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SEC Transactions and Compliance ("STAC") Group

The U.S. Subpart 1300 Mining Disclosure Regime – Trends in Staff comments during the first year of annual reporting

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Overview

The 2021/22 annual reporting cycle[1] was the first in which SEC-registered mining companies ("**Registrants**"), including domestic and foreign private issuers,[2] were required to comply with the U.S. Securities and Exchange Commission's ("**SEC**") Subpart 1300 mining disclosure rules in their annual reports. The rules, promulgated under subpart 1300 of Regulation S-K ("**Subpart 1300**") under the U.S. Securities Act of 1933 (the "**Securities Act**"), replaced existing guidelines under Industry Guide 7 with the goal of providing investors with a more comprehensive understanding of Registrants' mining properties while more closely aligning the SEC's disclosure requirements and policies for mining properties with current industry and global regulatory practices and standards.

As of October 31, 2022, the staff of the SEC (the "**Staff**") had issued over two dozen public comment letters on Subpart 1300 disclosure in annual reports. While each letter raises comments particular to the disclosure of the subject Registrant, a number of broad trends emerge.

In this briefing, we discuss four of these trends, each of which has implications for Registrants preparing or updating Subpart 1300 disclosure in their SEC filings:

> Materiality determinations are likely to be questioned if they contradict statements made elsewhere in the Registrant's public disclosure.

> Granular, item-by-item compliance with Subpart 1300 is expected.

> The carve-out from "expert" liability for QPs (as defined below) is very limited.

> Disclosure beyond the requirements of Subpart 1300, including from other mining disclosure regimes, is strongly discouraged.

For a discussion of the Subpart 1300 rules themselves, please see our original client briefing available here.

Key trends in Staff comments

Materiality determinations are likely to be questioned if they contradict statements made elsewhere in the Registrant's public disclosure

Under Subpart 1300, a Registrant is required to make specified disclosures about mining operations that it deems material to its business and financial condition (including, for each material property, a technical report summary pursuant to Item 1302 of Subpart 1300 ("**Item 1302**") and individual property disclosure pursuant to Item 1304 of Subpart 1300 ("**Item 1304**")). In promulgating Subpart 1300, the SEC chose not to adopt a bright-line test for materiality and declined to create a presumption of materiality, as initially proposed, for mining operations that comprise 10% or more of a Registrant's total assets.[3] Instead, the SEC opted for a principles-based approach in line with the existing approach to materiality under other provisions of the U.S. federal securities laws.[4]

Materiality under Subpart 1300 is determined pursuant to Rule 405 under the Securities Act and Rule 12b-2 under the U.S. Securities Exchange Act of 1934 (the "**Exchange Act**"). These rules state that a matter is material if there is a substantial likelihood that a reasonable investor would attach importance to it in determining whether to buy or sell the securities of the company. In declining to adopt a quantitative measure of materiality, the SEC emphasized that it believed that an assessment that takes into consideration all relevant facts and circumstances would lead to better materiality determinations. The SEC went on to say that, when determining whether its mining operations are material, a Registrant must:

> Consider both quantitative and qualitative factors, assessed in the context of the Registrant's overall business and financial condition;

> Aggregate mining operations on all of its mining properties, regardless of the stage of the mining property, and size or type of commodity produced, including coal, metalliferous minerals, industrial materials and mineral brines; and

> Include, for each property, as applicable, all related activities from exploration through extraction to the first point of material external sale, including processing, transportation and warehousing.[5]

