

BREAKING NEW GROUND: SEC UPDATES RULES TO MODERNIZE PROPERTY DISCLOSURES REQUIRED FOR MINING ISSUERS

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On November 19, 2018 the Securities and Exchange Commission (the “**Commission**”) announced that it had adopted amendments to modernize the property disclosure requirements for mining registrants in the United States, and related guidance, under the Securities Act of 1933 (the “**Securities Act**”) and the Securities Exchange Act of 1934 (the “**Exchange Act**”). The final rules apply to both domestic registrants and foreign private issuers.

The purpose of the amendments is to provide investors in U.S. publicly traded entities with material mining operations (“**Issuers**”) with a more fulsome understanding of an Issuer’s mining properties, which should help them make more informed investment decisions. The amendments are also intended to more closely align U.S. disclosure requirements and policies for mining properties with current industry and global regulatory practices and standards and, as a result, hopefully decrease the compliance burdens and costs for many publicly traded mining Issuers. The final rule amendments (the “**Final Rules**”) will rescind Industry Guide 7 and consolidate disclosure requirements for Issuers in a new subpart of Regulation S-K.

Compliance Date

The Final Rules provide a two-year transition period so that an Issuers will not be required to begin to comply with the new rules until its first fiscal year beginning on or after Jan. 1, 2021. An Issuer may voluntarily comply with the new rules prior to the compliance date, subject to the Commission’s completion of necessary EDGAR reprogramming changes.

The Final Rules become effective 60 days after publication in the *Federal Register*.

Highlights of the Final Rules

Under the final rule amendments, as proposed and consistent with global standards as embodied by the Committee for Reserves International Reporting Standards (“**CRIRSCO**”), an Issuer must disclose specified information in its Securities Act and Exchange Act filings concerning mineral resources that have been determined on one or more of its properties. Current Commission rules and guidance permit the disclosure of

non-reserve estimates, such as mineral resources, only in limited circumstances. The Commission believes that requiring the disclosure of mineral resources in addition to mineral reserves will provide investors with important information concerning the Issuer's operations and prospects.

Similar to Canadian NI 43-101 requirements and consistent with the CRIRSCO standards, the Final Rules require Issuers' disclosure of exploration results, mineral resources, or mineral reserves in Commission filings to be based on information prepared by a mining expert (i.e. a "qualified person").

The Final Rules, require Issuers to obtain a technical report summary from the qualified person(s), which summarizes the information reviewed and conclusions reached by such qualified person(s) about the mineral resources or mineral reserves on each of the Issuer's material properties. The technical report summary must be filed as an exhibit to the relevant Commission filing(s) when an Issuer discloses mineral reserves or mineral resources for the first time or when there is a material change in the mineral reserves or mineral resources from the last technical report summary filed for such material property or properties.

Principal Changes from the Proposed Rules

The Final Rules include a number of changes to the rules originally proposed in January of 2016. These changes are intended to more closely align the U.S. mining property disclosure requirements with the CRIRSCO standards and thereby help decrease, relative to the previously proposed rules, the compliance burdens and costs for the many Issuers that are subject to one or more of the CRIRSCO-based codes, while preserving important investor protections. For example, among the changes, the Final Rules:

- Require a qualified person to use a price for each commodity that provides a reasonable basis for establishing estimates of mineral resources or mineral reserves, which may be a historical or a forward-looking price, as long as the qualified person discloses and explains his or her reasons for using the selected price, including the material assumptions underlying the selection.
- Provide that a qualified person will not be subject to expert liability under Section 11 of the Securities Act for certain aspects of specified modifying factors outside the expertise of the qualified person that are based on information provided by the Issuer and are discussed in the technical report summary or other parts of the registration statement.
- Eliminate the proposed quantitative presumptions regarding when an Issuer's mining operations, and when a change in previously reported estimates of mineral resources or mineral reserves, are deemed to be material.
- Eliminate the proposed summary disclosure provision requiring specific items of information in tabular format about an Issuer's top 20 properties and, instead, adopt a more principles-based approach by requiring the Issuer to provide investors with an overview of its properties and mining operations.

