

# Proposed Rule on Disclosure of Mineral Properties: What it Means for Canadian Companies?

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**T**he United States Securities and Exchange Commission (SEC) has proposed a new rule governing disclosure of mineral properties by public companies<sup>1</sup> to modernize the existing U.S. mining disclosure policy set out in the SEC's *Industry Guide 7*. In several respects, the proposed rule would align the U.S. with the disclosure regime of most jurisdictions, including Canada's *National Instrument 43-101 (NI 43-101)*. Some of the unique aspects of the proposed rule, however, would result in increased potential liability for technical report authors and increased costs for mining companies. This article describes certain aspects of the proposed rule, and some ways in which it would impact Canadian-based companies.

## Impact on Canadian companies

The proposed rule would apply to U.S. issuers and foreign companies registered with the SEC. The latter category includes many Canadian mining companies that are currently able to report in accordance with *NI 43-101*, rather than *Guide 7*, under SEC's "foreign law" exemption. That exemption would not be available under the new proposed rule. The SEC estimates that 63 Canadian companies would be impacted.

Only Canadian companies registered with the SEC that file under the Multi-Jurisdictional Disclosure System would be exempted from the proposed rule. They could continue to make disclosures in accordance with *NI 43-101*.

## Introduction of resource disclosure, technical report, qualified person concept

Certain concepts included in the proposed rule are aligned with *NI 43-101*, and will be familiar to Canadian mining companies and their advisors. Notably, companies would be obliged to disclose any mineral resources established on their properties, in addition to any mineral reserves as required by the existing rules. A mineral resource is a deposit for which the prospect for economic extraction is less certain than for reserves. As in Canada, resources would be disclosable as either inferred,

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indicated and measured, in ascending order of confidence. An indicated or measured resource could be classified as a reserve once the issuer demonstrates economic viability by filing a feasibility or pre-feasibility study.

Consistent with *NI 43-101*, the proposed rule would require issuers to file a "technical report" in respect of a property in the event of first-time disclosure of a mineral resource or reserve, or a material change in resources, reserves or exploration results. Only a "qualified person" (QP)—due to relevant experience (defined as five years' relevant experience in the mineralization type and deposit type and specific type of activity), professional certification and academic credentials—may author a technical report.

## Key distinctions from the NI 43-101 regime

Some features of *NI 43-101* are not adopted by the proposed rule. One distinction is that a QP would not have to be independent of the issuer, as required for some technical reports filed under *NI 43-101*. Other distinctions, such as explicit rules as to what constitutes "materiality," are intended to remove ambiguity and therefore may be advantageous. Many of the key differences between the proposed rule and *NI 43-101*, however, will make compliance more expensive and cumbersome for Canadian issuers and their QPs.

Unlike *NI 43-101*, which provides an exception frequently used for early-stage projects for disclosing inferred resources in a "preliminary economic assessment," under the proposed rule, there is a prohibition on disclosing the results of economic analysis in respect of inferred resources.

Other aspects of the proposed rule not contemplated by *NI 43-101* include mandated

accuracy levels of capital and operating costs in a pre-feasibility study to within plus or minus 25 per cent, with a maximum contingency of 15 per cent; a feasibility study within a 15 per cent range above or below; and a contingency rate not exceeding 10 per cent.

In addition, mineral prices must be based on a two-year trading average prior to the last fiscal year with provisions for prices based on contracts in place for such minerals.

The required contents for technical reports under the proposed rule include hydrogeology and geotechnical factors. The contents otherwise track the *NI 43-101* report requirements.

The use of disclaimers is prohibited, which will result in QPs confirming such matters as political, legal, environmental and tax matters, which is generally outside the QP's expertise.

Accuracy levels are proposed for each stage of production, such as mining, processing and recovery of minerals.

The rule applies to royalty/streaming entities, however, they may rely on the producer's disclosure with the QP's consent. This consent, however, is unlikely to be obtained because of liability and confidentiality concerns. **M**

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## Reference

1. The proposed rule is published in Modernization of Property Disclosures for Mining Registrants, SEC 17 CFR Parts 229, 239 and 249.