
SEC adopts new rules for mining disclosures

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On October 31, 2018, the SEC adopted new rules governing disclosures by mining registrants. The new rules are intended to provide investors with a more comprehensive understanding of a registrant's mining properties and to more closely align the SEC's mining disclosure regime with current industry and international regulatory practices and standards, such as those embodied by the Committee for Mineral Reserves International Reporting Standards (CRIRSCO).

Largely designed to reduce the compliance burden and costs, the final rules reflect a number of significant changes from the initially proposed rules in June 2016 in response to comments received by the SEC from industry participants or representatives.

The new rule amendments will generally be effective 60 days after publication in the Federal Register. However, there will be a two-year transition period, meaning that mining registrants will not be required to comply until their first fiscal year beginning on or after January 1, 2021.

Consolidation of mining disclosure requirements

The current disclosure requirements for mining registrants are set forth in item 102 of Regulation S-K and Industry Guide 7 (Guide 7). The new rules will rescind Guide 7 and create a new Regulation S-K subpart 1300, intended to eliminate overlapping disclosure requirements and provide one standard set of disclosure rules for mining registrants.

Mining disclosure standards

The final rules, as proposed, require registrants to provide disclosure for their mining operations that are material to their business and financial condition. Materiality, in this context, will have the same meaning given to it under US securities laws. However, the final rules do not include the proposed presumption of materiality if mining assets constitute 10 percent or more of a registrant's total assets, reflecting the SEC's preference to rely on a more principles-based approach to the materiality determination that takes into consideration all relevant facts and circumstances.

Mining companies with multiple properties

If none of a registrant's multiple mining properties is individually material, it will only need to provide summary disclosure. If the registrant has individually material mining properties, it must provide more detailed disclosure concerning those properties in addition to summary disclosure.

Instead of requiring specific information in tabular format concerning a registrant's top 20 properties by asset value as proposed, the final rules contain significantly less prescriptive summary disclosure requirements that allow the required disclosure to be provided in either narrative or tabular format.

Vertically integrated and royalty or similar companies

The final rules will apply to all registrants with material mining operations, including vertically-integrated manufacturers, and will also require a royalty or similar company to provide mining disclosure if the underlying mining operations generating the royalty or similar payment are material to the

royalty or similar company's operations as a whole (subject to the information being known or reasonably available to the royalty or similar company).

Qualified person

Qualified person requirement

As proposed, a registrant's disclosure of exploration results, mineral resources or mineral reserves in SEC filings must be based on and accurately reflect information and supporting documentation prepared by a "qualified person," which is defined as a mineral industry professional with at least five years of relevant experience in the type of mineralization and the type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant. In addition, a qualified person must be an eligible member or licensee in good standing of a "recognized professional organization" (which must satisfy specific criteria set forth in the final rules) at the time the technical report is prepared.

Technical report summary

As proposed, the registrant must obtain a dated and signed technical report summary from the qualified person and file such technical report summary as an exhibit to the relevant SEC filing when disclosing mineral reserves or mineral resources for the first time or when there is a material change from the last filed technical report summary. The registrant must also obtain the written consent of each qualified person who prepared a technical report summary. In a clarification of the proposed rules, the final rules provide that a third-party firm comprised of mining experts may sign the technical report summary instead of, and without naming, the individual who prepared the summary.

Responsibility for disclosure

The final rules hold the registrant responsible for determining that the qualified person meets the specified qualifications and that the disclosure in the registrant's filing accurately reflect information provided by the qualified person. Where the registrant has provided the information relied upon by the qualified person, the registrant, and not the qualified person, will be subject to potential Section 11 liability, though the qualified person may not disclaim such responsibility for any information and documentation prepared by a third-party specialist hired by such qualified person upon whom he or she has relied. A third-party firm that signs the technical report

summary and provides the written consent will be treated as the expert and incur potential Section 11 liability rather than the unnamed individual.

Exploration results

While CRICSCO-based codes permit the disclosure of exploration results, neither Guide 7 nor Item 102 addresses the disclosure of exploration results in SEC filings. The final rules take an approach substantially similar to the CRISCO approach, permitting the disclosure of exploration results. Once exploration activity and related results become material, they must be disclosed. The registrant will be required to make a materiality determination with respect to its exploration activity and exploration results at the end of each fiscal year. The final rules also provide guidance as to materiality, which is a facts-and-circumstances determination.

In a change from the proposed rules, if a registrant discloses exploration results, the final rules do not require the filing of a technical report summary to support such disclosure. In addition, in response to commenters, the final rules provide that a registrant may disclose an exploration target for one or more of its properties based upon and accurately reflects information and supporting documentation of a qualified person, provided that any substantive disclosure of an exploration target must be provided in a separate section of the SEC filing or technical report summary clearly captioned as a discussion of an exploration target.

Mineral resources

Disclosure requirement

Most foreign mining codes require the disclosure of material mining resources, but Item 102 and Guide 7 generally prohibit the disclosure of mineral resources in SEC filings.

As proposed, the final rules provide that a registrant with material mining operations must disclose specified information in its SEC filings concerning mineral resources that have been determined to exist based on information and supporting documentation from a qualified person. There is no affirmative obligation to hire a qualified person to determine mineral resources, but in that case, the registrant would not be able to declare that it has mineral resources in a SEC filing.

Definition of mineral resources

As proposed, the final rules adopt the definition of mineral resource to mean 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. In order to classify a deposit as a resource, a qualified person must establish that there are reasonable prospects of economic extraction by estimating or interpreting key geological characteristics from specific geological evidence. In a change from the proposed rules, the adopted definition of mineral resource does not include geothermal energy.

Classification of mineral resources

As proposed, the final rules adopt a CRISCO-based classification of mineral resources by requiring that a registrant with material mining operations classify its mineral resources into inferred, indicated and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence.

Initial assessment requirement

As proposed, the final rules require that a registrant's disclosure of mineral resources be based upon a qualified person's "initial assessment" supporting the determination of mineral resources. An initial assessment means a preliminary technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources (but does not include a qualitative evaluation of modifying factors required at the reserve determination stage).

In a change from the proposed rules, in response to comments received, a qualified person must use a price for each commodity that provides a reasonable basis for establishing the prospects of economic extraction for mineral resource instead of a commodity price that is no higher than the average spot price during the 24-month period prior to the end of the last fiscal year. This means that a qualified person is able to use a price that is either historical or based on forward-looking pricing forecasts.

Mineral reserves

Definition of mineral reserves

As proposed, the final rules revise the definition of mineral reserves (currently set forth in Guide 7) by adopting the CRIRSCO framework of applying modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves. Also as proposed, a qualified person must subdivide mineral reserves into probable mineral reserves and proven mineral reserves.

In a change from the proposed rules, the adopted definition of mineral reserve provides that a mineral reserve includes diluting materials and allowances for losses that may occur when the material is mined or extracted.

Pre-feasibility versus feasibility study

As proposed, a registrant's disclosure of mineral reserves must be based upon a qualified person's pre-feasibility or feasibility study, the results of which support a determination of mineral reserves.

In a change from the proposed rules, a qualified person is not required to justify the use of a pre-feasibility study in lieu of a feasibility study. Similarly, in high risk situations, the decision regarding whether to use a pre-feasibility or a feasibility study is left to the discretion and professional judgment of the qualified person.

Applicability to foreign private issuers

The Form 20-F will also be amended to reflect the new rules such that the new mining disclosure rules will be equally applicable to foreign private issuers and domestic registrants. However, the new rules will not affect Canadian registrants who are eligible to file annual reports on Form 40-F under the Multijurisdictional Disclosure System.

Link to adopting release

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

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