fully in appropriate circumstances pursuant to CERCLA (or Superfund), which applies strict and joint and several liability, or counterpart statutes that exist in some states where mining is conducted. Such site remediation can often be quite costly, and can also take years to accomplish, with ultimate sign-off required by regulatory agencies at the state and federal levels.

Restrictions on building tailings or waste dams

39 | What are the restrictions for building tailings or waste dams?

The construction and care of tailings or waste dams are a relatively new phenomenon in the overall history of US mining activity. Unlike dams utilised for impounding water, which may ultimately be drained depending on structural integrity, a tailings dam must be designed to impound material safely in perpetuity, which requires careful consideration of seismic and hydrologic events. The MSHA conducts periodic inspections of tailings dams, authorising its enforcement personnel to inspect, evaluate and address relative hazards and to penalise poor operational controls.

In the United States, despite the MSHA's authority and presence, state regulators have the primary responsibility and authority to oversee the construction and management of tailings ponds or waste dams. Any applicable requirements or standards for such dams would be at the state level, for the most part, including professional qualifications for anyone in charge of operation and management of dam waste, inspection requirements, installation of alarms and emergency drills and evacuation procedures. Many states have promulgated regulations that classify dams by their hazard potential in terms of serious hazard to public health or serious damage to property. Typically, dams may not be constructed, operated, enlarged, repaired, altered, removed from service or abandoned without the express approval of the pertinent state agency. Those dams with the highest hazard are most strictly regulated, with professional design criteria, specific construction standards and strict maintenance procedures, including monitoring.

States have the authority to inspect, adopt regulations and issue orders, invoke injunctive or judicial action to enforce against unsafe dams or dams that present an imminent hazard or threat to life or property and possibly take supervisory control of the dam's operation. For high-hazard dams, emergency action plans within certain states may be invoked in the event of dam failure. Additional, detailed standards may be imposed on facilities that treat, store and dispose of solid and hazardous waste pursuant to the RCRA, and its state counterpart statutes and regulations. Expensive remediation of old or out-of-service tailings dams may also be required by enforcement efforts involving the CERCLA.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

40 | What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Federal Mine Safety and Health Act is the primary authority governing health, safety and labour issues regarding the mining industry in the United States with both civil and criminal enforcement authority. To carry out the provisions of the Act, the US Mine Health and Safety Administration (MSHA), an agency within the US Department of Labor, regulates the health and safety of mining operations and activities, with broad-based authority over miner health and safety, mine working conditions, training programmes, complaints of discrimination and prevention of accidents, injuries and illnesses, among other things. The MSHA also possesses significant enforcement, inspection and corrective action authorities, which can result in substantial fines and even mine suspension or closure. Additionally, the states in which mining occurs have their own counterpart legal and regulatory authorities over mine health and safety and each individual jurisdiction in which mining occurs should be reviewed and evaluated.

Management and recycling of mining waste

41 | What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

New methods and approaches to improve mine waste management practices continue being developed to reduce the adverse impact of both mining operations and mine closures that require planning for both the storage and long-term stabilisation of mining waste. The management and recycling of mining waste products may very well be regulated as solid or hazardous waste pursuant to restrictive requirements imposed by the federal Resource Conservation and Recovery Act, as amended (RCRA). The RCRA programme may be managed either by the US Environmental Protection Agency or by a state with delegated authority to manage the solid and hazardous waste programme. In such instances, a requirement may exist to obtain a federal or state permit to conduct waste recycling, including the exploration and exploitation of mining waste products.

Those seeking to explore and exploit mining waste products located in tailings ponds or waste piles should first familiarise themselves with the legacy liabilities that may be associated with such units (eg, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) or state authorities) before seeking to obtain any form of management or ownership control over them. Unless the ponds and piles have been abandoned, they may be otherwise owned and controlled by the same owners of the mine and related properties that were associated with them during periods of active mine operations. Consequently, the title may be held by private parties or possibly even the federal or state government, requiring approval from such owners for access to and control over the waste products in the form of a lease, licence or direct acquisition. The assumption of legacy liabilities should always be carefully considered and evaluated.

