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SEC Harmonizes its Mining Disclosure Requirements with Global Industry Practice

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After a long wait, the SEC has updated mining disclosure requirements for reporting companies and securities issuers to reflect global industry and regulatory practice.

Introduction

In seeking to modernize disclosure requirements for US public companies, the US Securities and Exchange Commission (the "**SEC**") has focused in particular on requirements for mining registrants set forth in Item 102 of Regulation S-K under the US. Securities Act of 1933 (the "**Securities Act**") and the US Securities Exchange Act of 1934, as well as in the 30-year old Industry Guide 7. On October 31, 2018, the SEC adopted final rules (the "**New Rules**"), introducing significant changes to the mining disclosure framework that better align it with international industry and regulatory practice. In doing so, the SEC hopes to encourage the offering of securities by mining companies in the US companies that historically looked to other markets with more pragmatic disclosure requirements. In the same way, the New Rules could also help to harmonize disclosure in unregistered securities offerings, including under Regulation S and Rule 144A under the Securities Act.

Key Changes

Elimination of the prohibition on disclosing mineral resources

Previously, registrants could only disclose mineral resources (as opposed to mineral *reserves*, which are more certain to be exploited) if required by foreign or state law, a carveout that the SEC has construed narrowly. The rigidness of this approach attracted criticism and produced odd results, particularly for registrants voluntarily disclosing mineral resources in other jurisdictions. The New Rules instead *require* that registrants disclose mineral resources in a manner largely consistent with the Committee for Mineral Reserves International Reporting Standards ("**CRIRSCO**") framework. However, companies without verified mineral reserves or resources do not need to meet this requirement. The result is a considerable leveling of the playing field in favor of US capital markets, as issuers wishing to highlight mineral resources to investors have previously gone elsewhere (in particular, to Canada and Australia).

The definition of "mineral resources" under the New Rules tracks industry standards, being "a concentration or occurrence of material of economic interest in or on the earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for its economic extraction." Like CRIRSCO, the New Rules seek a reasonable estimate of minerals that can be extracted economically (though extraction need not occur immediately), as opposed to a mere inventory of minerals. To satisfy the SEC's definition, registrants disclosing

mineral resources must enlist a qualified person (as discussed below) to substantiate such disclosure through an "initial assessment." The SEC stipulates that the qualified person must be able to "estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource from specific geological evidence and knowledge, including sampling."

Alignment of mineral reserves disclosure with the CRIRSCO framework

As with Industry Guide 7, the New Rules continue to require registrants to disclose mineral reserves. However, the SEC has introduced a new classification scheme distinguishing "probable mineral reserves" from "proven mineral reserves," again following the standards promulgated by CRIRSCO. The SEC enlists qualified persons to substantiate classifications of mineral reserves by disclosing "the specific mining, processing, metallurgical, environmental, economic, legal, and other applicable factors that he or she has evaluated in detail, and which has led the qualified person to conclude that extraction of the deposit is economically viable." Whether a mineral reserve is proven or only probable is left to the qualified person's judgment—to be a proven reserve, the extraction of the mineral reserve must be, in the opinion of the qualified person, "economically viable under reasonable investment and market assumptions."

Disclosure of material exploration results

Under Item 102 and Industry Guide 7, the SEC provided no instructions on how or whether to disclose exploration results. Fortunately, the New Rules provide some guidance: disclosure of exploration activity and results in required only when material, whereas disclosure for non-material activities and results is voluntary. Materiality is, as always, a facts-and-circumstances determination. For example, the SEC notes that exploration activities are likely more material in the context of an exploration-stage issuer with few mineral reserves as compared to a production-stage issuer.

Regarding the scope for disclosure of exploration results, the New Rules are largely consistent with CRIRSCO standards and provide reporting companies and issuers significant flexibility. This flexibility is evident in the SEC definition of exploration results:

> Exploration results are data and information generated by mineral exploration programs (*i.e.*, programs 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) that are not part of a disclosure of mineral resources or reserves.

Despite the breadth of this definition, the SEC carefully excludes estimates of tonnage, grade and production rates or assessments of economic viability. Exploration *targets* may be expressed in terms of tonnage, grade, etc. However, these require explanation by a qualified person in the technical report summary.

Enhanced role (and liability) for "qualified persons"

To ensure more accurate and investor-friendly disclosure, the New Rules require that mineral reserves, mineral resources and exploration results be substantiated with documentation prepared by a "qualified person," defined as a "mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant." A qualified person must also be in good standing with a "recognized professional organization," though the Rules do not list specific organizations.

Furthermore, companies must now file a technical report summary prepared by a qualified person with any relevant SEC filings detailing mineral reserves and resources for each material property. The technical report summary must "summarize the scientific and technical information and conclusions reached concerning material mineral exploration results, initial assessments used to support disclosure of mineral resources, and preliminary or final feasibility studies used to support disclosure of mineral reserves, for each material property". The New Rules further require that the summary include, as relevant, disclosure pertaining to some or all of 26 identified topics identified by the SEC.

With greater responsibility comes greater scrutiny. The SEC treats the technical report summary as expertise, exposing qualified persons preparing it to liability under Section 11 of the Securities Act. However, qualified persons bear no Section 11 liability for information provided to them by the company.

Compliance period

For companies anxious about updating their current disclosure before their next SEC filing, there's good news: the New Rules phase in over a period of two years with reporting companies needing to bring their disclosure into compliance in their first fiscal year beginning on or after January 1, 2021. Reporting companies may voluntarily comply earlier. However, Industry Guide 7 will remain effective until all companies are brought into compliance.

Conclusion

Reporting companies wishing to highlight mineral resources or exploration activities for US investors have long lobbied for disclosure requirements that are more aligned with those of the rest of the global mining industry. Likewise, issuers of unregistered securities, including in Rule 144A and Regulation S offerings under the Securities Act, have historically disregarded the guidance provided by Industry Guide 7 in preparing their offering materials. By aligning requirements for SEC registrants with industry practice, the New Rules potentially make the US a more attractive destination for mining companies and their securities by providing a helpful, up-to-date rubric for drafting disclosure.

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