ALERT MEMORANDUM

SEC Proposes to Overhaul Its Disclosure Requirements for Mining Companies

June 20, 2016

The U.S. Securities and Exchange Commission (the "SEC") proposed last week to replace completely its disclosure requirements for SEC-registered companies engaged in mining activities.

The proposal, issued on June 16, responds to repeated calls over the years for the SEC to improve its mining disclosure requirements and harmonize them with international standards.

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 Capital Markets and Metals and Mining in the "Our Practice" section of our website.

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

The SEC's proposal has two major themes. First, the proposal would introduce disclosure requirements aligned with the international standards developed under the aegis of the Committee for Mineral Reserves International Reporting Standards (which uses the acronym CRIRSCO). This should bring the United States closer to other major jurisdictions, including Canada and Australia, where disclosure requirements already conform, to varying degrees, to CRIRSCO standards. It would replace an outdated disclosure regime under the SEC's Industry Guide 7, which was last updated in 1982 and has become an outlier in a global industry. While the proposed rules are largely based on CRIRSCO standards, they go beyond those standards in some respects, which could prove significant.

Second, the SEC's proposal would codify mining disclosure requirements in SEC rules. Today the SEC requirements are governed by policies and practices of the Commission's staff, including Guide 7 and an extensive body of informal and uncollected guidance, and market participants have criticized the resulting lack of clarity and consistency. However, disclosures that are governed by specific SEC rules could entail a higher level of liability risk and administrative scrutiny.

It is a substantial proposal, contained in a 269-page release, and some time will be needed to analyze the details. In general, the proposed rules are highly prescriptive (particularly compared to the terse Guide 7). They require the public disclosure of extensive information – some of it proprietary and some forward-looking – that will raise important issues of confidentiality and liability. Below are some of the highlights based on an initial review.

- A registrant must provide mining disclosures if its mining operations are material to its business or financial condition, with a presumption of materiality at 10% of assets and specific guidance for vertically integrated companies, royalty companies and other special cases. This standard for determining whether specialized mining disclosure is required would provide greater clarity for registrants engaged in both mining and other businesses, which is lacking under the existing guidance.
- A registrant with more than one mining property must provide summary disclosure that includes a map, specified details on its 20 largest properties (regardless of materiality) and summary resource and reserve data grouped by commodity and geographic area.
- For any individual property that is material to the registrant's business or financial condition, it must provide extensive specific disclosures in a standardized format. These include matters such as exploration results and a prior-year reserve reconciliation that are not required under existing practice. If a registrant has a large number of mining properties, none of which is individually material, no specific disclosure on the individual properties is required.
- Mineral resources must be reported, if their existence has been determined based on an initial assessment by a "qualified person" as contemplated by the rules. A registrant may elect not to make this determination, and thus not to have reportable mineral resources. The SEC currently prohibits reporting of mineral estimates other than reserves (with a limited exception that is only available to Canadian companies), and this is one of the most prominent points on which they differ from requirements elsewhere in the world. The proposed rules also adopt the CRIRSCO classification of resources into inferred, indicated and measured, based on geologic uncertainty, and include detailed requirements for the qualified person's initial assessment when a mineral resource is first reported.
- Mineral reserves are defined based on the CRIRSCO framework, under which resources are converted to reserves using specifically defined "modifying factors" supported by a pre-feasibility or feasibility study by a qualified person. The SEC staff already relies to some extent on this framework, which is widely used by mining professionals, although it is not specifically reflected in Guide 7.
- Mineral resource and reserve estimates must be based on long-term price assumptions that are no higher than the average 24-month historical price. Guide 7 does not include a specific pricing model for the estimation of mineral reserves, although existing guidance generally contemplates the use of a price no higher than the trailing three-year average price. The proposal also differs from CRIRSCO, which permits the use of any reasonable and justifiable price based on a view of long-term market trends.
- Every disclosure of exploration results, mineral resources or mineral reserves for each material property must be based on the work of a qualified person that is summarized in a dated and signed "technical report summary." The registrant must file the technical report summary with the SEC when it makes these disclosures for the first time or when there is a material change from the last filed technical report summary. The proposed rules include extensive specifications for the content of the technical report summary and the qualifications of the qualified person. No such requirement exists currently – the SEC staff often requests a copy of the technical report underlying a registrant's determination of mineral reserves, but it is not filed publicly.
- The qualified person – an individual – will have liability as an expert under Section 11 of the

Securities Act for any material misstatements or omissions in the technical report summary. Many other jurisdictions require the identification of a qualified person, and some require a signed report, but none has practical litigation risk comparable to that facing an expert under the Securities Act. The proposed rules do not require the qualified person to be independent, but require disclosure of any relationship between the qualified person and the registrant.

- A registrant must describe "the internal controls that it uses in its exploration and mineral and reserve estimation efforts."
- The proposed rules, like the current disclosure regime, would apply to foreign private issuers (other than Canadian MJDS issuers) as well as domestic U.S. issuers. For dual-listed mining companies, this may simplify reporting to the extent that the new rules are closer to those that apply in other jurisdictions.

The proposal will be open for public comment for 60 days from its publication in the Federal Register, which should occur this week. For a proposal of this complexity and novelty, it could take a year or more before the Commission considers final rules, and the proposing release does not address how much time issuers would have to comply with the new regime if it is adopted.

Link to Proposing Release:

https://www.sec.gov/rules/proposed/2016/33-10098.pdf

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