

The U.S. Securities and Exchange Commission's New Regulation S-K 1300,
Disclosure Requirements for Mining Registrants;
What Every Minerals Geologist Needs to Know.

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Abstract

Until most recently, field geologists employed by mineral exploration and mining companies, with stock listings in the United States (U.S.), had little reason to be concerned about public disclosure of their data generated by field mapping, geophysical surveys, geochemical sampling, drilling, and analytical work. Public disclosures of results from such activities were often made by senior exploration or mine operations management, based on the data and information fed to them by their hands-on geologists. This situation had the potential to cause a disconnect between the persons generating the results and those disclosing them - if they were disclosed at all. For those disclosures, officers, senior management and investor relations staff of companies registered with the U.S. Securities and Exchange Commission (SEC) relied on a set of general and brief guidelines set forth in the SEC Industry Guide 7 (Guide 7), which was based loosely upon the 1980 U.S. Geological Survey Circular 831.

Prior to Guide 7, and outside of the U.S., guidelines and/or requirements for public disclosure of technical exploration results and data had, for the most part, not yet been developed. However, governmental concern in Australia, in the 1980s, regarding fraudulent disclosure of exploration results and mineral reserves for certain projects resulted in the formation of the Joint Ore Reserves Committee (JORC) of the Australasian Institute for Mining and Metallurgy and the Australian Stock Exchange and the subsequent enactment of the JORC Code in 1989. Despite promulgation of the JORC Code, in February 1999, it was revealed that the publicly disclosed mineral reserves of more than 200 million gold ounces for the Busang gold exploration project in Indonesia, operated by the Canadian-listed junior company, Bre-X, was fraudulent. This infamous, watershed event caused radical changes in public disclosure requirements and responsibilities to begin to take place worldwide. Canada was first to react to the Bre-X fraud by enacting National Instrument 43-101 (NI 43-101) in 2001, which consisted of a comprehensive set of technical guidelines and regulations pertaining to public disclosure of geologic results and data for projects ranging from grassroots exploration to mine operations.

In the U.S., work to revise SEC Industry Guide 7 public disclosure requirements began, as early as 1989, with the formation of the first of a series of committees assembled by the Society for Mining, Metallurgy, and Exploration (SME). After much effort by SME and other groups to encourage the SEC to update its technical disclosure guidelines and requirements, in line with those of Canadian, Australian, South African, and other jurisdictions, SEC Regulation S-K 1300 For Mining Property Disclosure was approved on October 31, 2018. S-K 1300 effectively replaces Guide 7.

Introduction

The replacement of SEC Guide 7 with S-K 1300, issued in 2018, served to rationalize technical disclosure standards for U.S. publicly traded mineral exploration and mining companies with those of other countries' regulatory systems; notably, Canada, South Africa and Australia. Though the earlier development of Guide 7 preceded many of the other guides in effect today, it was much less encompassing than all the others typically utilized by publicly traded companies at the time. Some pundits believed the strength of Guide 7 was in its simplicity, which minimized the paperwork for U.S. public companies, and allowed the SEC much latitude in their review of public company disclosures, while others saw it as major flaw and one that did little to provide a common set of terms, concepts, and rules in sync with other countries' security-market systems.

Discussion

Background

The SEC was one of the first governmental agencies in the world to adopt guidelines for technical disclosure by publicly traded mineral exploration and mining companies, which were collectively termed Mining Registrants by the SEC. Mining disclosure guides were first developed in Form S-3 for mining issuers and for Regulation A in 1939. These mining disclosure guides were updated in 1981 for the new Form S-18 (Release 33-6299), closely following the publication of the 1980 U.S. Geological Survey Circular 831, authored by the U.S. Geological Survey and the U.S. Bureau of Mines. That widely known publication, “Principles of a Resource/Reserve Classification for Minerals”, presented the two agencies’ concepts of how mineral deposit inventories should be classified as a revision of the prior classification system published in U.S. Geological Survey Bulletin 1450-A (1976). Circular 831 was written under the premise that *“Experience with this resource classification system showed that some changes were necessary in order to make it more workable in practice and more useful in long-term planning”* (USGS, Cir. 831, 1980).

