

SEC Clarifies the Compliance Deadline for New Mining Disclosure Rules

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by Christopher L. Doerksen

On April 29, 2020, the SEC issued new Compliance & Disclosure Interpretations (the “New C&DIs”) that clarified the compliance deadline for many mining companies that file with the SEC on non-MJDS forms such as Form 10-K or Form 20-F to comply with the SEC’s new mining disclosure rules in Subpart 1300 of Regulation S-K. The New C&DIs follow closely on the heels of the National Mining Association having submitted a letter on April 24, 2020, to the SEC’s Chairman, Jay Clayton, requesting a one-year delay in the Subpart 1300 compliance deadline in light of the COVID-19 pandemic.

The SEC’s adopting release for Subpart 1300 on October 31, 2018, had required that mining companies begin complying with the new rules, including the filing of technical report summaries, beginning with the annual report filed for the company’s first fiscal year beginning on or after January 1, 2021 (in other words, in early 2022 for calendar year companies, and later in 2022 or very early 2023 for other companies). However, that timeline was to be accelerated for new registrants and also, apparently, for companies accessing the public markets, with compliance required beginning January 1, 2021, for any registration statement filed on or after that date. The treatment of shelf takedowns from existing registration statements after January 1, 2021, was not specifically addressed.

The New C&DIs provide much-needed clarity regarding the Subpart 1300 compliance deadline for many mining companies:

- For non-calendar year companies, Subpart 1300 will not apply until the beginning of the company’s first fiscal year on or after January 1, 2021. For example, a company with a June 30 fiscal year end will not in any circumstance become subject to Subpart 1300 until July 1, 2021.
- If a company files a Securities Act registration statement after the beginning of its first fiscal year on or after January 1, 2021, and prior to its annual report for such fiscal year,^[1] it is not required to comply with Subpart 1300 in the Securities Act registration statement if the form being used permits incorporation by reference of information from a prior annual report that was not subject to Subpart 1300, and such disclosure is not otherwise prohibited under the SEC’s rules. For example, if a calendar-year end

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company files a Form S-3 or Form F-3 during 2021, it may incorporate its annual report on Form 10-K or Form 20-F for the fiscal year ended December 31, 2020, even if that report contains disclosure in accordance with SEC Industry Guide 7.

As a result of the New C&DIs, many mining companies that are working on implementing Subpart 1300 will not be required to comply with the new rules until the date in 2022 when they file their annual report for their first fiscal year beginning on or after January 1, 2021.

The exception to this rule will be companies that file an initial Exchange Act registration statement or a Securities Act registration statement that does not permit incorporation by reference^[2] after the start of their first fiscal year beginning on or after January 1, 2021. Those filings will trigger early compliance with Subpart 1300.

The New C&DIs are available at sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#section155. The SEC's adopting release for Subpart 1300 is available at sec.gov/rules/final/2018/33-10570.pdf.

Links for Dorsey's prior Q&A and webinar regarding Subpart 1300 are available at dorsey.com/newsresources/publications/client-alerts/2019/02/new-mining-disclosure-rules-2019 and dorsey.com/newsresources/events/videos/2019/02/webinar-playback-sec-new-mining-rules, respectively.

^[1] Technically, the New C&DIs refer to the date on which audited financial statements for such fiscal year are required to be included in the Securities Act registration statement.

^[2] For example, Forms F-1 and S-1, the SEC's equivalents to a "long form" prospectus, do not permit incorporation by reference if the company (i) is a new registrant, (ii) has not yet filed its SEC annual report for its most recently completed fiscal year, (iii) is delinquent in its SEC reports, (iii) is or was, or has a predecessor that was, within the last three years, a blank check company, a shell company, or a registrant for an offering of penny stock, or (iv) is registering a business combination. Forms F-4 and S-4, which are used to register business combinations, also include restrictions on incorporation by reference, depending on the nature of the registrant and the company being acquired.