

Changes to National Instrument NI 43-101: Standards of Disclosure for Mineral Projects

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Canada is the home to the majority of the world's public mining companies, and the majority of mining company financings are completed in Canada. As a result, Canada has one of the most developed regulatory systems for mining companies, and its national rule NI 43-101 Standards of Disclosure for Mineral Projects ("NI 43-101") that establishes standards for disclosure of scientific and technical information for mineral projects has become somewhat of an international standard. Investors know, like, and understand NI 43-101, and often mining companies with no connection to Canada and therefore not subject to NI 43-101 will prepare technical reports and feasibility studies in accordance with NI 43-101 standards because of its acceptance in the mining and financing industry. NI 43-101 has become an international brand name conveying quality of the scientific and technical information on mineral projects.

On June 30, 2011 amendments to NI 43-101 became effective, to produce an updated and more flexible rule ("New NI 43-101") for mining issuers. New NI 43-101 reflects issuer and regulator experience with NI 43-101, and changes in the mining industry that has occurred over the years.

New NI 43-101 allows issuers to go to market without a technical report - in most circumstances

Under New NI 43-101, the trigger to file a technical report when filing a preliminary short form prospectus ("Short Form Prospectus") has been relaxed. Prior to its effective date, an issuer had to file a technical report in connection with a Short Form Prospectus, if the Short Form Prospectus contained new material scientific or technical information not contained

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A cautionary note:

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in a previously filed technical report. This trigger was easy to hit: either because an issuer clearly had new scientific or technical information; or, an issuer was unsure if the securities regulators would agree that its technical reports on SEDAR were current at the time the Short Form Prospectus was filed. The result being issuers usually had to file at least one technical report in connection with a Short Form Prospectus.

With New NI 43-101, an issuer must file a technical report with a Short Form Prospectus if the Short Form Prospectus discloses, for the first time, mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change in relation to the issuer, or a change in this information, if the change constitutes a material change in relation to the issuer. The securities regulators have said that in most cases, they think that first time disclosure of mineral resources, reserves, or the results of a preliminary economic assessment on a property material to the issuer will constitute a material change in the affairs of the issuer. Note that if disclosure of this information was made within 45 days of filing the Short Form Prospectus, and no technical report was filed in support, then a current technical report would have to be filed with the Short Form Prospectus. For example, prior to the effective date of New NI 43-101, if an issuer were describing for the first time a material property in a Short Form Prospectus (with or without a resource or reserve estimate or preliminary assessment), the issuer would be required to file a technical report at the same time as filing its Short Form Prospectus. Under New NI 43-101, the issuer would not have to file a technical report to support the scientific or technical information at the same time as the Short Form Prospectus, unless the Short Form Prospectus disclosed for the first time mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change, or a change in this information, if the change constitutes a material change.

New NI 43-101 should result in significantly less technical reports being filed in connection with Short Form Prospectus offerings. Also, these changes remove a significant uncertainty as to whether securities regulators reviewing the Short Form Prospectus would consider previously filed technical reports still current and suitable to support disclosure in the Short Form Prospectus. Issuers should therefore be able to access markets more quickly, and with less uncertainty about the outcome of the regulatory review, under New NI 43-101.

New NI 43-101 changes how historical estimates are treated

The definition of historical estimate has changed under New NI 43-101. It now means “an estimate of the quantity, grade, or metal or mineral

content of a deposit that an issuer has not verified as a current mineral resource or mineral reserve, and which was prepared before the issuer acquiring, or entering into an agreement to acquire, an interest in the property that contains the deposit.” There is no longer a calendar date (*i.e.*, Feb 1, 2001) to make an estimate historical under New NI 43-101.

If an issuer treats the historical estimates as historical and complies with New NI 43-101, no technical report will be triggered (this has remained the same as under NI 43-101). What has changed under New NI 43-101, is the time limit for filing a technical report when an issuer treats historical estimates as current. Under New NI 43-101, the time limit has been extended to six months, subject to the caution set out below.

New six month time limit to file technical report and related pitfall

Under New NI 43-101, issuers will have up to six months to file a technical report (subject to the caution set out below), when the issuer discloses information that requires a technical report to be filed under New NI 43-101 in a document that would not otherwise immediately trigger a technical report (*e.g.*, press release), and the disclosure is, among other things, supported by a technical report filed by another issuer that holds or held an interest on the same property. The document would contain first time disclosure by the issuer that acquired the interest in the property of mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change in relation to the issuer.

Issuers should be aware that it will be easy to have the six month deadline in mind and forget that it can be shortened if an issuer hits another trigger to file a technical report under New NI 43-101 before the six months is up. For example, in the context of an acquisition, if an issuer discloses, in a press release for instance, resource estimates on a property it is set to acquire, and that information constitutes a material change in the affairs of the issuer, under New NI 43-101 the issuer has six months from the date of the press release to prepare and file its own technical report on the property, as long as there is a technical report on SEDAR that supports that information. However, if the issuer then includes this information in an information circular or annual information form (“AIF”) one month later, the six month deadline is shortened to the date it files its information circular or AIF.

These are not the only examples when the six month deadline will be abridged. An issuer must be aware of all of the triggers that will shorten this time period as set out in New NI 43-101.

