

# Property Disclosures for Mining Registrants

## An Overview of the SEC's Proposed Rules and their Implications

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# Guide 7 Provisions and Problems

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## The Commission's Failure to Act

- Reserves vs. Resources – Guide 7 precluded disclosure of mineral resources in SEC filings, pushing companies outside the U.S.
- Disclosures (e.g., regarding mineralized material) were addressed by the Commission on an informal basis
- Private entities such as the Society for Mining, Metallurgy & Exploration, National Mining Association and various issuers encouraged reform
- The Rest of the World Moved On
  - Other frameworks were adopted across the globe (CRIRSCO, JORC, N.I. 43-101), but still no change at the SEC
- After 35 years of the same Guide 7, a groundbreaking proposal...

# Overview; the Proposed Rules:

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1. Apply where any company's mining operations are material to its business or financial conditions (presumed material if a company's mining assets constitute 10% or more of its total assets)
2. Require detailed property and technical reports to be filed by royalty and similar companies (no reduced disclosure requirements)
3. Requires a company to disclose "mineral resources" and "material exploration results" in addition to "mineral reserves"
4. Adopt the CRIRSCO-based classification of mineral resources / inferred, indicated and measured
5. Commodity prices used in reserve and resource estimations may not be higher than prior 24-month average closing price
6. Comments deadline August 26, 2016!

# Overview of the Proposed Rules – Con't

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8. Disclosure of resources, reserves and exploration results must be based on documentation prepared by a “qualified person” (both (1) a mineral industry profession with at least 5 years of experience and (2) a member or licensee of a recognized professional organization)
9. “Technical report summary” prepared by a qualified person for each material property (signed and dated by the preparer with consent filed as an exhibit) (The qualified person is deemed an “expert” for securities liability purposes)
10. Summary disclosure in several tables, including for property details, mineral resources and reserves (broken down by in situ, mill feed, and saleable product) with reconciliations of changes over prior year, exploration results by drill holes, sample and assay
11. Internal control disclosures (including quality control and quality assurance and verification of analytical procedures)

# Definitions of Mining Operations and Materiality

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- “Mining Operations” includes operations on all mining properties that a company owns or in which it has, or it is probable that it will have, a direct or indirect economic interest.
  - Includes operating leases, royalty, stream or other similar rights
  - Covers activities from exploration through first material external sale
- 10% Rule of Thumb – Mining Operations presumed to be material if mining assets constituted 10% or more of a company’s total assets
- Qualitative and quantitative factors should be considered (revenues, net income or operating income, stock price, market reactions, etc.)

# Exploration Results

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- Proposed rules would require companies to disclose material exploration results for each of its material properties in tabular form
  - “Exploration Results” would be defined as data and information generated by mineral exploration programs that are not part of a disclosure of mineral resources or reserves
  - Would not require disclosure by a company that has material mining operations in the aggregate but no individual properties that are material.
  - Tables require disclosure of exploration data by property and drill hole, length, lithography, sampling methods, size or length of sample and number of assays
- Exploration results, by themselves, not permitted to derive estimates of tonnage, grade, or production rates, or in an assessment of economic viability

# CRIRSCO Framework on Exploration Results Differs

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- Disclosure of exploration results are optional and only required when considered appropriate and material to the investor
- Proposed rules would require calendar-based intervals, which may not match timing of results being considered material
- Early disclosure could result in loss of competitive advantage
- May affect confidentiality obligations in joint venture or other agreements
- Level of detail not mandated

**“Under CRIRSCO Templates, the release of exploration results are optional, and an issuer is only required to provide full disclosure of exploration results when considered appropriate and material to the investor.”**

*The Society for Mining, Metallurgy and Exploration, Inc., comments to the SEC dated Aug. 4, 2016*

# Mineral Resources

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- Disclosure currently prohibited by Guide 7
- New rules require mineral resources disclosure when determined based on qualified person's findings
  - “Mineral resource” is a concentration or occurrence of material of economic interest (including mineralization, dumps and tailings) in or on the Earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for economic extraction
    - qualified person must estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource from specific geological evidence and knowledge, including sampling
    - Includes non-solid matter, such as geothermal fields and mineral brines, in addition to mineralization
- Generally follow CRIRSCO standards, except SEC prohibits consideration of inferred resources in economic analysis of a project



# Classification of Mineral Resources

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Companies must classify mineral resources as “inferred”, “indicated” or “measured”

## Inferred

Quantity and grade or quality are estimated on the basis of **limited** geological evidence and sampling

