

# Client Update

## SEC Proposes Overhaul of Mining Disclosures

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In an effort to respond to the ever-increasing globalization of the mining industry, the U.S. Securities and Exchange Commission (“SEC”) has announced its intention to overhaul the disclosure regime for mining companies listed in the United States. The recent proposal reflects the SEC’s intent to align U.S. reporting standards more closely with the standards of the Committee for Mineral Reserves International Reporting Standards (“CRIRSCO”) and create uniformity for companies with cross-border mining operations.

The SEC’s proposed rules represent a complete reworking of the current U.S. mining disclosure framework, as set out in the Industry Guide 7 applicable to companies listed in the U.S. If adopted, U.S. mining disclosure requirements will begin to resemble requirements currently found in the European Union, Canada and Australia. The proposed rules would apply equally to foreign private issuers and domestic registrants, other than Canadian issuers that report pursuant to the multijurisdictional disclosure system (MJDS).<sup>1</sup> The most significant points of the proposed rules are summarized below.

- **Disclosures required for companies with material operations.** Under the proposed rules, mining disclosures must be provided by any U.S.-listed company with mining operations that are material to its business. The relevant materiality threshold is proposed to be 10 percent of assets. Vertically integrated companies with mining activity representing less than 10 percent of assets would nonetheless be covered by the rules if the company relies upon or derives a competitive advantage from its use of minerals from its mining operations. The proposed rules also provide specific guidance for royalty companies, companies with multiple individually nonmaterial mining properties and other cases.
- **“Qualified Person” liable for disclosures.** Under the proposed rules, all disclosures of mineral reserves, resources and exploration must be based upon the findings of a “qualified person,” as defined by the rules. The

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<sup>1</sup> The proposed requirements will not apply to companies with Rule 144A GDRs or Level 1 ADRs traded in the U.S. markets, but will apply to companies with Level 2 or Level 3 ADRs.

“qualified person” would be considered an expert for purposes of the U.S. Securities Act of 1933, and as such would be subject to potential disclosure liability.

- **Disclosure of mineral resources and exploration.** In a complete reversal of the current guidelines (and a nod to the prevailing CRIRSCO requirements), under the proposed rules, U.S.-listed mining companies would be required to disclose the mineral resources of each of their material mining properties if an initial assessment of a “qualified person” has provided confirmation of their existence. Under the proposed rules, disclosures must follow the geologic uncertainty-based CRIRSCO resource classifications. The proposed rules also provide detailed guidelines for initial assessments of mineral resources by “qualified persons” based upon CRIRSCO’s “modifying factors” framework already broadly used in the industry. However, under the proposal, companies may choose to refrain from making any initial determinations by “qualified persons” regarding resources on their mining properties and omit required disclosure.
- **Proposed specific requirements for disclosures.** The proposed rules require companies with two or more mining properties to provide summary disclosure of their mining operations irrespective of the individual materiality of their properties. This disclosure must include details (including maps, descriptions and data) on the registrant’s 20 largest mining properties. For properties that are material to the company’s business, more extensive disclosures are required. In addition to items currently required, the proposed rules would mandate that companies disclose royalty interests, comparisons of reserves with those of the previous fiscal year and assumptions used to arrive at their estimates. Furthermore, all U.S.-listed mining companies would have to describe the internal quality control and quality assurance measures they use to ensure the accuracy of their disclosures.

The SEC’s proposed rules more closely align U.S. mining disclosure regulation with most of the other major jurisdictions where mining companies are listed. In the E.U., for instance, listed mining companies must make disclosures that include details on mineral resources, reserves, exploration results, mine duration, licenses and concessions, and indications of extraction or exploration progress. In the case of a public offering in the E.U. by a mineral company, a “competent person’s report” must be included, subject to certain exceptions. The E.U. and CRIRSCO “competent person” standard appears more stringent than the “qualified person” standard under the SEC proposal, and “competent persons” will likely be considered “qualified persons” under the proposed SEC rules. Most importantly, reserves and resources are determined in accordance with a

specified list of standards, which includes Australia's JORC and other industry standards, but excludes the current SEC Industry Guide 7, causing additional burdens for companies with dual listings in Europe and the United States.

In the time since the SEC's Industry Guide 7 was last updated in 1982, a growing number of industry participants and investors have criticized these rules. The need for reform has further increased as jurisdictions around the world have adopted CRIRSCO standards. While the changes may ease the burden of complying with parallel regulatory schemes, the SEC's codification of mining disclosure requirements is not without potential issues for companies listed in the United States with significant mining interests. The new disclosure framework contemplates extensive disclosure of information regarding mineral resource assets and exploration—as well as carrying the potential for increased scrutiny from regulators. The proposal is not final, and the SEC has requested comments by August 26, 2016.

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Please do not hesitate to contact us with any questions.