Use of domestic and foreign employees

42 | What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

US law does not impose specific restrictions or limitations on the use of domestic or foreign employees in connection with mining activities. Generally, applicable US immigration law applies to foreign employees working in mining activities in the United States. Subject to certain limitations and requirements, which should always be evaluated in advance, highly skilled and specialised foreign citizens may qualify for temporary visas to work at mining operations in the United States.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

43 What are the principal community engagement or corporate and social responsibility (CSR) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Although the United States does not have laws mandating corporate social responsibility as such, certain aspects of the mining industry are subject to public engagement and disclosure requirements, particularly when developing pursuant to federal mineral rights. Many mining projects in the United States are subject to environmental review under the National Environmental Policy Act, which mandates that federal agencies study the environmental impact of certain mining projects. Further, corporations engaged in mineral development in the United States are openly seeking to improve relationships with local communities, the wider society and various constituent groups to align stakeholder and company values. Increasingly, the mining Industry is tracking its sustainability performance by measuring the implementation of its environmental and social governance (ESG) strategies and reporting on its performance in public disclosure filings. Such efforts are typically voluntary. However, on 21 March 2022, the US Securities and Exchange Commission proposed its long-anticipated climate-related disclosure rules that would require public companies to make disclosures of greenhouse gas emissions and climate-related risks that are reasonably likely to have a material impact on the business of public companies. The Commission is currently seeking public comments on the proposed rules.

The issue of CSR continues to be an important form of stakeholder and community engagement throughout the mining industry. However, CSR principles have been subsumed by ESG criteria, as many companies are now disclosing to stakeholders their progress in areas such as climate change, corporate governance, health and safety of the workforce, diversity and inclusion, and community engagement.

Rights of aboriginal, indigenous or disadvantaged peoples

44 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Generally, aboriginal or indigenous rights impact the acquisition or exercise of mining rights when those rights are located on Indian lands. Indian reservations are federal lands set aside by treaty or administrative action for the occupancy and use of specified Indian tribes. The United States holds legal title to Indian lands in trust for the benefit and use of the Indian owners, and the federal government has undertaken to protect tribal treaty rights, lands, assets and resources. The Bureau of Indian Affairs administers the federal trust responsibility and any agreement to develop minerals held in trust for Indian beneficiaries must be approved by the US Secretary of the Interior. Unlike the federal supervision applicable in the lower 48 states, Alaskan native regional corporations have title to the surface and subsurface estates and directly control their mineral assets.

Laws designed to protect cultural resources, cultural items, sacred sites or historic properties may also affect mining rights. Mining projects continue to face increased scrutiny by US indigenous groups where those projects are developed on land considered to have significant religious or cultural value to Indian tribes. When permitting certain mineral development projects, federal agencies will also consider environmental justice issues, a policy that seeks to prevent placing an unequal share of the burdens of hazardous waste and other potentially harmful impacts on disadvantaged populations.

International law

45 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The United States is a party to many international treaties, conventions or protocols of general application that in some way relate to and impact CSR globally. In addition to CSR issues, companies continue to showcase advances in ESG issues in sustainability reports and other disclosures. Although the United States is not a party to any ESG-specific international treaty, the United States has re-joined the Paris Agreement in 2021, recommitting to the global framework for global action with respect to climate change. The breadth and impact of any general international agreement on the mining industry and related CSR and ESG issues vary significantly and should be evaluated on a case-by-case basis.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

46 Describe any local legislation governing anti-bribery and corrupt practices.

The primary statute that expressly criminalises corruption of US federal public officials, which prohibits both making and receiving either bribes or gratuities, is title 18 of the United States Code (USC), section 201. Additionally, title 18 USC, section 666 applies when governmental or other entities receive federal programme benefits in excess of US$10,000 in any one year. The Hobbs Act targets public corruption by criminalising extortion. Although no federal statute specifically prohibits private commercial bribery, federal prosecutors may use existing laws such as the mail and wire fraud statute and the federal tax code to prosecute such acts. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), creates anti-corruption directives regarding payments made to the US and foreign governments related to the commercial development of minerals and other natural resources. Additionally, in recent years, non-US companies have been the target of some of the most high-profile prosecutions under the Foreign Corrupt Practices Act (FCPA) as the anti-bribery provisions of the FCPA extend to foreign companies and individuals.

Foreign legislation

47 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

The United States has signed and ratified several significant treaties related to the fight against corruption. However, given the strength and reach of US anti-corruption laws, companies operating in the United States do not pay particular attention to any specific foreign anti-bribery or corruption legislation.