Not permitted as a basis to determine mineral reserves

Qualified person may not use in any economic analysis to determine economic viability or prospects in support of SEC disclosures (departure from CRIRSCO)

## Indicated

Quantity and grade or quality are estimated on the basis of **adequate** geological evidence and sampling

## Measured

Quantity and grade or quality are estimated on the basis of **conclusive** geological evidence and sampling

# Initial Assessments of Mineral Resources

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- Disclosure of mineral resources must be based on a qualified person's "initial assessment" including economics
- Must include a qualitative evaluation of modifying factors (site infrastructure, mine design and planning, processing plant, environmental compliance and permitting, and socio-economic factors)
- Must include an estimation of the cut-off grade

# Mineral Reserves – Framework and Proposed Definitions

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## Mineral Reserve

“The economically mineable part of a measured or indicated mineral resource, **net of allowances for diluting materials** and for losses that may occur when the material is mined or extracted”

Must be based on a pre-feasibility or feasibility study conducted by a qualified person

Extraction of the mineral reserve is economically viable under reasonable investment and market assumptions

## Probable Mineral Reserves

Confidence in the results is lower than what is sufficient for a classification as a proven mineral reserve

Must consider modifying factors (mining, energy recovery and conversion, processing, metallurgical, economic, marketing, legal, environmental, infrastructure, social and governmental factors)

## Proven Mineral Reserves

The economically mineable part of a measured mineral resource

The qualified person must have a **high degree of confidence** in the results considering modifying factors

Can **only result from conversion of a measured mineral resource**

# Mineral Reserves – Con't

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- Mineral reserve tabular disclosure required at three points of reference (in situ, plant or mill feed and saleable product)
- Definition of mineral reserves net of allowances for diluting materials and mining losses that may occur when the material is mined, which conflicts with the CRIRSCO definition of mineral reserves
- Table 3 will require companies to present summary mineral reserves and resources on a saleable basis, which causes reporting on “recoverable reserves” versus “contained reserves” in contrast to other reporting jurisdictions

# Commodity Pricing

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Proposed rule requires that the price used to determine the mineral reserves and mineral resources not be higher than the average spot price during the 24-month period prior to the end of the fiscal year covered by the study, determined as an unweighted arithmetic average of the daily closing price for each trading day within such period, except in the cases where sales prices are determined by contractual agreement.



# Commodity Pricing – Proposed Rules Differ from Other Key Frameworks

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- CRIRSCO Templates:
  - require forward-looking market forecasts and prices
  - allow qualified person to make judgments regarding the proper long-term future price to use in the calculation of mineral reserves and resources
- Informal SEC guidance mentions the use of a 36-month average
- US GAAP requires the use of estimated future cash flows based on management's projected sales prices with current and future forecasted prices
  - Used for determining the value of mining assets in a purchase price allocation and in testing for impairment
  - Inconsistency with CRIRSCO and NI 43-101 could harm comparability of other information in filings to financial statements

"The proposed 24-month period intends to strike a balance between the ceiling price being sensitive to recent changes in fundamental market conditions while avoiding introducing fluctuations in the ceiling price that may be driven more by short-term price volatility than by changes in fundamental market conditions."

*Securities and Exchange  
Commission, Release Nos. 33-10098;  
34-78086; File No. S7-10-16*

# Other Commodity Pricing Considerations

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- Future pricing is critical to evaluating and financing a mine that may produce for 10-20 years
- Typical to use higher future prices for resources than for reserves, since resources typically are going to be produced years later than reserves
- SME notes value of resources likely to be greatly diminished using the same price assumption as reserves

# Comparability based on Mine/Commodity Type

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Photo Credit: The Atlantic

- The proposed disclosure tables rarely distinguish between mine or commodity type (One size fits all?)
  - Rules do not recognize that different terminology applies in different industries (e.g. coal vs. precious minerals vs. sand and gravel)
- Because the mining industry is heterogeneous, comparability is minimal.
  - The proposed rules try to force comparability by eliminating a company's choice on the format for disclosure



# Qualified Person Requirement

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- Overview:
  - “Every disclosure of mineral resources, mineral reserves and material exploration results reported in a company’s filed registration statements and reports must be based on, and accurately reflect information and supporting documentation prepared by, a ‘qualified person’”
- A “Qualified Person” is a
  - Mineral industry professional with at least **five years** of relevant experience in the type of mineralization and type of deposit under consideration; and
  - **Eligible member or licensee** in good standing of a recognized professional organization at the time the technical report is prepared
- Requirement applies to foreign private issuers as well

