

Status Check on the SEC's Proposed Overhaul of the Mining Disclosure Regime

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About 18 months have passed since the U.S. Securities and Exchange Commission (SEC) published its bold attempt to modernize the disclosure requirements for mining companies that are listed on U.S. stock exchanges or otherwise report to the SEC. With final rules not yet adopted, the fight for a streamlined reporting regime continues.

The SEC's proposed overhaul was spawned by industry request – specifically, a request by the Society for Mining, Metallurgy & Exploration (SME), the leading professional society of mining professionals in the United States, that the SEC bring its disclosure requirements into the modern age and adopt a new disclosure regime based on the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) standards. CRIRSCO-based standards have been adopted in most countries with advanced mining disclosure regimes, including Canada and Australia. Industry was concerned that the existing rules under SEC Industry Guide 7, nearly 35 years old, were hampering the ability of U.S. mining companies and U.S. trading markets to compete by, among other things, prohibiting the disclosure of mineral resources that have not yet been determined to be mineral reserves.

As a result, in June 2016, the SEC proposed a new CRIRSCO-based disclosure system that would bring U.S. disclosure requirements more in line with Canada and other jurisdictions. One might think that such a proposal, to modernize rules at the request of industry to benefit American business, would find easy adoption following the election of Donald Trump and the appointment of a Republican Chairman and majority to the SEC, but that hasn't been the case.

Overhauling a system that has been in place for 35 years is a difficult thing to do at any time. The election of Donald Trump likely delayed the process further. The President's party controls the chairmanship and majority of seats on the SEC, so the election resulted in the resignation of the Democratic Chairman that had overseen the initial proposal. Months of uncertainty passed before her replacement was sworn in. The new Republican Chairman was not appointed until May 2017, seven months ago, without any

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background on the proposed new mining rules and undoubtedly bringing his own ideas and interests to the table. President Trump also campaigned on a platform of eliminating regulation, and while the proposals were intended to benefit industry, they require passing *additional* regulations.

Finally, but perhaps most importantly, the proposals were not as well-received by the mining industry as the SEC had undoubtedly hoped. Most industry organizations, companies, and law firms that commented on the proposals were supportive of the idea of modernization, but felt that the SEC's proposals were too prescriptive and varied in too many ways from CRIRSCO standards, thereby imposing an administrative burden on companies, especially those reporting in more than one jurisdiction. Worst of all for many of our Canadian clients, the new rules as proposed would have eliminated the ability of Canadian companies that file SEC reports on non-MJDS forms such as Form 20-F or 10-K from including National Instrument 43-101 (NI 43-101) information in their SEC filings, even if these disclosures were mere supplements to SEC disclosure. The SEC received a lot of feedback to digest. According to the staff, they are continuing to review and consider the comments received.

While it's not a secret, few are aware that the National Mining Association (NMA), the national trade organization of the mining industry, and the SME have teamed up to present the SEC with an alternative proposal for modernizing the SEC's mining disclosure rules. The NMA and SME have proposed that instead of working from the framework of the SEC's 2016 proposals, the SEC merely amend the content of Industry Guide 7. The NMA and SME have recommended that Guide 7, as revised, allow companies to disclose estimates of mineral resources in addition to mineral reserves, allow reserves to be established in a pre-feasibility study, not require disclosure to be attributed to a qualified person, limit required disclosures to those that are material, and limit the information required to be disclosed by those holding passive mining interests such as royalties, all without imposing the more detailed, prescriptive requirements contained in the SEC's 2016 proposals.

Of most interest to Canadian companies, the NMA/SME proposal would allow foreign companies that are subject to and required to disclose information in compliance with another CRIRSCO-based standard, such as NI 43-101, to comply with such other standard in lieu of, and in full satisfaction of, the SEC standards, subject only to a requirement to include a reconciliation of any material differences. The NMA/SME proposal includes a specific note that for Canadian companies subject to NI 43-101, reconciliation would generally not be required (due to the lack of material differences between NI 43-101 and the NMA/SME proposed version of Guide 7). If the SEC accepts the NMA/SME proposal, most smaller Canadian companies that do not satisfy the market capitalization requirements of the Multi-Jurisdictional Disclosure System (MJDS) will find it easier and less expensive to file with the SEC than in prior years. Whether the SEC will do so, we cannot say.