

NATURAL RESOURCES BULLETIN

November 2005

CHANGES TO NATIONAL INSTRUMENT 43-101 STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS

National Instrument 43-101 "Standards of Disclosure for Mineral Projects" ("NI 43-101" or "Rule") and its Companion Policy ("CP 43-101") have been in effect since February 1, 2001. NI 43-101 replaced NP 2-A "Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators". The Rule:

- establishes standards for all oral and written disclosure made by an issuer concerning mineral projects and requires that all disclosure be based on information prepared by or under the supervision of a "qualified person";
- requires that disclosure of mineral resources and mineral reserves be made in accordance with industry standard definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum ("CIM") unless otherwise provided for in the Rule; and
- requires certain disclosure to be supported by a written technical report prepared and certified by a qualified person, who in certain cases must be independent, in accordance with Rule.

On September 10, 2004 the Canadian Securities Administrators ("CSA") published for public comment certain changes to NI 43-101 ("Proposed Amendments"). After considering the comments received, the CSA made further revisions to the Proposed Amendments. On October 7, 2005 the CSA published new versions of National Instrument 43-101 and Form 43-101F1 Technical Report (the "New NI 43-101"). The Companion Policy 43-101 will also be replaced. The New NI 43-101 is to reflect changes in the mining industry, correct errors in the previous rule, simplify drafting, provide new exemptions, and generally make NI 43-101 more user-friendly and practical.

The New NI 43-101 is expected to come into force in every province and territory in Canada on December 30, 2005, subject to ministerial approvals where required.

HISTORICAL ESTIMATES

The CSA has added a definition for the term "historical estimate" in the New NI 43-101. Historical estimate means an estimate of mineral resources or mineral reserves prepared prior to February 1, 2001. An issuer may disclose a historical estimate using the historical terminology of the estimate provided that the issuer complies with the conditions set out in section 2.4 of New NI 43-101. However, an issuer will trigger the filing of a technical report if it makes disclosure of the historical estimate as if it is a current estimate.

The CSA has also created a new section 4.2(2). This change provides that an issuer will not trigger the requirement to file a technical report under section 4.2(1)(j) for first time disclosure of an historical estimate of mineral resources or mineral reserves if that disclosure includes the cautionary statements set out in 4.2(2)(b)(i) to (iii). The CSA expects the issuer to include the required cautionary statements in the same paragraph as, or immediately following, the disclosure of the historical estimate.

ROYALTY INTERESTS

The CSA has revised the definition of "mineral project" to include an explicit reference to "royalty interest or similar interest" in any exploration, development or production activity. As a result, issuers whose only interest in a mineral project is a royalty interest would be subject to NI 43-101 in the same manner and to the same extent as other mining issuers (i.e. if that royalty interest is material to the issuer).

While the CSA recognizes that a royalty interest is different from other interests in mining properties, it is nevertheless of the view that NI 43-101 should apply to this type of issuer if the technical information on the mineral projects underlying a royalty interest is material information about a royalty issuer.

The CSA also recognizes that it may be difficult for royalty holders to get the information they require to comply with the requirements of the Rule. A company that holds any such interest in a mineral project and has triggered on the requirements to file a technical report under section 4.2(1) of NI 43-101 may find the limited relief from this requirement under section 9.2 of NI 43-101. However, if the royalty holder's arrangements or agreements involve the sharing of capital losses or operating losses the CSA expects the royalty holder to make arrangements to access the necessary data from the operating company.

FOREIGN ISSUERS

The NI 43-101 provided for an exemption from the application of the Rule to a foreign issuer that met specified criteria. The New NI 43-101 does not contain the proposed exemption, since according to the CSA, over the past two years no issuer has sought this type of relief. This type of relief will continue to be dealt with on a case-by-case basis.

QUALIFIED PERSONS – INDEPENDENCE REQUIREMENT

The CSA has modified its definition of independence from the one included in the Proposed Amendments. The New NI 43-101 states that a qualified person is independent of an issuer if there are no circumstances that could, in the opinion of a reasonable person aware of all relevant facts, interfere with the qualified person's judgment regarding the preparation of a technical report.