Disclosure of payments by resource companies

48 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The United States is no longer a member of EITI. Owing primarily to the widely varied nature of ownership interests in natural resources in the United States (eg, private, federal, state, tribal), the US Department of the Interior determined that forcing universal participation across the United States was too difficult to administer. Having joined in 2011,

the United States created a public data portal to document natural resource revenues from federal lands, managed by the US Office of Natural Resources Revenue, which includes detailed information on taxes collected from oil, gas, coal, wind and geothermal operations on federal lands and how such revenues are distributed. Despite its withdrawal in 2017, the United States has stated its continued commitment to the ideals of transparency enshrined in the EITI Principles and the EITI Standard as well as fighting corruption in the extractive industries sector.

Adding to its list of tools to fight global corruption, in late 2020 the US Securities and Exchange Commission adopted Rule 13q-1 under the Securities Exchange Act of 1934, as amended (the Exchange Act), and related amendments to Form SD to implement section 13(q) of the Exchange Act. The rules require resource extraction issuers to make certain public disclosures relating to any payment made to a foreign government or the US federal government for commercial development of minerals, including the total amount and the project related to such payment.

FOREIGN INVESTMENT

Foreign ownership restrictions

49 | Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

Mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a business entity organised under the laws of any state is considered a US citizen. Generally, foreign ownership is permitted of stock in corporations that own or control mining claims, and US mining laws generally allow for foreign investment through a business entity organised pursuant to endemic state laws. No foreign ownership restrictions as such apply in respect of state minerals or privately owned mineral interests. More generally, certain tax withholding requirements may apply in transactions involving transfers of real property interests in the United States (including mineral interests) by a foreign person.

Additionally, a transaction of any sort (including a mining transaction) that could result in control of a US business by a foreign person is subject to scrutiny by the Committee on Foreign Investment in the United States (CFIUS), a federal inter-agency committee, to identify and address any national security concerns that may arise because of the transaction involving foreign investment. If a covered transaction presents national security risks and other provisions of law do not provide adequate authority to address the risks, the CFIUS may impose conditions on the transaction to mitigate such risks. The Foreign Investment Risks Review Modernization Act of 2018, and its implementing regulations, expand the jurisdiction of the CFIUS to add new types of covered transactions and broadens the ability of the CFIUS to review transactions, including foreign investments in US businesses involved in critical technology, critical infrastructure and sensitive personal data.

INTERNATIONAL TREATIES

Applicable international treaties

50 | What international treaties apply to the mining industry or an investment in the mining industry?

The United States is a party to numerous international treaties of general application that address or relate to foreign investment in the United States, but no treaties address investment in the mining industry per se. However, foreign investment, particularly currently, is subject to US national security laws and related government scrutiny. For example, the Committee on Foreign Investment in the United States (CFIUS) reviews foreign direct investment and any related potential impact on national security. 'Covered transactions' are reviewed and evaluated to determine if any resultant control of a US business by a foreign person or entity could have or pose a national security risk, whereupon CFIUS has the authority to require changes to mitigate risk and, ultimately, recommend the suspension or prohibition of the transaction to the President of the United States. The President is charged with the responsibility to make the final decision.

Because of its proximity to both Canada and Mexico, two treaties that have traditionally been a focus of the United States are the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership Agreement (TPPA). The Trump administration withdrew the United States from the TPPA and negotiated a new investment treaty with Mexico and Canada called the United States–Mexico–Canada Agreement (USMCA), which replaced NAFTA. The United States, Canada and Mexico have signed and ratified the USMCA, which became effective on 1 June 2020. Significantly, like NAFTA, the USMCA prohibits expropriation or nationalisation of projects across international borders and provides a methodology for redress and compensation. In any event, new developments regarding the future cross-border relationships with both Canada and Mexico are expected and should be further investigated and evaluated. Additionally, although presently uncertain, President Biden has signalled that he will re-join many of the various international treaties, agreements and bodies from which former President Trump withdrew the United States during his four years in office.

UPDATE AND TRENDS

Recent developments

51 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry (legislation, major cases, significant transactions)?