# Qualified Person Requirement – Con't

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- Company Requirements:
  - Ensure the “qualified person” meets required qualifications and that the disclosure accurately reflects the information provided by the qualified person
  - Obtain a dated and signed technical report summary from the qualified person; the qualified person’s “consent” to use his or her name and summary of his or her report to be filed with the SEC
  - File the QP’s “technical report summary” with respect to every material mining property as an exhibit to the 10-K or registration statement
  - Disclose employment or affiliate relationship between the company and the QP

# Qualified Person as an Expert

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- If the technical report summary is filed or incorporated by reference into a registration statement, the qualified person would be deemed an “expert” who must provide his or her written consent
- The QP would be subject to liability as an expert for any untrue statement or omission of a material fact contained in the technical report summary or description thereof under Section 11
- Note: no individual audit partner is named as an “expert” when his or her audit firm signs its auditor’s report and he or she does not have to file a consent
- Will individual QPs be willing to do this? (be named individually in securities class actions in the U.S?)

**“[Individually signing] is consistent with the practice under the CRIRSCO Template; however, liability concerns are more pronounced in the US.”**

*The Society for Mining, Metallurgy and Exploration, Inc., comments to the SEC dated Aug. 4, 2016*

# Qualified Person Disclaimers and Reliance

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## Proposed Rules vs. Canadian Standards

### Proposed Rules

- Do not permit a qualified person to include a disclaimer of responsibility if he or she relies on a report, opinion, or statement of another expert in preparing the technical report summary
- The technical report summary includes sections about hydrogeology and geotechnical data, including testing and analysis

### Canadian Standards

- Canada's NI 43-101 permits disclaimers for expert reports, opinions, or statements by non-engineering and non-geoscience work by persons that are not qualified persons
- Hydrogeology and geotechnical data are not included in NI 43-101

# Summary Disclosure Requirements

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- Proposed rules would require a company that owns two or more mining properties to provide a summary disclosure of their mining operations
  - Covers all properties that the company owns or in which it has a direct or indirect economic interest
  - Covers properties that a company operates under a lease or other legal agreement
  - Covers properties for which a company has an associated royalty or similar right
- Must include a map showing the locations of all mining properties

# Summary Disclosure Requirements – Con't

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- A new summary disclosure table calls for identification of each property, reporting the total production from the property for the three most recently completed fiscal years, and disclosure of the following information:
  - **the location of the property;**
  - **the type and amount of ownership interest;**
  - **the identity of the operator;**
  - **title, mineral rights, leases or options and acreage involved;**
  - **the stage of the property (exploration, development or production);**
  - **key permit conditions;**
  - **mine type and mineralization style; and**
  - **processing plant and other available facilities, all in tabular form**
- The summary table requires a tabular presentation of this information on up to 20 properties based on properties with the largest asset values.

# Individual Property Disclosure

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Proposed rules would require companies to provide more detailed information for each of its individual properties that is material to its business or financial condition, including:

- the property's location
- existing infrastructure (roads, railroads, airports, towns, ports, sources of water, electricity, and personnel)
- the name or number and size (acreage), of the titles, claims, concessions, mineral rights, leases or options granting the right to hold or operate the property; royalties burdening the property
- history of previous operations and current condition and status of the property
- work completed on the property; proposed program of exploration and development and current stage of property as well as mine type



Photo Credit: Mitra Jaya Group

# Application of Proposed Rules to Non-U.S. Issuers

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- SEC believes that the “proposed rules should apply equally to foreign private issuers and domestic registrants.”
- Proposed rules include a new instruction for Form 20-F that directs issuers engaged in mining operations to refer to, and comply with the new rules
- Thus Canadian companies that report on Form 20-F could no longer provide mining disclosure under NI 43-101 under the previous “foreign or state law” exception (exception eliminated under the proposed rules).
- Proposal should not affect Canadian issuers that report pursuant to the MJDS (principal market in Canada).



# The Biggest Problems with the Proposed Rules ?

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- Required disclosure of material exploration results for each material property
- Commodity pricing assumptions based on a 24-month historical average
- No accommodations for different types of ownership, commodities, mines or issuers
  - Royalty and stream owners are treated the same as mine owners and operators
  - Oil and gas, coal, sand and gravel, precious minerals, etc. are treated the same
- Extensive tabular disclosure requirements may be costly and confusing
- Personal liability for qualified persons
- Other than MJDS issuers, multi-jurisdictional listed companies become subject to a burdensome and inconsistent disclosure regime
- No economic credit allowed to be considered for inferred resources
- Required annual reconciliation of changes in reserves and resources



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