The CSA has set out a number of examples that would not meet the independence requirement. These include where the qualified person:

- is an employee, insider, or director of the issuer or a related party of the issuer or a partner of any of these individuals;
- holds or expects to hold securities, either directly or indirectly, of the issuer, or a related party of the issuer, or another issuer with an interest in the property that is the subject of a technical report, or an adjacent property;
- has or expects to have, directly or indirectly, an ownership, royalty or other interest in the property that is the subject of the technical report or an adjacent property; or
- has received the majority of their income in the three years preceding the date of the technical report from the issuer or a related party of the issuer.

Discretionary relief from the independence requirement may be granted by the CSA where an issuer demonstrates that independence is not necessary in the particular circumstances.

PERSONAL INSPECTION REQUIREMENT

The CSA Proposed Amendments to NI 43-101 provided an exemption from the requirement that the qualified person preparing the technical report inspect the property that is the subject of the report in instances of extreme weather condition. The New NI 43-101 has broadened the exemption as a result of changing the term "grassroots exploration property" to "early stage exploration property". The expanded exemption will now apply to a property that has "no current mineral resources or mineral reserves defined, and no drilling or trenching proposed" in a technical report the issuer is filing. To rely on the exemption the issuer must disclose in the technical report the intended time frame to complete the personal inspection. The qualified person is still required to complete the personal inspection as soon as practical, and immediately file an updated technical report and qualified person's certificate and consent once the inspection is completed.

Examples given by the CSA of extreme weather conditions include inaccessibility due to seasonal flooding or where the property is completely covered in snow for an extended period of time. Other than in these circumstances where it is not possible to inspect the property, the issuer must obtain relief from the CSA where they wish to avoid a site visit. Disclosure of the reasons for not visiting the site must be included in the technical report.

TECHNICAL REPORTS – ACCREDITED INVESTORS

A current technical report must be filed to support information in an offering memorandum describing a mineral project on a material property distributed in Canada. However, the New NI 43-101 has removed the trigger for a technical report where the offering memorandum is delivered solely to accredited investors under local securities laws.

SAMREC CODE

The CSA has added the South African Code for Reporting of Mineral Resources and Mineral Reserves ("SAMREC Code") and replaced USGS Circular 831 with SEC Industry Guide 7 as acceptable foreign codes for reporting mineral resources and mineral reserves.

As a result, issuers incorporated outside of Canada are able to file a technical report that uses the mineral resource and mineral reserve categories of the JORC Code, the SEC Industry Guide 7, the IMMM System or the SAMREC Code if a reconciliation to the mineral resource and mineral reserve categories set out in NI 43-101 is disclosed in the technical report. Issuers incorporated in Canada but with properties outside of Canada would also be able to report under the JORC Code, the SEC Industry Guide 7, the IMMM System or the SASMREC Code if appropriate reconciliation and disclosure is made.

In the instance where an issuer announces the acquisition or proposed acquisition of property that is not in accordance to the CIM standards or the alternative codes set out above, the issuer may reclassify the resource and reserves according to CIM, disclose it as a target potential, apply to the CSA for an exemption to disclose the foreign estimates as is, or if applicable, for an extension of time for filing a technical report (for example, the Russian and Chinese codes).

DISCLAIMERS IN TECHNICAL REPORT

The CSA has expressed a concern with the use of blanket disclaimers by qualified persons. The New NI 43-101 prohibits blanket disclaimers that purport to disclaim responsibility for, or reliance on, that portion of the report that the qualified person prepared and disclaimers that create limitations on the use or publication of the report that would interfere with the issuer's continuous disclosure obligations.

The CSA considers blanket disclaimers potentially misleading. In certain circumstances, securities legislation provides investors with a statutory right of action against a qualified person for a misrepresentation in disclosure that is based upon the qualified person's technical report. That right of action exists despite any disclaimer to the contrary that appears in the technical report.

Item 5 of Form 43-101F1 Technical Report allows a qualified person to include a disclaimer of responsibility if the qualified person relied on other experts who are not qualified persons for legal, environmental, political or other issues relevant to the technical report that are not within a qualified person's area of expertise.

SUMMARY

The New NI 43-101 attempts to deal with many of the practical problems that issuers have had in applying NI 43-101. However, in some instances New NI 43-101 will result in extensions of the ambit of the Rule where arguably such coverage is not necessary, for example to royalty holders. It remains to be seen whether the New NI 43-101 provides more practical standards and accurately reflects the changes in the mining industry.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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