

SEC Adopts New Rules for Mining Disclosures

November 1, 2018

Yesterday, the SEC adopted new rules governing disclosure by registrants engaged in mining. It had initially proposed rules back in June 2016. The adopting release, with 453 pages and 1,451 footnotes, will take a while to digest, but here are four preliminary takeaways:

- The rules will not take effect for more than two years. For most already-reporting calendar-year registrants, the annual report for 2021 (due in 2022) will be the first filing for which the new disclosure regime is mandatory, although it will also apply to long-form registration statements filed in 2021. A registrant can voluntarily adopt the new disclosure regime earlier, if it does so in full.
- For years, the SEC has required disclosure of mineral reserves, but prohibited disclosure of mineral resources (which are characterized by a lower level of confidence). This prohibition has become increasingly archaic, and particularly artificial for dual-listed issuers that publish resources in another jurisdiction. The new rules will lift the prohibition and with it remove a major difference in mining disclosures between the United States and the rest of the world. (The SEC made a similar change for oil and gas reporting back in 2008, effective in 2010.) This change alone may help level the disclosure playing field for U.S. mining registrants and make the U.S. capital markets more attractive for global mining IPOs.
- The new rules will replace Industry Guide 7. Industry guides are an anomalous regulatory technique, in that they are staff guidance and not Commission rules. Over time, they tend to generate further staff interpretations, often in the form of unpublished lore; rules adopted by the Commission following notice and comment offer a more transparent and certain regulatory regime. (That's what the SEC did to the former Industry Guide 2 with the 2008 modernization of oil and gas reporting.) A good next target might be Industry Guide 3 for bank holding companies, on which the Commission published a concept release in 2017.
- This is an interesting test of the current SEC's attitude toward international disclosure standards.
 - Mining disclosure requirements in other countries – particularly Canada and Australia, which have numerous listed mining companies – have converged on one set of disclosure standards, referred to by the unwieldy acronym CRIRSCO (Committee for Reserves International Reporting Standards). Meanwhile, the SEC continued applying its older and increasingly outdated regime.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any of our partners and counsel listed under [Corporate Advisory](#), [Capital Markets](#) and [Metals and Mining](#) in the "Our Practice" sections of our website.

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- The SEC's 2016 proposal went a long way toward the CRIRSCO standards, but on a number of important points, it would have diverged with additional or conflicting requirements, some of them highly prescriptive.
- It looks like the final rules have moved closer to CRIRSCO on some significant points, in response to comments. A particularly important example is the price to be used in establishing estimates of mineral resources or mineral reserves: the 2016 proposal would generally have prohibited a price that exceeds the average for the preceding 24 months, but the final rules (like the CRIRSCO standards) allow a price that provides a reasonable basis for establishing estimates, which may be historical or forward-looking. The more the final rules align with CRIRSCO, the easier it will be for dual-listed registrants to comply with the new rules.

We will provide more detailed analysis of the new disclosure regime in the coming weeks.

Link to Adopting Release:

<https://www.sec.gov/rules/final/2018/33-10570.pdf>

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