



## Understanding SEC's New Mining Disclosure Rules

Christopher Doerksen and Kimberley Anderson  
Dorsey & Whitney LLP

February 26, 2019



### Overview



- **Background**
- **The New Rules**
- **Differences from NI 43-101**
- **What to Do and Expect**



## SEC's Industry Guide 7

- **Current SEC disclosure rules governed by Industry Guide 7**
- **Industry Guide 7 dates from 1982**
  - Had not been updated until the most recent rule amendments in 2018
  - Many other jurisdictions have adopted standards based on Committee for Mineral Reserves International Reporting Standards (CRIRSCO)
- **Does not recognize resources, only probable and proven reserves**
- **Reserves requirements**
  - Requires ore to be both economic and legal to extract
  - Requires assessment of the likelihood of permitting
  - Economic analysis cannot use a commodity price greater than 3-year trailing average
  - Unlike CRIRSCO, requires a final “bankable” feasibility study and not just a pre-feasibility study

## SEC's Industry Guide 7 (con't)

- **No requirement for qualified person review of technical disclosures**
- **No requirement to publish technical reports supporting technical disclosures**
- **Rules do not apply outside core SEC filings**
- **Exempt for foreign companies that are required by law to make non-compliant disclosures (Canada 43-101 only)**

## Committee for Mineral Reserves International Reporting Standards (CRIRSCO)

- Representatives of national organizations responsible for national reporting codes
- 20+ years working toward international standards
- Published “International Reporting Template for the public reporting of Exploration Results, Mineral Resources and Mineral Reserves” (IRT)
- CRIRSCO-based codes include Australia (JORC Code), Canada (NI 43-101 and CIM Guidelines), South Africa (SAMREC Code), Europe (PERC), Chile, Russia and others
- US had one (SME Guide), but SEC did not adopt it

## CRIRSCO (con't)

### Key features

- Concept of qualified or competent person (QP) that is educated and trained to evaluate mining projects
- Technical and scientific information should be attributed to a QP
- Mineral resources – inferred, indicated and measured
- Mineral reserves – probable and proved (or proven)
- Technical reports to support disclosures

## The Problem

- **Industry Guide 7 placed significant disclosure limitations on all issuers other than Canadian issuers**
- **Disclosure of mineral resources was limited to web sites and press releases, but omitted from core SEC filings, such as annual and quarterly reports**
- **Placed US issuers at a disadvantage and resulted in SEC reports having to omit information that an issuer might consider material or is reporting in other jurisdictions**

## SEC's 2016 Proposed Rules

- **In 2016, the SEC issued proposed new mining disclosure rules**
- **“Bought into” the idea of a CRIRSCO-based system**
  - QPs
  - Resources and reserves
  - Technical reports
- **But, many tweaks that would have made compliance a burden**

## SEC's New Mining Disclosure Rules

### Improvements from Proposed Rules

- Flexibility in establishing the commodity price used in estimating resources and reserves
- Inferred resources can be included in an initial assessment's economic analysis
- Reserves can always be declared in a pre-feasibility study
- Technical report summary not triggered until resources or reserves

## SEC's New Mining Disclosure Rules

### Improvements from Proposed Rules

- Fewer bright line thresholds and mandated disclosures, in favor of qualitative standards
- Less required disclosure about non-material assets
- Royalty holders can omit information they cannot obtain without unreasonable burden or expense
- Qualified persons can divide responsibility for different sections of report
- Qualified persons can rely on issuers for certain information

## SEC's FINAL New Mining Disclosure Rules

### Overview

- Adopted October 31, 2018
- Establishes new subpart 1300 to Regulation S-K
- Effective for issuer's first fiscal year beginning on or after January 1, 2021
- Early adoption permitted, subject to the SEC first updating the EDGAR system
- Based on Committee for Mineral Reserves International Reporting Standards (CRIRSCO)
- Speaks the same language as NI 43-101, JORC, other CRIRSCO-based systems
- Replaces SEC Industry Guide 7



## SEC's New Mining Disclosure Rules

### Who will be subject to the new rules?

- All SEC reporting companies, except MJDS filers
- With mining operations (including exploration and including holding royalties) that are material to their business or financial condition
- Also Regulation A filers

**Canadian 20-F and 10-K filers will no longer be able to present NI 43-101 information in their covered SEC filings unless that information also complies with the new SEC rules**



## SEC's New Mining Disclosure Rules

### Who will be subject to the new rules?

If I'm not subject to the new rules (because I'm a non-SEC reporting company or an MJDS filer), why should I care about the SEC rules?