Rare earth and critical minerals

The Trump administration utilised the 69-year old Defense Production Act of 1950 to address the shortfall of capabilities within the defence industrial base to produce rare earth elements and to address the necessity for increased domestic production of critical or strategic minerals to decrease reliance on sources from other nations. President Biden followed with an Executive Order titled Securing America's Critical Supply Chains (Executive Order 14017), which is intended to focus on government evaluation and assessment of US supply chains regarding critical and rare earth minerals and metals believed essential to the national and economic security of the United States and to undertake a comprehensive review of America's supply chains regarding such minerals and metals. Copper and uranium do not fall within the Biden administration's executive mandate. The Executive Order requires a 100-day review by several federal agencies of US supply chains pertaining to rare earth elements and large capacity batteries, among other things.

Executive Order 14051

In a further development nearly one-year later regarding continuing concern over critical and strategic minerals and metals, the Biden administration issued Executive Order 14051 titled Designation to Exercise Authority Over National Defense Stockpile. The Order addresses the necessity of better coordinating stockpiling activities and safeguarding strategic supply chains in the United States by ensuring against shortages, avoiding dependence on foreign countries and maintaining adequate quantities of raw materials in the federal government's National Defense Stockpile. The Order confers authority on the Defense

Department to strengthen the National Defense Stockpile and as determined necessary release critical and strategic minerals therefrom in the interest of national security.

Federal Government Expenditures to Enhance Strategic Supply Chain

A programme sponsored by the Department of Defense to facilitate a permanent magnet supply chain has awarded a private company, MP Materials, US$35 million to process heavy rare earth minerals at its site located on the border of California and Nevada. In a similar government-sponsored effort, the Department of Energy has announced a US$140 million demonstration project to recover and process rare earth minerals from coal ash and mine waste at old or abandoned mine sites. An additional effort sponsored by the Department of Energy will be funded to facilitate significant government investment in refining elements such as lithium, cobalt and nickel for use in battery materials to advance the Biden administration's clean energy agenda and increase the production of electric vehicles and facilitate storage of alternative energy.

Mining reform activities

Increased attention in the Biden administration and Congress is focused on regulatory and legislative reforms of the mining industry and the benefits it has enjoyed pursuant to the General Mining Act of 1872 that has been in existence for 150 years. An Interagency Working Group has been established by the Department of the Interior to lead the Biden administration's efforts in evaluating reforms. The Working Group has been tasked to adhere to the President's vision for a mining industry that ensures sustainable and responsible mineral production. The mining reforms being sought are intended to address outdated mining laws and regulations and in doing so to:

> *promote strong social, environmental and labor standards that [avoid] the historic injustice that too many mining operations have left behind.*

The House of Representatives has also explored legislation that would establish royalties payable to the federal government by existing and new hard rock mines as well as other reform initiatives to reduce the scope of the General Mining Law.

The Biden administration's Impact on planned mining projects

In addition to legislative and reform efforts that can dramatically impact the United States mining industry, the Biden administration has taken actions to delay and possibly kill certain planned projects. For instance, Rio Tinto's Resolution copper mine permitting project in Arizona has been substantially delayed by the Biden administration pending issues raised by environmentalists and certain Native American tribes. In fact, the Biden administration reversed the Trump administration's prior approval of the project. The copper mine project has also been the focus of efforts in the House of Representatives to block mine construction altogether through potential legislation. Additionally, the Biden administration, in another effort to abandon an approval provided by the Trump administration, has filed a complaint in federal district court to halt the mining project through enforcement of environmental protections at Northern Dynasty Minerals' Pebble mine project in Bristol Bay, Alaska, due to tribal and fishery concerns. Similarly, the Biden administration has held up or cancelled mining leases related to two different Minnesota mining projects (namely, sulphide-ore mining in the Rainy River Watershed and an underground cobalt, copper and nickel mine project near the Boundary Waters Canoe Area Wilderness).

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Carbon reduction

The mining industry is expected to play a major role in an evolving lower carbon future through the increased use of metals and minerals utilised in solar panels, wind turbines, batteries, electric vehicles and other technological advances. A Heartland Institute policy statement that addresses the Green New Deal and other proposed renewable energy programmes asserts that a significant worldwide increase in mining will undoubtedly take place as increasing efforts are undertaken to replace fossil fuels with renewable energy sources including solar and wind. In addition, increased mining activity on a worldwide scale will be necessary to meet the increased demand for the utilisation of electric vehicles.