PROPOSED SEC RULES MODERNIZE MINING DISCLOSURES USING CANADIAN RULES AS THE GOLD STANDARD

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Attorneys

Timothy Ho

On June 16, 2016, the U.S. Securities and Exchange Commission proposed a set of comprehensive mining disclosure rules with the stated intent of "aligning such rules with current industry and global regulatory practices and standards." The proposal extensively references the Canadian rules in National Instrument 43-101 ("NI 43-101") as one of the global standards in comparable mining disclosure regimes. Let's take a closer look at the proposed changes and some potential effects on US-listed Canadian companies. For the comprehensive SEC proposing release, see this link.

The Commission's proposed rules would update Item 102 of Regulation S-K under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") and replace the related guidance in Industry Guide 7 ("Guide 7"). This set of disclosure rules govern a registrant's principal mines that are materially important to it—and have not been updated in 30 years. Some of the salient proposals are as follows:

- Provide one standard requiring registrants to disclose mining operations that are material to the company's business or financial condition;
- Require a registrant to disclose mineral resources and material exploration results in addition to its mineral reserves; *
- Permit disclosure of mineral reserves to be based on a preliminary feasibility study or a final feasibility study;
- Provide updated definitions of mineral reserves and mineral resources;
- Require, in tabular format, summary disclosure for a registrant's mining operations as a whole as well as more detailed disclosure for material individual properties;
- Require that every disclosure of mineral resources, mineral reserves and material exploration results reported in a registrant's filed registration statements and reports be based on, and accurately reflect information and supporting documentation prepared by a "qualified person";
- Require a registrant to obtain a technical report summary from the qualified person, which identifies and summarizes for each material property the

information reviewed and conclusions reached by the qualified person about the registrant's exploration results, mineral resources or mineral reserves.

Public comments on the proposed rules will be open for a period of 60 days after publication in the Federal Register and final rules will be promulgated by the commission after taking the feedback into account.

What is particularly noteworthy from a cross-border perspective is the emphasis placed by the SEC on the parallel Canadian rules in NI 43-101. Indeed, NI 43-101 is referenced throughout the proposing release as a model for the present proposal. For example, the contents of the technical report summary (which are intended to elicit the scientific and technical information necessary to support the determination and disclosure of mineral resources, mineral reserves and material exploration results) are intended to be similar in most respects to the items of information required for the summary report under NI 43-101.

As currently proposed, the rules would apply equally to foreign private issuers and domestic registrants. Specifically, various amendments to Form 20-F (the annual report filed by most foreign private issuers) are proposed, including an instruction to the exhibits section of Form 20-F stating that a registrant that is required to file a technical report summary may do so as an exhibit to its Form 20-F.

If these proposed revisions to Form 20-F are adopted, foreign private issuers that use Form 20-F will have to comply with the new mining disclosure requirements. This would include Canadian registrants that report pursuant to Form 20-F and that are currently permitted to provide mining disclosure under NI 43-101 pursuant to the "foreign or state law" exception under current Reg. S-K Item 102 and Guide 7 (see footnote 1). The SEC notes that the proposed disclosure requirements would be similar to Canada's NI 43-101, but the proposed rules would eliminate the "foreign or state law" exception. Following adoption of the revised disclosure rules, the sole group of Canadian registrants permitted to continue reporting under the Canadian disclosure requirements are those using the Multijurisdictional Disclosure System ("MJDS"). The right of MJDS registrants to use their Canadian disclosure documents for purposes of their Exchange Act and Securities Act filings would be based on their eligibility to file under the MJDS, and not on the "foreign or state law" exception.

As a large number of the proposed revisions bring US disclosure requirements closer to those in NI 43-101, the SEC feels that Canadian registrants that are currently providing disclosure pursuant to NI 43-101 should not incur particularly onerous compliance costs. Conversely, because Canadian registrants are able to disclose mineral resources in SEC filings under the "foreign or state law exception", the SEC is actually aiming to eliminate any potential competitive advantage enjoyed by Canadian registrants over companies that are not currently allowed to disclose mineral resources in their SEC filings.

* *Under existing rules, a registrant may not disclose estimates for non-reserve deposits, such as mineral resources, unless such information is required to be disclosed by foreign or state law.*