

What Mining Companies Need to Accomplish Before 2021

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In November 2018, the U.S. Securities and Exchange Commission (SEC) adopted new mining disclosure standards applicable to all SEC reporting companies, except those that report exclusively under the Multijurisdictional Disclosure System (MJDS). While the new rules will not take effect until 2021, that date is quickly approaching. Mining and mineral royalty companies should brook no further delay in their preparations.

Below are a few of the important steps to get ready to comply with the new standards:

Determining whether the company must or should comply with the SEC's new requirements. Does the company file a Form 20-F or Form 10-K annual report with the SEC? If the company files on MJDS Form 40-F, how certain is it that the company will remain MJDS eligible, will remain a foreign private issuer, and will not need to use any non-MJDS registration forms? Does the company envision a future U.S. registration and listing? Does it have joint venture or other partners that will require an SEC-compliant technical report? Will an SEC-compliant technical report be useful for other reasons, such as marketing the property, the company, or a royalty on the property?

Updating technical reports, as necessary. If an SEC-compliant technical report will be required, or useful, a company's qualified persons (QPs) under Canada's National Instrument 43-101 (43-101) will need to be advised. The company will need to confirm whether the existing QPs are eligible to be QPs under SEC standards and whether they have a sufficient understanding of the new SEC rules to update the technical reports as required. A timeline and budget will need to be agreed with the QPs. In updating the reports, the QPs will need to determine whether the methodology used and determinations made under 43-101 are consistent with the new SEC standards and add to the report all SEC-mandated disclosures. Companies that are commissioning new technical reports may avoid the need for amendments by ensuring the standards used for the initial report satisfy both 43-101 and the SEC rules.

Evaluating the agreements between the company and its QPs regarding the

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provision of any necessary expert consents. While QPs named in certain SEC filings have long been required to provide expert consents, this requirement will expand to additional forms. The passage of the SEC's new rules has increased awareness among QPs and within large engineering firms of the potential liability associated with being named as a QP. Some engineering firms have already started to push back, in a manner similar to audit firms, requiring new engagements or assurance procedures as a condition to providing a consent or resisting consent in situations in which they feel exposed. Companies should evaluate any existing agreements with their QPs regarding the provision of expert consents and consider whether changes may be appropriate to help ensure that such consents can be reliably obtained for a reasonable cost.

Planning for new disclosures in SEC filings. Companies that file on non-MJDS forms such as Form 20-F or Form 10-K should begin to map out the other technical disclosures that will need to appear in their SEC annual reports and other filings. For companies not already subject to 43-101, this may include obtaining technical reports for the first time.

Quality assurance. Mining companies have long asked their Canadian counsel for assistance in working with QPs, reviewing draft technical reports, and reviewing other technical disclosures to help verify compliance with 43-101. Companies subject to the SEC rules should now involve U.S. counsel in a similar manner and allow additional time for review of the technical disclosure as a result of the newness of the rules.