- May decide to list in US
- M&A, asset sale, JV or royalty with a covered issuer
- May lose foreign private issuer status
- May lose MJDS status
- May do a registered acquisition on a non-MJDS form

## SEC's New Mining Disclosure Rules

### To what disclosures do the rules apply?

- Most SEC registration statements, except for S-8s and MJDS
- Domestic 10-Ks, 10-Qs, and 8-Ks that are deemed "filed"
- Foreign 20-Fs
- Foreign 6-Ks incorporated by reference into a covered registration statement
- Regulation A offering documents



## New York CLE Code

## SEC's New Mining Disclosure Rules

### What disclosures are exempt?

- **6-Ks and 8-Ks that are not filed or incorporated into a covered registration statement**
  - An earnings release furnished under Form 8-K Item 2.02 or other information furnished under Item 7.01 for selective disclosure purposes are not “filed”
  - A Form 6-K is never filed and won't be impacted unless it is specifically incorporated into a registration statement
- **MJDS filings and S-8s for equity plans**
- **Website disclosures**
- **Other written or verbal disclosures**

**But, all disclosures are subject to antifraud rules**



## SEC's New Mining Disclosure Rules

### What is a mineral resource?

- Under Industry Guide 7
  - Not recognized
- Under new rules
  - **Measured mineral resource** is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of conclusive geological evidence and sampling. The level of geological certainty associated with a measured mineral resource is sufficient to allow a qualified person to apply modifying factors . . . in sufficient detail to support detailed mine planning and final evaluation of the economic viability of the deposit.
    - may be converted to a proven mineral reserve or to a probable mineral reserve

## SEC's New Mining Disclosure Rules

### What is a mineral resource?

- Under the new rules
  - **Indicated mineral resource** is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of adequate geological evidence and sampling. The level of geological certainty associated with an indicated mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit.
    - May only be converted to a probable mineral reserve
  - **Inferred mineral resource** is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of limited geological evidence and sampling. The level of geological uncertainty associated with an inferred mineral resource is too high to apply relevant technical and economic factors likely to influence the prospects of economic extraction in a manner useful for evaluation of economic viability.
    - May not be converted to a mineral reserve

## SEC's New Mining Disclosure Rules

### What is a mineral reserve?

- **Under Industry Guide 7**
  - That part of a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination.
    - **Proven (Measured) Reserves.** Reserves for which (a) quantity is computed from dimensions revealed in outcrops, trenches, workings or drill holes; grade and/or quality are computed from the results of detailed sampling and (b) the sites for inspection, sampling and measurement are spaced so closely and the geologic character is so well defined that size, shape, depth and mineral content of reserves are well-established.
    - **Probable (Indicated) Reserves.** Reserves for which quantity and grade and/or quality are computed from information similar to that used for proven (measure) reserves, but the sites for inspection, sampling, and measurement are farther apart or are otherwise less adequately spaced. The degree of assurance, although lower than that for proven (measured) reserves, is high enough to assume continuity between points of observation.

## SEC's New Mining Disclosure Rules

### What is a mineral reserve?

- **Under new rules**
  - An estimate of tonnage and grade or quality of indicated and measured mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project. More specifically, it is the economically mineable part of a measured or indicated mineral resource, which includes diluting materials and allowances for losses that may occur when the material is mined or extracted.
    - **Probable mineral reserve** is the economically mineable part of an indicated and, in some cases, a measured mineral resource.
    - **Proven mineral reserve** is the economically mineable part of a measured mineral resource and can only result from conversion of a measured mineral resource.