In its comment letters, the Staff has challenged Registrants' materiality determinations when they appear to conflict with statements that the Registrant makes elsewhere in its public filings about the financial or operational significance of such operations. For example, while the SEC declined to adopt a specific quantitative measure of materiality as part of Subpart 1300, where a Registrant's mining properties appeared to represent approximately 12% of total sales, 26% of operating income, 22% of adjusted EBITDA and 20% of total assets, the Staff asked the Registrant to explain its determination that these operations were not material.[6] In a separate instance, a Registrant described an exploration property as "one of the largest critical mineral deposits in the U.S." and further noted that its executive compensation and certain equity instruments were economically correlated with development milestones and timelines at the property. This led the Staff to assert that the Registrant needed to make disclosures consequent with the property being material.[7] While in the latter case the Registrant provided an explanation of its materiality analysis on which the Staff raised no further comments,[8] in the former case the Registrant amended its annual report to include the additional requested disclosures.[9] Even in the absence of potentially conflicting disclosure, the Staff has asked mining companies to explain whether they have assessed materiality under Subpart 1300 if the mining companies do not disclose any material mining operations.[10]

Takeaway – In order to achieve its aim of providing investors with a more comprehensive understanding of Registrants' mining operations, the SEC is likely to continue to test Subpart 1300 materiality determinations. When assessing the materiality of their mining operations, Registrants should apply a reasoned approach consistent with their approach to evaluating materiality for purposes of their other U.S. disclosures. All relevant facts and circumstances, including both quantitative and qualitative factors, should be considered in coordination with other company functions that assess materiality for purposes of the Registrant's disclosures, including finance, controlling, legal and company secretarial. Registrants should be prepared to explain their materiality determinations in the event of Staff comment.

Granular, item-by-item compliance with Subpart 1300 is expected

One of the trends that is most apparent from the Staff's comments is the specificity with which it has assessed Registrants' summary disclosure, individual property disclosures and technical report summaries against the detailed requirements of Subpart 1300 during the first year of annual reporting. While the Staff has taken a flexible approach to the format and presentation of certain disclosures under Subpart 1300, it has closely evaluated compliance with each disclosure requirement and issued comment letters highlighting granular omissions.[11]

Disclosure topics which drew repeated comment include:

> **Summary Disclosures:** Registrants with material mining operations and two or more mining properties are required to disclose aggregated summary information that includes ***all*** of the properties comprising a Registrant's mining operations.[12] The scope of information required is intentionally broad to provide investors with an accessible snapshot of the Registrant's complete operations. While the Staff appears to accommodate various formats and presentations of aggregated summary information (with presentations ranging from tabular to narrative and detailed cross-reference guides), it has focused on the comprehensiveness of Registrants' summary disclosure, with Registrants drawing comments for not including all mining properties in their summaries, particularly those they deem immaterial or exploratory, which must be included.[13] The Staff has also made clear that summary disclosures are required for Registrants with just one, or even no, producing properties.[14]

> **Attributable interest:** To avoid potentially misleading investors, Subpart 1300 requires that Registrants only disclose that portion of their mineral resources and reserves that is attributable to their interest in the property.[15] While this provision is expressly contained in Item 1303 of Subpart 1300 (Summary Disclosures), it applies broadly to disclosures made under Subpart 1300, with a number of Registrants drawing comments from the Staff for disclosing mineral resources and reserves information on a 100% basis in their technical report summaries and individual property disclosures when their attributable interest was below 100%.[16]

> **Commodity price:** Because of the important role that pricing considerations play in determining estimates of mineral resources and reserves, the Staff believes that pricing information is material to an investor's understanding of these estimates and must therefore be disclosed under Subpart 1300.[17] However, the Staff has cautioned that overly optimistic prices may mislead investors about the actual prospects of the mining operations by inflating the value of estimated mineral resources.[18] In a number of comment letters, the Staff stressed the need for Registrants to disclose detailed explanations of how and when commodity prices are determined and provide fulsome disclosure of the material assumptions underlying the selection of the prices.[19] Relatedly, the Staff has asked Registrants to clearly specify the point of reference for their reserves to further clarify an investor's understanding of its pricing considerations.[20]

