Mining Companies Subject To The SEC'S Subpart 1300 Of Regulation S-K Should Prepare Now For Next Year's Annual Report

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In 2022, many SEC reporting companies with mineral resource assets completed their inaugural SEC annual report on Form 10-K or 20-F subject to the SEC's mining disclosure rules in subpart 1300 of Regulation S-K ("subpart 1300"), and filed their inaugural subpart 1300 technical report summaries, if applicable. As 2023's annual reporting season approaches, we outline for our readers some important factors to consider in preparing for Year 2 of subpart 1300 compliance. Depending on the situation, an issuer may need to begin its preparations well in advance of its fiscal year end ("FYE"), or risk being in default of its reporting requirements.

Overview

Subpart 1300 requires an issuer with material mining assets that is filing a new Form 10-K or 20-F ("Annual Report") to report mineral resources and reserves as of the end of the fiscal year, with a comparison to prior year figures. Determinations of mineral resources and reserves must be based on information provided by a qualified person ("QP). If an individual property is material to the issuer and the issuer will be disclosing any mineral resources or reserves for that property, the issuer must file with the SEC a technical report summary by a QP that complies with subpart 1300. For most issuers subject to subpart 1300, the first Annual Report for a year ended on or after December 31, 2021, filed in 2022, was the first report required to comply with subpart 1300 and to be accompanied by a subpart 1300 compliant technical report summary, where applicable. Accordingly, for most issuers subject to subpart 1300, preparing for its first Annual Report for a fiscal year ended on or after December 31, 2022, to be filed in 2023, will be the first time the issuer has needed to assess the requirements for updating subpart 1300 disclosure.

An updated technical report summary is not required every year. In conversations with the Staff of the SEC, they expected most technical report summaries would be good for 3-5 years before updating was required, although material changes at a project (for example, a significant and sustained cost increase) would require that it be updated

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sooner.

As part of subpart 1300 disclosure in Year 2 (and each year in the future), issuers will be required, among other things, to:

- reassess, as at the FYE, which mineral properties are material to the issuer;
- have a QP determine, as at the FYE, for each material property that has a previously-filed subpart 1300 technical report summary, whether all material assumptions and information set forth in the technical report summary, including assumptions relating to modifying factors, price estimates, and scientific and technical information (e.g., sampling data, estimation assumptions and methods), remain current;
- have a QP assess, as at the FYE, whether any changes have occurred in mineral resources or reserves, and explain the changes if any (including the comparison discussion required by Item 1304(e) of the current year's mineral resources or reserves against the prior year's mineral resources or reserves);
- determine which QP will update prior estimates of mineral resources and reserves as of the new FYE or confirm that the estimates remain current as at the FYE;
- if there are material changes to the information in a technical report summary, prepare the new technical report summary if required. Subpart 1300 does not require the use of the same QP who prepared the initial technical report summary; however, in some cases a consent may be required from the previous QP.

Year 2 Reporting Disclosure

For Annual Reports where the mineral reserves and mineral resources remain unchanged as of the FYE, the Staff of the SEC has indicated that they expect to see a statement in the Annual Report that the QP has determined that all material assumptions and information, including those related to price estimates, remain current as of the FYE.

Year 2 Backup Documentation

Except with respect to an updated technical report summary, there is no specified backup procedure or documentation for updating or confirming estimates in Year 2. *We recommend some form of backup memo or certification from the QPs relating to the Year 2 disclosure as part of an issuer's disclosure controls and procedures.*

Procedures For New Material Properties

If any new material property is identified, the issuer may not disclose any mineral resources or mineral reserves for that property in the Annual Report unless the Annual Report is accompanied by a subpart 1300 compliant technical report summary. If a material property has an existing subpart 1300 technical report summary, but the QP is unable to determine that all material assumptions and information set forth in the report remain current as of the new FYE, the issuer similarly may not disclose any mineral resources or mineral reserves for that property in the Annual Report unless the Annual Report is accompanied by a new or updated subpart 1300 compliant technical report summary. *We recommend that issuers begin their assessment of these matters prior to the FYE, because the preparation of any required new or updated technical report summaries may take significant time.*

If an issuer is unable to finalize any required new or updated subpart 1300 technical report summary by the date of the Annual Report, the Annual Report must report that the property has no mineral resources or reserves. While this approach may be permissible under the Annual Report form requirements, it may result in an adverse reaction from investors and analysts. Depending on the circumstances, it may also require the issuer to suspend sales under certain SEC registration statements if it may constitute or result in a material misstatement or omission.

Procedures For New Properties That Are Not Material

Whether or not a property is material, the issuer may not disclose any mineral resources or mineral reserves for that property in the Annual Report unless those mineral resources or mineral reserves are determined in accordance with subpart 1300. For non-material properties that are discussed in the summary disclosure section, a technical report summary is not required but a QP must still conduct the required procedures to determine mineral resources or mineral reserves as of the FYE.

Internal Controls Disclosure for Resource and Reserve Estimates in Year 2

We note that the language of Item 1305 relating to internal controls disclosure is open to significant interpretation by the reader. In discussions with the Staff of the SEC, they noted the internal control disclosure was intended to be at the corporate level, not the project level. In other words, are there board committees or members of senior management that are responsible for the oversight of mineral estimates? What are the company's procedures? To see examples of this type of disclosure, keep in mind that oil and gas companies have been subject to this requirement for a number of years.