## SEC's New Mining Disclosure Rules

### Some details – QP standards

- **Individual, professional with 5+ years' experience in this type of mineralization and deposit**
- **Member in good standing of a “recognized professional organization”**
- **Organization must be**
  - recognized in the mining industry or authorized by law
  - admit members based on academic qualifications and experience
  - have professional standards of competence and ethics
  - promote continuing professional development
  - have and apply disciplinary powers including expulsion power
  - provide a public list of members in good standing
- **Doesn't need to be independent**

## SEC's New Mining Disclosure Rules

### Some details – technical report summaries

- **Detailed rules about required contents**
- **Must be signed by QP**
- **Must include as exhibit to an SEC annual report or registration statement when first disclosing mineral resources or mineral reserves for a property that is material to the issuer's business or financial condition**
- **Permitted to file report on exploration results, prior to resources**
- **Material change in prior report requires an updated report when filing new SEC annual report or registration statement**

## SEC's New Mining Disclosure Rules

### Some details – QP consents

- QP must sign consent before technical report summary filed
- Consent itself is filed only if report used in an SEC registration statement
- If QP is not an employee of the issuer, ok to attribute the report to the QP's firm without naming the individual
  - Then firm must sign the report and consent

## SEC's New Mining Disclosure Rules

### Some details – QP liability

- For registration statements, prospectus liability for QP material misstatements or omissions
- For private placements or secondary trading, only if QP “makes” a misleading statement in connection with the offer or sale of a security
- Can divide report responsibility among QPs
- Can rely on certain information from issuer if expressly stated
  - Macroeconomic and marketing info, issuer's plans, and certain legal, environmental or governmental matters outside QP's expertise
- But, QP cannot disclaim work of its employees or contractors

## SEC's New Mining Disclosure Rules

### Some details – Annual Report Disclosures

- SEC Annual Report Forms 10-K and 20-F, Registration Statement Forms S-1, S-3, S-4, F-1, F-3 and F-4 and Regulation A Form 1-A have all been revised to mandate specific disclosures relating to mineral projects
- Overview covering all properties
  - Map for each property
  - Overview summary of properties, with relevant details
  - Company-wide three year production history
  - Company-wide mineral resource and mineral reserve tables at the last fiscal year end, organized by commodity, geographic property and categories of resource and reserve

## SEC's New Mining Disclosure Rules

### Some details – Annual Report Disclosures

- For each material property, a property description
  - Location
  - Infrastructure
  - History
  - Description of title and rights
  - Condition, past and planned work, stage of development (exploration, development or production)
  - P&E, and cost or book value of PP&E
  - Encumbrances
  - Material exploration results
  - Disclosure of any exploration target must be separately captioned

## SEC's New Mining Disclosure Rules

### Some details – Annual Report and Registration Statement Content

- For each material property, a property description (con't)
  - Resource and reserve tables, including comparisons to prior year
  - If resources or reserves are being declared for the first time, or if material changes being disclosed, file a technical report summary as an exhibit, and discuss material assumptions and criteria used (with cross-references to report sections)
- Discussion of issuer's internal controls
  - Quality control and quality assurance (QC/QA) programs
  - Verification of analytical procedures
  - Risk inherent in any estimates
- QP info
  - Identify the QP who prepared any technical report summary
  - State whether an employee of the issuer
  - If not, name the QP's employer, and whether affiliated with the issuer or any other person with an interest in the property (and if so, describe the affiliation)



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## SEC's New Mining Disclosure Rules

### Key Similarities with Canadian Rules and Terminology Differences

#### Similarities

- Mineral resources - inferred, indicated and measured
- Mineral reserves - probable and proven
- Qualified person must approve any resource or reserve estimates
- Technical reports for material properties with resources or reserves, authored by a QP
- Similar types of technical reports

#### Terminology differences

- Initial assessment, v. NI 43-101's preliminary economic assessment
- Technical report summary, v. NI 43-101's technical report



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## SEC's New Mining Disclosure Rules

### Key Differences with Canadian NI 43-101

- **Scope of Application**

- **S-K 1300**

- Only applies to SEC reporting companies
    - Only certain SEC filings must comply (10-K, 20-F, S-1, S-3, S-4, F-1, F-3, F-4, Reg A)
    - Excludes website disclosure, press releases and corporate presentations
    - Only technical reports must be attributed to a QP
    - But more expansive than NI 43-101 in covering mineral brines
    - MJDS exemption

- **NI 43-101**

- All written disclosures must comply with NI 43-101
    - Includes disclosures to the public by private companies
    - All scientific and technical disclosure must be attributed to a QP
    - Exclusion for certain historical estimates (more permissive than S-K 1300)
    - Exemption for US companies and US projects (likely)