> **Cash flow forecast components:** Subpart 1300 requires that the technical report summary includes annual cash flow forecasts based on an annual production schedule for the life of the project and measures of economic viability.[21] The Staff has highlighted that a Registrant's cash flow forecasts are a material part of an investor's assessment of the Registrant's current and prospective mining operations.[22] Certain of the Staff's comments appear to be directed at maximizing the detail contained in these forecasts by prompting Registrants to disclose, on an annual basis, the line items used in calculating them (e.g., revenues, royalties, taxes, by-products etc). Such annual line item disclosures are not explicitly part of the required technical report summary disclosures.[23]

> **Deficient technical report summaries:** Where the Staff has deemed technical report summaries to be deficient because of a lack of the particularized disclosure required under Item 601 of Regulation S-K ("**Item 601**") or because of the omission of information that the Staff considers material to an investor's understanding of a Registrant's property, the Staff is unlikely to allow a Registrant to address the deficiency by agreeing to update the disclosure in a technical report summary filed as part of the following year's annual report. Instead, the Staff's comments indicate that they will require Registrants to file technical report summaries as amendments to the annual report in the current reporting year in order to remedy the deficiencies with respect to the related annual report filing.[24] The Staff has also asked that any deficiencies in technical report summaries that are due to information not being available are disclosed and thoroughly explained. For example, when disclosure of mineral resources is not possible, a technical report summary must include a discussion of the circumstances underlying the absence of the mineral resources and must clarify whether measured and indicated resources were converted to reserves and why inferred resources were not determined.[25]

Key takeaway – In its comments on the first round of annual reporting under Subpart 1300, the Staff has been acutely focused on Registrants providing comprehensive information about their mining operations and strictly complying with the granular requirements of Subpart 1300. In light of the policy goals underpinning Subpart 1300,[26] we expect this focus to continue. Registrants and qualified persons ("**QPs**") should closely evaluate their Subpart 1300 disclosures against each item of the subpart and should err on the side of strict compliance with the detailed prescriptions of each disclosure requirement to mitigate the change of receiving comments from the Staff.

The carve-out from "expert" liability for QPs is very limited

Under Subpart 1300, every disclosure of mineral resources, mineral reserves and material exploration results must be based on, and accurately reflect information and supporting documentation prepared by, a QP. Registrants are required to obtain a signed and dated technical report summary from the QP which must be filed as an exhibit to the related SEC filing when the Registrant is disclosing mineral reserves or mineral resources for the first time or when there has been a material change in the mineral reserves or mineral resources from the last technical report summary filed for the material mining property. If the technical report summary is filed as an exhibit either to a registration statement or to an Exchange Act report (e.g., *inter alia*, an annual report on Form 20-F) that is incorporated by reference into a registration statement, the QP is considered an "expert" under the Securities Act and must provide their written consent as an exhibit to the filing. In these situations, the QP is subject to liability as an expert for any untrue statement or omission of a material fact contained in the technical report summary under Section 11 of the Securities Act.

While the Staff maintained in the Adopting Release that categorizing QPs as experts subject to Section 11 liability is consistent with the protections afforded to investors under the Securities Act, it acknowledged that there are certain matters in the technical report summary which fall outside the expertise of the QP. For these matters, the Staff expects QPs to require assistance from the Registrant. As a result, the Staff provided a carve-out from liability for the QP for any description in the of the procedures, findings, and conclusions reached about matters identified by the QP as having been based on certain information provided by the Registrant. The information must be identified in a separately captioned section entitled "Reliance on Information Provided by the Registrant" that identifies the categories of information set out in the rule, the extent of the reliance and why the QP considers reliance to be reasonable.[27]

Contrastingly, the Staff did not provide an exemption to allow QPs to disclaim responsibility for any information and documentation prepared by a third-party specialist upon which the QP has relied or for any part of the technical report summary based upon or related to that information and documentation.[28] The Staff believes that allowing these disclaimers would undermine the quality of the technical report summary as neither the QP nor the third-party would be accountable for any material misstatements or omissions in the information.

