



SEC Proposes Modernization of Disclosure Requirements for Mining Registrants

The U.S. Securities and Exchange Commission (“SEC”) recently proposed rules that, if adopted, would overhaul disclosure requirements for mining registrants.¹ As part of the SEC’s ongoing disclosure effectiveness initiative, the proposed rules are primarily intended to align the SEC’s disclosure requirements and related guidance with current industry practices and international standards, while reducing the complexity of current disclosure requirements. The proposed rules would apply to both domestic issuers and foreign private issuers, other than Canadian registrants filing reports under the Canada–U.S. Multijurisdictional Disclosure System.

Comments on the proposed rules are due on August 26, 2016.

Consolidation: Simplifying the Property Disclosure Requirements

The current mining company disclosure regime is spread across Item 102 of Regulation S-K, Industry Guide 7, and SEC interpretive guidance. Item 102 sets forth the basic disclosure requirements for a registrant’s principal mines. For mining registrants with “significant mining operations,” Industry Guide

7, which has not been substantively updated since 1982,² provides the views of the SEC staff on how mining registrants should comply with the SEC’s disclosure requirements, principally with regards to the disclosure of information regarding “mineral reserves” and the classification of mineral reserves as “proven” or “probable.”

The proposed rules would replace Industry Guide 7 with a new subpart 1300 of Regulation S-K that contains revised rules and codifies previously informal and interpretive guidance from the SEC staff.

Alignment: Modernizing the Property Disclosure Requirements

Currently, under both Item 102 and Industry Guide 7, registrants are generally not permitted to disclose estimates for non-reserve mineral deposits, or “mineral resources.” Mineral resources, as opposed to mineral reserves, are generally understood in the mining industry to be mineral deposits having prospects for economic extraction that are less certain than those for reserves because economic viability has yet to be demonstrated. Many foreign disclosure regimes require disclosure of mineral resources, and

that information is frequently disclosed by domestic issuers voluntarily outside of SEC filings.

The proposed rules would update the SEC's mining property disclosure requirements and largely align them with disclosure standards of the Committee for Mineral Reserves International Reporting Standards ("CRIRSCO"), which have been widely adopted by several countries with mining industries. Among other updates, the proposed rules would require SEC registrants with mining operations that are material to their business or financial condition to:

- Disclose mineral resources and material exploration results in addition to mineral reserves, a noted departure from Industry Guide 7, where disclosure of mineral resources is not permitted in SEC filings;
- Base disclosure of mineral resources, mineral reserves, and material exploration results on supporting documentation prepared by a "qualified person,"³ and ensure that the disclosure accurately reflects information provided by the "qualified person";
- Disclose "material exploration results" for each material property, including data and information generated by mineral exploration programs, such as sampling, drilling, trenching, analytical testing, assaying, and other similar activities undertaken to investigate a mineral prospect;
- Base mineral resources and reserve estimates on long-term price assumptions that are generally no higher than the average 24-month historical price, and describe the registrant's internal controls and quality assurance measures used in exploration and reserve estimation efforts;
- For registrants with material mining operations and with more than one mining property, provide summary disclosure of mining operations as a whole and on an individual property basis, including a map of all mining properties (whether or not material), tabular presentation of specified information on the registrant's 20 largest properties, and summary resource and reserve data with respect to both commodity type and geographical area; and

- File a technical report summary with the SEC as an exhibit to public filings for each material property, to be prepared by a "qualified person" who will have liability as an "expert" under Section 11 of the Securities Act.

While the proposed rules would align U.S. disclosure requirements with those of other CRIRSCO-based disclosure regimes, they would also significantly expand the type and scope of information that mining registrants are required to provide to the SEC. The proposed rules would likely increase costs and liability concerns for many mining registrants, particularly those that do not currently report in jurisdictions with CRIRSCO-based disclosure requirements.

Preparing for the Final Rules: What Companies Should Do in Light of the Proposed Rules

Both domestic and foreign private issuers can take several steps to prepare for the revised disclosure requirements in anticipation of adoption of final rules.

Determine whether mining operations are "material" to the company's business or financial condition. The proposed rules would trigger disclosure obligations for companies with mining operations that are material to their business or financial condition. In determining whether operations are material, companies should consider the proposed rules' presumption that mining operations are material if they constitute 10 percent or more of a company's total assets. Operations below that threshold may nonetheless be material depending on certain facts and circumstances.

Determine whether any mining properties are individually material. Under the proposed rules, companies would be required to consider all mining properties individually and in the aggregate, regardless of size or commodity produced, when assessing materiality of mining operations. Companies would be required to provide disclosure regarding, among other things, an individually material property's exploration activity, exploration results, and mineral resources and reserves.

Identify potential "qualified persons" who will provide supporting documentation on which disclosures of mineral

resources, mineral reserves, and material exploration results will be based, and who will prepare the technical report summaries of material mining properties filed with the SEC. While many companies already engage experts to evaluate resource and reserves information, companies should analyze their historical engagement agreements and evaluate whether changes may be necessary to address new requirements if the SEC adopts the rules as proposed.

Memorialize a system of internal controls applicable to individual mining properties and across all mining properties, which include quality assurance and verification measures used to ensure the reliability of disclosure of exploration results and estimates of mineral resources and mineral reserves. The proposed rules call for the disclosure of these internal controls, consistent with CRIRSCO-based disclosure requirements in foreign jurisdictions.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Bradley C. Brassler

Chicago

+1.312.269.4252

bcbraessler@jonesday.com

Joel T. May

Atlanta

+1.404.581.8967

jtmay@jonesday.com

Boris Dolgonos

New York

+1.212.326.3430

bdolgonos@jonesday.com

Michael J. Solecki

Cleveland

+1.216.586.7103

mjsolecki@jonesday.com

Rory T. Hood

New York

+1.212.326.3814

rhood@jonesday.com

Endnotes

- 1 See [Release No. 33-10098](#) (June 16, 2016).
- 2 See [Release No. 33-6406](#) (June 4, 1982) [47 FR 25126] (June 10, 1982) and [Release No. 33-6949](#) (July 30, 1992) [57 FR 36442] (August 13, 1992).
- 3 “Qualified persons” are defined in the proposed rules as persons who are mineral industry professionals 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 undertaken on behalf of the registrant. In addition, the person must be an eligible member or licensee in good standing of a professional organization recognized within the mining industry as reputable at the time the technical report summary is prepared.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.