National Instrument 43-101: Amendments to Canadian Rules Concerning Mineral Project Disclosure and Technical Reports

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CANADA — MINING

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NATIONAL INSTRUMENT 43-101: AMENDMENTS TO CANADIAN RULES CONCERNING MINERAL PROJECT DISCLOSURE AND TECHNICAL REPORTS

In the late 1990s, unfortunate developments within the mining industry made clear the need to develop uniform Canadian standards to govern how issuers disclose scientific and technical information about mineral projects to the public. The response was National Instrument 43-101 (NI 43-101 or Instrument), a rule issued by the Canadian Securities Administrators which aimed to restore public confidence in mining-related stocks by enhancing the accuracy and integrity of public disclosure in the mining sector. The Instrument governs the public disclosure of scientific and technical information by publicly-traded mining companies, covers oral statements as well as written documents and websites, and requires that all disclosure be based on advice by a "qualified person" (QP) who, in some cases, must be independent of the mining company and the property. A QP as defined in the Instrument is an individual who:

a) is an engineer or geoscientist with at least five years of experience in mineral exploration, mine development or operation or mineral project assessment, or any combination of these;

b) has experience relevant to the subject matter of the mineral project and the technical report; and

c) is a member in good standing of a recognized professional association.

NI 43-101, pt. 1, § 1.2.

Administered by the provincial securities commissions, the Instrument requires the use of defined standard terms to enhance communication, and ensures that public disclosure is based on reliable information which reflects professional opinion. Recent amendments to the Instrument, intended to further enhance the accuracy of disclosure and reflect changes that have occurred in the mining industry since 2001, became effective on December 30, 2005. *See* http://www.bcsc.bc.ca/policy.asp?id=2779. This article highlights and discusses several, but not all, of these amendments.

Changes Affecting Issuers

Royalty Interests Now Considered Mineral Projects. The amendments expand the definition of "mineral project" to include a "royalty interest or similar interest" in any exploration, development, or production activity. As a result, when a royalty interest is material to the holder, in certain circumstances the holder must file a technical report. Holders of royalty interests cannot rely on technical reports filed by the operator of the mineral project to satisfy this disclosure obligation.

Regulators have recognized that it may be difficult for royalty holders to obtain the information they need to comply with the Instrument. Accordingly, the amendments afford limited exemptions from data verification, inspection of documents, and site visit requirements of the technical report, provided that the royalty holder utilizes cautionary language and identifies the items that could not be completed. If, however, the royalty holder shares capital costs or operating losses with the site operator, the regulators expect that the royalty holder will make arrangements to access the necessary records from the operating company. The royalty holder must have attempted to obtain the information and been denied access to it in order to rely on the exemption in such circumstances.

Interestingly, this requirement may change the landscape in which royalty agreements are negotiated. The royalty holder must now attempt to negotiate access to both the operator's data and the operator's property, and perhaps require that technical reports prepared for the operator also be addressed to the royalty holder. Further, when the mineral project is material to the royalty holder but not the operator, the royalty holder will bear the entire cost of preparing the technical report.

Exemptions from the Obligation to File a Technical Report. Prior to the recent amendments, an issuer wishing to obtain financing in a new Canadian jurisdiction was obligated to file a current technical report prepared by an independent QP. Now, however, an issuer that is already a reporting issuer in another Canadian jurisdiction is exempt from this requirement.

A technical report is also no longer required when an offering memorandum is delivered solely to purchasers who are "accredited investors" as defined under securities legislation. The result is that foreign issuers and private Canadian companies are able to raise funds in Canada without the expense of preparing a NI 43-101 compliant technical report.

Disclosure of Historical Estimates. Given the current economic climate of rising commodity prices, inactive properties, which in many cases have had some initial studies performed on them, are now being reconsidered for development. Accordingly, regulators have become concerned that historical estimates, based on studies conducted prior to implementing the Instrument in February 2001, might be improperly promoted by issuers and relied upon by investors assuming there has been compliance with the Instrument. The amendments provide both a simplified definition of "historical estimate" as an estimate of mineral resources or mineral reserves prepared prior to February 1, 2001, and attach conditions to the disclosure of historical estimates using historical terminology. These conditions include disclosing the source and date of the historical estimate, commenting on the reliability and relevance of the historical estimate, and indicating any differences between the current Canadian Institute of Mining, Metallurgy and Petroleum's (CIM) definition standards and the terminology used in connection with the historical estimate. Further, the issuer must disclose any more recent estimates that are available.