Consistent with the policies expressed in the Adopting Release, the Staff has stressed the limited nature of the carve-out from Section 11 liability for QPs in its comments. Specifically:

> **QP reliance on information provided by the Registrant is strictly limited to the codified categories:** The Staff has clarified that the QP may only refer to one or more of the six categories set out in Item 1302(f)(1) when describing information from the Registrant on which it has relied.[29] These references should be verbatim, although some Registrants have shortened the name of the categories and/or included brief summaries of the particular information relied upon within each codified category.[30] As articulated by the Staff, the accommodation is strictly limited to these categories because they are the most likely to fall outside of the QP's expertise and the categories about which the QP is most likely to require assistance from the Registrant.[31]

> **QPs must take, and may not disclaim, responsibility for information or documentation from a third-party specialist:** Where Registrants have filed technical report summaries that reference work completed by other specialists which have not been identified as QPs, the Staff has stressed that a QP must take responsibility for all information in the technical report summary except for certain information provided by the Registrant. The QP must make a statement to this effect within the report. Similarly, the Staff has rejected the use of any form of disclaimer to qualify QP reports and estimations with reference to reliance on any third party specialist who is not a QP.[32] The Staff has, however, indicated a willingness to allow general disclaimer language informing investors of the inexact nature of estimates and approximations and the factors that may cause mineral resources and mineral reserves to fluctuate.[33]

Takeaway – In preparing technical report summaries, QPs and Registrants should work together to clearly delineate the information for which each party is responsible. Registrants should ensure that the information they provide to QPs is subject to their internal controls and disclosure procedures. In reviewing and finalizing the language of the report, both parties should confirm that any explanations of reliance on Registrant information and general disclaimers are consistent with the wording of Subpart 1300. Boilerplate disclaimers should be avoided.

Disclosure beyond the requirements of Subpart 1300, including from other mining disclosure regimes, is strongly discouraged

In adopting Subpart 1300, the SEC noted that it believed that the final rules reflect an appropriate consideration of the promotion of efficiency, competition, and capital formation in addition to investor protection.[34] Between the proposal of the rules and their adoption, the SEC made several revisions to align the Subpart 1300 disclosure requirements more closely with international standards. However, the SEC also retained certain requirements which diverge from international standards and specifically declined to adopt other mining codes because of the unique purposes and characteristics of the U.S. federal securities laws.[35] In its comments on the first year of annual reports, the Staff focused on ensuring that the contents of Subpart 1300 disclosures did not exceed the parameters set by the requirements of the rules, demonstrating a preference for precisely tailored disclosure as opposed to over disclosure. For example, the Staff has requested the removal of terms that imply an equivalence to disclosure required under Subpart 1300 without being fully compliant with the subpart.[36] Relatedly, while Subpart 1300 is closer to international standards than Industry Guide 7, the Staff has continued to emphasize that Registrants must not include mining information which is required by other jurisdictions as a substitute for disclosures required by Subpart 1300.[37]

Takeaway – Registrants should exercise caution when including information in their Subpart 1300 disclosures which exceeds the specific requirements of the rules. Where a Registrant prepares public disclosure under more than one mining disclosure regime, care should be taken to ensure that disclosure included within their SEC filings is consistent with the requirements of Subpart 1300 and not substituted for, or supplemented by, non-compliant disclosure from another mining regime.

Conclusion

Taken together, the Staff's comments on the first set of annual reports subject to Subpart 1300 demonstrate a focus on detailed compliance with each of the enumerated disclosures in the rules. While the Staff has accommodated differences in style and manner of presentation, it has adopted a robust interpretative approach to Subpart 1300's substantive requirements in line with the policy goals and rationale articulated in the Adopting Release. Consistent with its approach to other required disclosures under the U.S. federal securities laws, in reviewing Subpart 1300 disclosures the Staff will not necessarily accept a Registrant's materiality determination at face value and will question it in light of the totality of the Registrant's disclosure. The Staff has also shown that it intends to tightly monitor the content of QP technical reports to remediate deficiencies and exclude non-compliant disclosures from other mining regimes and impermissible limitations on QP liability.