- Reduce the number of summary and individual property disclosure provisions requiring tables from seven, as proposed, to two, and permit other required disclosure to be in either narrative or tabular format.
- Permit, but not require, a registrant Issuer to file a technical report summary to support its disclosure of exploration results.
- Permit the disclosure of exploration targets in Commission filings if accompanied by certain specified cautionary and explanatory statements.
Permit a qualified person to determine mineral resources and mineral reserves at any specific point of reference, which must be disclosed in the technical report summary, rather than at three points of reference.
- Permit a qualified person to include inferred resources in an economic analysis that the qualified person opts to include in an initial assessment as long as certain conditions are met.
- Define “mineral reserve” to include diluting materials and allowances for losses that may occur when the material is mined or extracted.
- Permit a qualified person to conduct either a pre-feasibility or final feasibility study to support a determination of mineral reserves even in high risk situations.
- Permit the use of historical estimates of mineral resources or mineral reserves in Commission filings pertaining to mergers, acquisitions or business combinations if the Issuer is unable to update the estimate prior to the completion of the relevant transaction, provided that the Issuer discloses the source and date of the estimate and does not treat the estimate as a current estimate.
- Permit an Issuer holding a royalty or similar interest to omit any information required under the summary and individual property disclosure provisions to which it lacks access and which it cannot obtain without incurring an unreasonable burden or expense.

The Final Rules also clarify that a third-party firm, which employs a qualified person, may sign the technical report summary and provide the written consent required for an expert under the Securities Act.

Canadian Issuers

The Final Rules do not permit Canadian-based Issuers that are not eligible under the Multijurisdictional Disclosure System (“**MJDS**”) to continue to provide disclosure that meets the requirements of Canada’s National Instrument 43-101 Standards of Disclosure for Mineral Projects (“**NI 43-101**”), nor do they permit non-Canadian or U.S. based Issuers to file disclosure documents that meet the requirements of another CRIRSCO-based code to satisfy their U.S. reporting obligations, as recommended by some commenters. Although some commentators expressed concern about the significant differences between the CRIRSCO standards and the

proposed rules, and the correspondingly significant compliance burdens that a dual-listed Issuer might incur if the Commission adopted those rules as proposed, the Commission does not believe it is appropriate to continue to permit non-MJDS Canadian-based Issuers to prepare and submit their Commission filings in accordance with Canada's NI 43-101 under the "foreign or state law" exception or otherwise. Instead, the Commission rationalized the Final Rules, to the extent possible, with the CRISCO standards.

Under the Final Rules, the sole group of Canadian Issuers that may continue to report pursuant to Canadian disclosure requirements following adoption of the revised mining disclosure rules are those Canadian issuers that report pursuant to the MJDS. According to the Commission, the ability of those Issuers to use their Canadian disclosure documents for purposes of their Securities Act and Exchange Act filings is based on their eligibility to file under the MJDS, and not on the "foreign or state law" exception.

Conclusion

The Commission's new rule amendments seek to modernize the property disclosure requirements for mining registrants. While Canadian registrants that file reports pursuant to the Canada-U.S. MJDS may continue to prepare mining disclosure in accordance Canadian disclosure requirements, other Canadian and non-U.S. participants in the U.S. equity markets will now be required to comply with the new U.S. requirements. We expect that these amendments will level the playing field for US domestic issuers. We also expect that, over time, the new U.S. model will become the international standard by which mineral resources and reserves will be reported. Issuers would do well to familiarize themselves with the Final Rules.

A copy of the final rules can be found at <https://www.sec.gov/rules/final/2018/33-10570.pdf>.

About McMillan's Mining Industry Group

McMillan's Mining Industry Group has been advising Canadian and international clients since the late 1920s. Our professionals' knowledge extends to exploration, development, project finance and production transactions - including negotiating earn-in, joint venture operating, strategic alliance, royalty and metal streaming agreements. In 2012, we were ranked as the number one law firm in Canada for metals and mining financings on the Toronto Stock Exchange*.

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A Cautionary Note

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