Form S-18 was subsequently abandoned in 1992, but the disclosure language in Form S-18 was re-issued, unchanged, in 1992 as SEC Guide 7 of the Securities Act Industry Guides (<https://www.sec.gov/about/forms/industryguides.pdf>, page 30). SEC Guide 7 became the standard by which the SEC assessed the adequacy of mining company disclosures. Although Guide 7 was one of the first sets of guidelines in the world to assist the mining industry with the proper way to disclose technical information to the stock-buying public, it encompassed only slightly more than two pages of the full SEC Securities Guides. Because of its brevity, mineral exploration and mining companies and the consulting industry that served them perceived the lack of specific details in the guidelines of Guide 7 to be a significant issue. But perhaps more importantly, the mining industry was frustrated by Guide 7’s requirement that material containing potentially valuable amounts of metal(s), situated outside of the physical boundaries of ore reserves, could only be classified generally as “mineralized material”, rather than designated as measured, indicated or inferred mineral resources, as allowed by other securities markets in Canada, Australia, and other countries. It was widely believed that this restrictive requirement imposed by Guide 7 created a significant disadvantage to companies listed on U.S. stock exchanges regulated by the SEC.

A major event in this chapter of the history of U.S. mining security regulations was a 2003 SME conference held in Washington, DC, which brought together professionals from around the world to discuss Guide 7 and its comparison to the various international regulations and their differences. From that meeting, at which the SEC presented its rationale for maintaining the format and content of Guide 7, the wheels of change began to turn. However, it would not be until 2018 that changes were made; fifteen years after the watershed Washington, DC conference. SME, and its Reserve and Resource Committee, took a lead role in ongoing, constructive dialogue with the SEC on behalf of

its members. The result was the replacement of Guide 7 by a new set of regulations: S-K 1300.

Principles of S-K 1300

In October 2018, SEC adopted amendments to its property disclosure requirements for mining registrants, laid-out in Item 102 of Regulation S-K of the Securities Act of 1933 and the Securities Exchange Act of 1934 and in its Industry Guide 7. For additional information the reader is referred to the SEC's website (<https://www.sec.gov/corpfin/secg-modernization-property-disclosures-mining-registrants>). The new rules take effect January 1, 2021, though companies may tailor their new disclosures to comply with them now. After January 1, 2021, Guide 7 will be rescinded.

Within the new regulations, it is especially important for minerals geologists to know that the SEC now embraces concepts of Mineral Reserves (formerly referred to as Ore Reserves) and Mineral Resources. Especially important to the global mineral exploration and mining industry is the inclusion of the concept of Inferred Mineral Resources. This simple change to SEC regulations now allows companies to use terms and concepts embraced around the world in numerous other regulatory systems, thus reducing the potential for confusion within the global stock buying public.

The information presented herein about the new U.S. SEC regulations is not, by any means, all encompassing. The minerals geologist is encouraged to read the details in the SEC website information and discuss them with their own in-house "qualified person" (QP) or persons" (the definitions of which follow) and legal counsel for clarity and a more comprehensive understanding. Minerals industry professionals in the U.S., including the Geological Society of Nevada ("GSN") 2020 Symposium attendees, now have a framework for the reporting of exploration and mineral resources and mineral reserves that translates across the globe.

As codified in S-K 1300, U.S. mining registrants must now, among other requirements:

- Provide disclosures specified in S-K 1300 for all its material mining operations and/or exploration projects. Important salient points include:
 - Satisfactory application of the concept of "materiality" as it applies to 1) The overall importance of exploration discoveries, lack of exploration success, or significant progress towards diligent evaluation of exploration projects. For junior exploration companies, one or all of these issues may be material; 2) Significant disruptions in or shortfalls to production at existing mine operations;
- Provide all information ranging from exploration through extraction to the first point of sale;
- Disclose information related to measured, indicated, and inferred mineral resources in addition to proven and probable mineral reserves;

- Previously, though not specifically stated in Guide 7, the SEC permitted non-reserve mineralization to be stated only as “Mineralized Material”. Inferred resources could not be included in name or by implication.
- Disclose material information in aggregate as well as individually (for those companies with more than one material property);
- Disclose exploration results, if those results are determined to be material to investors when deciding to invest;
- Disclose exploration targets along with cautionary and explanatory comments;
- Ensure that disclosed information is prepared by a Qualified Person(s) (QP);
 - Similar to criteria of other jurisdictions, the QP must have at least five years of relevant experience in the type of mineralization and deposit discussed, and be a member or licensee in good standing of a recognized professional organization. For more details, See S-K 1300, Section II.C.2, Page 79 – The Definition of “Qualified Person”;
- Submit a Technical Report Summary (the “TRS”), which must be prepared by a QP;
 - The TRS must be included with the company’s SEC filings, as an exhibit, either when the company first reports mineral resources or mineral reserves for a project in development or an existing mine operation, or when there has been a material change to either of these. Furthermore, a company may, but is not required to (subject to materiality determinations), file a TRS to support disclosure of exploration results;
 - The TRS required to support the determination and first disclosure of mineral resources is termed the Initial Assessment (the “IA”). The IA must be prepared by a QP and must include, among other items, a qualitative assessment of technical and economic factors applied during the estimation of mineral resources and any other factors that support the reasonable prospects for economic extraction of the mineral resource. The QP must include a description of the derivation of the cutoff grade (or commodity value cutoff) used as the basis for tabulating the mineral resources in the IA, including the unit operating costs for the type of mine envisioned and projected mineral prices;
 - The QP must use a price for each recoverable commodity in the mineral resource or mineral reserve. The price(s) used may be either historical or based on forward-looking forecasts, with reasons and assumption stated for the price(s) selected; and
 - The QP may elect to include a cash-flow analysis in an IA. If a cash-flow analysis is included, the QP may include inferred mineral resources, provided that cautionary and explanatory statements are also included.
- Classify mineral resources into inferred, indicated, and measured mineral resources categories, based on increasing confidence in the underlying geological evidence;