Changes related to qualified persons (“QPs”)

More flexibility in disclosure of scientific or technical information

Before New NI 43-101 came into effect, all disclosure of scientific or technical information made by an issuer had to be prepared by or under the supervision of a QP. Under New NI 43-101, this scientific or technical information is no longer required to be prepared or supervised by a QP, as long as it is approved by a QP. For example, an issuer disclosing scientific and technical information taken from a technical report in a news release would no longer be required to name the QP author in the news release as having prepared or supervised the information. New NI 43-101 allows, as an alternative, a QP employee of the issuer to be named as approving the content in the press release.

QP consent requirements are more relaxed under new NI 43-101

Some changes in New NI 43-101 that facilitate QP consents include:

- (i) QP consents are limited to parts of the technical report that the QP prepared;
- (ii) QP consents must identify the disclosure that it supports;
- (iii) in-house QP can approve later disclosure (see example below); and
- (iv) updated QP consents and certificates are not required where issuers rely on previously filed technical reports and there is no new material scientific or technical information (see example below).

Regarding subparagraph (iii) above, this means issuers are not required to get the original QP that prepared a technical report to sign off on technical information that is based on that technical report and presented in a later disclosure document. For example, if an issuer filed a technical report in connection with resource estimates disclosed in a press release, and the issuer then uses that same information in their AIF, the issuer does not need to name the author of the original technical report as having prepared or supervised the preparation of the technical disclosure in the AIF. Instead, they can get their own in-house QP to review and approve the disclosure

Regarding subparagraph (iv) above, this means that if an issuer already has a technical report on file that supports scientific or technical information in a document the issuer is now filing (*e.g.*, press release, AIF, information circular, takeover bid circular, offering memorandum, etc.), and there is no new material information on the property (*i.e.*, the technical report is still current), no technical report is triggered under New NI 43-101. Therefore, no additional QP consents are required.

Consequential amendments to NI 44-101 short form prospectus distributions

In addition to NI 43-101, the prospectus rule NI 44-101 *Short Form Prospectus Distributions* (“NI 44-101”) requires QPs to be named in the Short Form Prospectus as experts, and requires a written consent from those named QPs. Issuers used to spend a lot of time trying to locate QPs for written consents when it came time to file a Short Form Prospectus, or final short form prospectus if they were relying on a previously filed technical report. This often proved challenging, as QPs were frequently in remote locations and difficult to locate.

Consequential amendments to NI 44-101, which also came into effect June 30, 2011, allow issuers to file expert consents of the QPs by an authorized signatory of the company that employed or employs the QP instead of the QP himself or herself, if:

- the qualified person’s consent is required in connection with a technical report that was not required to be filed with the Short Form Prospectus,
- the qualified person was employed by a person or company at the date of signing the technical report, and
- the principal business of the person or company is providing engineering or geoscientific services.

A consent filed under the amendments to NI 44-101 must be signed by an individual who is an authorized signatory of the person or company. Also, this individual must fall within the definition of “qualified person” (which has been revised) under New NI 43-101, except for the requirement to have experience relevant to the subject matter of the mineral project and the technical report.

Other changes related to QPs

New NI 43-101 contains other changes related to QPs. These include not requiring independence for QPs when preparing technical reports for issuers listed on certain exchanges upon becoming a reporting issuer in Canada, and the expansion of foreign codes allowed to be used in technical reports and other disclosure, by foreign issuers or Canadian issuers with foreign properties. In addition, the list of acceptable associations for QPs has been revised under New NI 43-101.

New NI 43-101 tailors technical report content to the stage of development of project

The technical report form under New NI 43-101 is less prescriptive and gives more discretion to the QP on form content details. Under New NI

43-101, the technical report content requirements are different, depending on the stage of development of the subject property. For example, there are different requirements for illustrations in technical reports under New NI 43-101 for “exploration project,” “advanced properties other than properties under development,” and “properties under development or in production”.

The “advanced property” definition is new, and means: “a property that has (a) mineral reserves, or (b) mineral resources the potential economic viability of which is supported by a preliminary economic assessment, a pre-feasibility study or a feasibility study”.

In reality, however, when preparing the content of technical reports, there are four levels of development of mineral properties recognized, each with different allowances and requirements under the new technical report form: (i) exploration without mineral resources, (ii) exploration with mineral resources, (iii) advanced properties and producing properties with a planned material expansion, and (iv) producing properties with no material expansion planned (see below).

Under New NI 43-101, producing issuers are exempt from including economic analysis in technical reports on properties currently in production, unless the technical report includes information on a material expansion of current production. This will provide relief to producing issuers who often do not want to provide this sensitive information in publically available technical reports.

Other changes under new NI 43-101

Issuers holding royalty interests will be exempt under New NI 43-101 from filing technical reports if the owner or operator of the property is a reporting issuer in Canada. Producing issuers listed on a specified exchange, who have disclosed the scientific and technical information that is material to the royalty holder, will also be exempt under New NI 43-101.

In addition, gross value of metal or mineral in a deposit or a sampled interval or drill intersection is prohibited under New NI 43-101. As well, metal or mineral equivalent grade for a multiple commodity deposit, sampled interval or drill intersection is prohibited, unless the grade for each material or metal used to establish the equivalent grade is also disclosed.

Finally, there are other small changes in New NI 43-101 that, together with the changes described in this article, should make New NI 43-101 more flexible and easier to deal with for issuers, once issuers understand how to take advantage of these changes.