In certain circumstances, disclosing a historical estimate can trigger a requirement to file an independent technical report. Such a requirement would be prompted if, for example, an issuer disclosed a historical estimate in a news release without appropriately cautioning that the QP had not done sufficient work to classify the historical statement as current resources or reserves, and that the historical estimate should not be relied upon. Regulators stress that the treatment of historical estimates as current will command much of their attention; issuers should not include historical estimates in economic analysis or add historical estimates to current mineral resources or reserves.

Use of Foreign Mining Codes. The amendments allow a foreign issuer or a Canadian issuer with properties in a foreign jurisdiction to use certain foreign mining codes in preparing a technical report, provided that a reconciliation to the CIM categories is disclosed. The SAMREC Code (South Africa), the IMMM Reporting Code (United Kingdom), and the JORC Code (Australia) may be used. In addition, the amendments replaced the permitted use of U.S. Geological Survey Circular 831 with the U.S. Securities and Exchange Commission Industry Guide 7 (Guide 7). It should be noted, however, that reconciliation of CIM and Guide 7 categories is only possible for reserves as Guide 7 allows only measured and indicated resource categories aggregated as "mineralized material" to be disclosed. Accordingly, the issuer must estimate resources using CIM categories to meet its obligations under the instrument in Canada.

Derivative Disclosure—Analysts' Reports. Representatives of the British Columbia Securities Commission (BCSC) and the Ontario Securities Commission (OSC) have expressed the view that issuers that promote the reports prepared by analysts may be taken to have adopted the contents of the reports as their own disclosure. Promotion could include distributing the reports or even linking to a report from the issuer's webpage.

Changes Affecting Qualified Persons

Limitation of Disclaimers. Regulators suggest that the use of blanket disclaimers in technical reports is misleading as some provincial securities legislation gives investors a statutory right of action against a QP for misrepresentation in disclosure, based on the technical report. That right of action exists despite any disclaimer to the contrary. Consequently, the amendments prohibit an issuer from filing a technical report in which the QP has disclaimed responsibility for, or liability in connection with any reliance on, the portion of the technical report prepared by or under the supervision of the QP. Disclaimers that limit the use or publication of the technical report in a manner that interferes with the issuer's obligation to file it publicly on SEDAR are also prohibited.

QPs are permitted to state that they relied on the work of other experts for information that is relevant to the technical report but outside of the QP's area of expertise. A QP must, however, conduct proper due diligence to ensure that the information relied on is sound in his or her professional opinion. On a practical note, issuers should agree with QPs on disclaimer language at the time the technical report is commissioned, rather than after it has been written.

New Requirements for Certificates. Prior to the amendments, a QP was required to certify that he or she was not aware of any material fact or material change with respect to the subject matter of the technical report, not reflected in the technical report, the omission of which would make the technical report misleading. Certificates must now state that, as of the date of the certificate,

to the best of the QP's knowledge, the technical report contains all scientific and technical information that is required to be disclosed to make the technical report not misleading.

Exemptions for Current Personal Inspections. A technical report does not need to include current personal inspection of a property by a QP if the mineral property in question is an "early stage exploration property," and seasonal weather conditions prevent the QP from either accessing the property or obtaining beneficial information from a personal inspection of the property. The issuer must disclose its reliance on the exemption, and complete the personal inspection as soon as is practical. The issuer would then be required to update all necessary filings. Representatives of the BCSC and the OSC have suggested that the postponed site visit should be conducted, at the latest, when the issuer first mobilizes crews to the property.

Changes to the TSX-V Appendix

In addition to the Instrument, issuers listed on the TSX Venture Exchange (TSX-V) must comply with the TSX-V Exchange Policy Manual Appendix 3F (the Appendix), which has recently been amended to be more consistent with current securities regulatory requirements, mining industry standards, and the TSX-V's working practices for issuers involved in mineral exploration. These amendments also became effective on December 30, 2005. Although not a new requirement, each director, regardless of his or her geological experience, must ensure that scientific and technical information collected and reported to the public is timely, balanced, accurate, and complies with the Appendix.

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