- This classification requirement is consistent with the classification scheme accepted by the Committee for Mineral Reserves International Reporting Standards (CRIRSCO; <http://www.criresco.com/welcome.asp>), the 1994 alliance of National Reporting Organizations, and those of other jurisdictions.
- Disclose the modifying factors applied to indicated and measured mineral resources in the conversion of these to mineral reserves;
 - The CRIRSCO modifying factors form the framework for the new regulations.
 - The TRS required to support the determination and disclosure of mineral reserves may be either a pre-feasibility study (PFS) or a feasibility study (FS).

Furthermore, the new S-K 1300 guidelines state that a QP will not be subject to expert liability under Section 11 of the Securities Act for modifying factors beyond the expertise of the QP. These factors are enumerated in the new regulations but include such items as macroeconomic trends, marketing information and plans, legal matters, environmental matters, accommodations to local individuals or groups, and governmental factors.

Conclusions

Why should geologists working for U.S.-listed companies and the GSN 2020 Symposium attendees care about S-K 1300? As one of the preeminent, U.S. professional societies supporting the dissemination of research in mineral deposit formation and, as a natural consequence, exploration for those deposits, GSN reaches a large number of mineral industry geologists in the US and the world. Many industry professionals attend GSN events, purchase GSN publications, and work for publicly traded mineral exploration and production companies. Those same technical professionals interact with other professionals in their companies or business dealings, such as legal, accounting, and finance staff members, which are responsible for molding technical information generated by their exploration staff into public company disclosures to the stock-buying public. Understanding the nature of disclosure requirements allows the exploration and mine geological professional staff to conduct their work and generate results in a manner that is material, transparent, and competent - three fundamental tenets of many industry guidelines and regulations.

Salient points about S-K 1300, for the mineral exploration and production geologists, include:

- S-K 1300 provides unanimity with the existing guidelines and regulations of other securities agencies to provide for Material, Transparent, and Competent scientific and technical disclosures by U.S. publicly-traded mineral-exploration and production companies;
- Exploration and mine operations data can be complex and potentially confusing to the stock-buying public. S-K 1300 was formulated to make it easier for investors to grasp the significance of public company results by ensuring such results (i.e. surface outcrop and trench sampling, geochemical soil sampling, geophysical surveys, and drill hole sampling procedures) conform to S-K 1300 guideline;
- S-K 1300 promotes the principles of “Best Practice” in mineral exploration (Birak and Earnest, 2016);
- The new regulation provides for the development of Quality Assurance/Quality Control (QA/QC) programs that conform to guidelines in other jurisdictions, thus promoting generation of reliable, fundamental data;
- S-K 1300 promotes early communication with company and consultant mining engineers to ensure that they have an understanding of the geometry of the mineralization to allow them to select the appropriate mining method for the mineral deposit;
- S-K 1300 fosters early communication with company and consulting metallurgists to ensure proper collection of representative metallurgical samples conforming to stated guidelines;
- The new regulation encourages estimation of mineral resources that reflect the geologic characteristics of the underlying mineral deposit; and

- Understanding the responsibilities, and liabilities, of the QP as defined in the new regulation is critical for all geologists.

More and more frequently, mineral exploration and mining companies are working in multiple jurisdictions and, as a result, subject to those jurisdictions' regulatory regimes. It is not only incumbent on geologists to understand the regulatory "lay-of-the-land" in the U.S. but to be able to conduct their work in a manner that gives company senior management and, ultimately, company stockholders confidence in their results; all embraced within the concepts of Best Practice (Birak and Earnest 2016). With the enactment of S-K 1300, the US regulatory framework is now consistent with Canadian and other jurisdictions and shareholders' interests are, arguably, better served.

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