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Mining Companies: Don’t Let Your QP Refuse to Provide Required SEC Consents

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We are seeing a significant increase in cases where a qualified person (QP) or related engineering firm has prepared a technical report or other required disclosure for a mining company, but then resisted, or outright refused, to provide the written consent that the mining company is required to obtain in order to be permitted to disclose the name of the QP and the conclusions of the QP in a prospectus that forms part of an SEC registration statement for a public offering or for the mining company’s annual report that is filed with the SEC. This can be costly and damaging to the mining company, because it may put the company in a position where it cannot satisfy both the SEC consent requirements and the requirements of Canada’s National Instrument 43-101 (NI 43-101) without having another QP redo the first QP’s work.

The incidence of QPs taking this position seems to be increasing as the SEC’s new mining disclosure rules under subpart 1300 come into effect. For companies that file with the SEC on non-MJDS forms (Forms 10-K, S-1 and S-3 for domestic issuers, and Forms 20-F, F-1 and F-3 for foreign private issuers), the subpart 1300 rules will impose new requirements on QPs that will increase their exposure to potential liability. The subpart 1300 rules will not apply to MJDS forms. For the many Canadian mining companies that file with the SEC under the MJDS system (e.g., Forms 40-F and F-10), their QPs will not be subject to any increased exposure. Nevertheless, we are seeing QPs taking a more cautious approach to consents as they become more aware of the potential liability to which they have always been subject as “experts”.

To avoid the potential for unpleasantness at a later date, mining companies that may require an SEC consent from a QP should raise this requirement with the QP as part of the process of initially engaging the QP and consider building the QP’s obligation to provide any required consents into the express terms of any written agreement with the QP.

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