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SEC Seeks To Modernize Mining Disclosure Rules

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On June 16, 2016, the Securities and Exchange Commission (SEC) proposed the first revisions in more than 30 years to the disclosure requirements for issuers that own mining properties. The proposed revisions modernize the SEC's disclosure requirements and policies for mining properties by aligning them with current industry and global regulatory practices and standards. The rules specifically target vertically integrated companies, multiple property ownership companies, and royalty companies and other companies holding economic interests in mining properties.

Current Disclosure Landscape

The current rules, set out in Item 102 of Regulation S-K under the Securities Act of 1933 as amended (the Securities Act), the Securities Exchange Act of 1934 as amended (the Exchange Act) and Industry Guide 7, apply to domestic issuers and foreign private issuers, except Canadian issuers that use the Multijurisdictional Disclosure System. Currently, Item 102 requires basic disclosure for a mining registrant's "principal" mines that are "materially important," which are determined by using quantitative and qualitative factors set forth in Regulation S-K. Registrants with "significant mining operations" are directed to more extensive disclosure required by Industry Guide 7, which sets forth the views of the staff of the Division of Corporation Finance (the Staff) on how to comply with disclosure requirements applicable to the registrants. Although both sources are intended to work harmoniously, the Staff has provided significant supplemental and interpretive guidance over the years through comment letters, creating uncertainty on disclosure and regulatory authority.

Defining 'Material' Mining Operations

Under the proposed rules, issuers would be required to disclose material mining operations. "Material" is defined as a substantial likelihood that a reasonable investor would attach importance to the information in determining whether to buy or sell the registered securities. The proposed rules redefine "mining operations" to include all related activities, from exploration through extraction to the first point of material external sale. A registrant's mining operations may be presumed to be material if its mining assets constitute 10 percent or more of its total assets. Other quantitative or qualitative factors may also render mining operations material:

Mining operations that constitute 10 percent or more of some other financial measure, such as the registrant's total revenues, net income or operating income.

Evidence that disclosure of a similar property or properties has had a significant impact on the price of a registrant's securities.

Public disclosure by the registrant discussing the importance to its operations of a particular property or properties.

The unique or rare nature of the particular mineral or the importance of the mineral to the registrant's operations.

The actual and projected expenditures on the registrant's mining properties as compared to its expenditures on non-mining business activities.

The amount of capital raised or planned to be raised for the company's mining properties.

Under the proposed rules, any registrant that owns one or more mining properties must provide a summary disclosure, in tabular format, of its mining operations as a whole. The proposed rules would also require registrants with individual properties that are material to its business or financial condition to separately provide detailed disclosure on the individual properties.

Additional Proposed Revisions

Currently, Industry Guide 7 permits disclosure of mineral reserves based on only a final feasibility study, but the proposed rules would permit these reports to be based on a preliminary feasibility study as well. Additionally, the proposed rules require disclosure of "mineral reserves," an estimate of tonnage and grade or quality of indicated or measured mineral resources that, in the opinion of a qualified person, can be the basis of an economically viable project; "mineral resources," 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; and "material exploration," data and information generated by sampling, drilling, trenching, analytical

testing and other similar activities undertaken to investigate a mineral prospect that is not part of mineral resources or mineral reserves.

Under the proposed rules, disclosure results must be based on supporting documentation prepared by a "qualified person." A qualified person is a qualified professional who has at least five years of experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking, and who is a member of a recognized professional organization. The issuer would be responsible for, among other things, confirming the status of the qualified person, obtaining a technical report summary from the qualified person on every material property (which would be filed as an exhibit to the issuer's registration statements and relevant Exchange Act reports), and obtaining written consent from the qualified person to use the information. The qualified person will have liability as an expert under Section 11 of the Securities Act for any material misstatements or omissions in the technical report summary. While the proposed rules do not require the qualified person to be independent, the issuer must ensure disclosure of any relationship between the qualified person and the issuer.

What This Means to You

By aligning disclosure with industry and global regulatory standards similar to the Committee for Mineral Reserves International Reporting Standards (CRIRSCO), which have been widely adopted by several foreign countries and differ significantly from Industry Guide 7, the proposed rules will require that issuers provide more comprehensive disclosure to investors on mining operations. Additionally, the proposed rules are more prescriptive than existing rules. 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. Finally, the rules as proposed would impact a wider range of issuers and would encompass nontraditional resources, so issuers who were previously not subject to the mining disclosure requirements should consider the potential impact the proposed rules could have on their ongoing reporting obligations.

Initial comments should be received by August 26, 2016. If you would like to submit comments to the SEC on the proposed rules, please contact us so we can provide more detailed guidance on the proposed rules, along with a detailed analysis of what the proposed rules mean for your business. After reviewing all comments received, the SEC will either issue a release adopting final rules or modify the proposed rules in a subsequent proposal.

Contact Us

For more information on the implications of these proposed rule changes, contact Chauncey Lane of Husch Blackwell's Securities & Corporate Governance team.