## SEC's New Mining Disclosure Rules

### Key Differences with Canadian NI 43-101

- **Qualified Persons**

- **S-K 1300**

- Organization of which the QP is a member must publish a list of all members (not in 43-101)
    - QP must have 5 years of experience in the type of mineralization, type of deposit and type of activity being undertaken (more restrictive than 43-101)
    - Individual QP need not be named (can simply name the firm), unless the QP works for the issuer

- **NI 43-101**

- Requires a university degree or equivalent accreditation in geoscience or engineering (not in S-K 1300)
    - QP must be independent in some circumstances (not in S-K 1300)
    - Requires naming individual QP in at least some circumstances



## SEC's New Mining Disclosure Rules

### Key Differences with Canadian NI 43-101

- **Technical Report Summaries**
  - **S-K 1300**
    - Initial assessment is required in order to declare a mineral resource (more restrictive than 43-101)
    - Technical report only required if declaring resources or reserves
    - Filing trigger is SEC annual report or covered registration statement
  - **43-101**
    - Report required for all material properties, even if no resources
    - Quicker filing trigger (cannot wait until annual report), but
    - In some cases, can delay filing for a newly-material property (not in S-K 1300)
  - **Some content differences**

## SEC's New Mining Disclosure Rules

### Preparing for Implementation

- **S-K 1300 is more detailed and specific than Industry Guide 7**
- **Ensure your QPs understand the rules and know you want them to comply**
- **As mining companies in Canada have experienced under NI 43-101:**
  - Expect the SEC to review and comment on technical reports for form compliance, QP standards and other issues, and to comment on other SEC disclosures
  - Expect that deficiencies could stall or kill fundraising transactions and mergers
- **Knowledgeable US counsel can help you instruct the QPs and do form checks on technical reports while still in draft form, to preempt these issues**



## SEC's New Mining Disclosure Rules

### What to Do – Companies Already Subject to NI 43-101

- Companies subject to both S-K 1300 and NI 43-101 will need to evaluate side by side
- First, check that your QPs qualify under both schemes
- Second, see if your resource and reserve estimates are compatible with S-K 1300
- Third, see how much your technical reports may need to change to be compatible with S-K 1300
- Ideally, resource and reserve estimates will be made and technical reports drafted in a manner that complies with both NI 43-101 and the SEC rules
- MJDS filers should evaluate pro/con list to decide upon approach



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## SEC's New Mining Disclosure Rules

### What to Do – US Companies Subject Only with Industry Guide 7

- Do your internal personnel and external advisers qualify as QPs?
- Consider whether to name external QPs individually or only the firm
- Prepare to complete technical reports
- Declare mineral resources once you can



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## SEC's New Mining Disclosure Rules

### What to Do – QPs

- Check your credentials against the new rules
- Does your professional organization qualify as a recognized professional organization?
  - Changes in the organization's governance rules may be required
  - Does the organization publish its list of members?
- Consider whether the tighter S-K 1300 standards regarding five years' experience limits the types of reports you are qualified for
- Two years to make any necessary changes or obtain additional qualifications and experience
- Independent QP firms, consider preference re naming firm v. individual
- Consider liability implications if not used to being named



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## SEC's New Mining Disclosure Rules

### Preparing for implementation

- If an issuer is preparing or updating a technical report prior to the effective date of the new rules
  - If the information will be included in filings or registration statements following the effective date, be sure the report complies with S-K 1300
- If an existing technical report will be used following the effective date of the new rules
  - Check with the engineering firm to determine if the report complies with the new rules or what changes would need to be made for it to comply
- When it comes to naming the QPs
  - SEC reporting rules require consents from QPs more frequently
  - If other disclosure rules, such as 43-101, requires naming the individual QPs, consider whether the technical report summary to be filed under the new rules requires including the individual names or if that can be bifurcated



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## QUESTIONS?



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### Contact Information



### **Christopher Doerksen**

Partner  
Dorsey & Whitney LLP  
Seattle, Washington  
doerksen.christopher@dorsey.com  
(206) 903-8856

### **Kimberley R. Anderson**

Partner  
Dorsey & Whitney LLP  
Seattle, Washington  
anderson.kimberley@dorsey.com  
(206) 903-8803



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