We expect the Staff to continue to apply a high level of scrutiny to Subpart 1300 disclosures during the next reporting cycle as it looks to further establish its disclosure expectations under the regime. Accordingly, in preparing or updating Subpart 1300 disclosure, Registrants should keep these trends in mind and ensure that disclosure is prepared in close cooperation with other key reporting functions and advisers to present a comprehensive and consistent description of their mining properties.

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[1] Annual reports for fiscal years beginning on or after January 1, 2021.
[2] Canadian issuers that report pursuant to the Multijurisdictional Disclosure System (MJDS) are not required to comply with SK-1300.
[3] Rule 40 Modernization of Prop. Disclosures for Mining Registrants ("**Adopting Release**"), Release No. 10570 at 24 (Oct. 31, 2018).
[4] Id. 23-24.
[5] 17 CFR 229.1301(c).
[6] SEC Comment Letter, Summit Materials Inc. ¶1 (June 27, 2022).
[7] SEC Comment Letter, IperionX Ltd. ¶4 (April 12, 2022).
[8] SEC Comment Response Letter, Summit Materials Inc. ¶1 (July 12, 2022).
[9] SEC Comment Response Letter, IperionX Ltd. ¶4 (May 4, 2022).
[10] SEC Comment Letter, Gerdau SA ¶1 (June 9, 2022).
[11] E.g., SEC Comment Letter, SSR Mining Inc. ¶2, 10 (May 2, 2022); SEC Comment Letter, Aluminium Corp. of China Ltd ¶7 (July 7, 2022).
[12] Includes all properties that a Registrant (i) owns or in which it has, or it is probable that it will have, a direct or indirect economic interest; (ii) operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; or (iii) has, or it is probable that it will have, an associated royalty or similar right.17 CFR 229.1303(a)(1).
[13] E.g., SEC Comment Letter, Odyssey Marine Exploration Inc. ¶1 (July 6, 2022); SEC Comment Letter, SSR Mining Inc. ¶1 (May 2, 2022).
[14] SEC Comment Letter, Arras Minerals Corp. ¶2 (July 29, 2021); SEC Comment Letter, Odyssey Marine Exploration Inc. ¶1 (July 28, 2022).
[15] Adopting Release supra note 3, at 226.
[16] E.g., SEC Comment Letter, Freeport-McMoran Inc. ¶2 (April 25, 2022); SEC Comment Letter, Sisecam Resources LP ¶1 (June 30, 2022); SEC Comment Letter, SSR Mining Inc. ¶4 (May 2, 2022).
[17] Adopting Release supra note 3, at 165.
[18] Adopting Release supra note 3, at 342.
[19] E.g., SEC Comment Letter, Freeport-McMoran Inc. ¶7 (April 25, 2022); SEC Comment Letter, Summit Materials Inc. ¶3 (June 27, 2022); SEC Comment Letter, Martin Marietta Material Inc. ¶1 (June 27, 2022).
[20] E.g., SEC Comment Letter, Summit Materials Inc. ¶4 (June 27, 2022); SEC Comment Letter, Patagonia Gold Corp. ¶2 (June 2, 2022); SEC Comment Letter, Perpetua Resources Corp. ¶2 (May 13, 2022).
[21] 17 CFR 229.601(96)(iii)(B)(19)(ii); 17 CFR 229.1302(d)(4)(i).
[22] Adopting Release supra note 3, at 69.
[23] E.g., SEC Comment Letter, Freeport-McMoran Inc. ¶8 (April 25, 2022); SEC Comment Letter, Alliance Resource Partners ¶12 (May 3, 2022).
[24] E.g., SEC Comment Letter, Alliance Resources Partners ¶2 (June 30, 2022); SEC Comment Response Letter, Aluminium Corp. of China Ltd ¶7-10 (August 10, 2022).
[25] SEC Comment Letter, Alliance Resources Partners ¶4 (May 3, 2022).
[26] SK-1300 was promulgated to assist investors in making informed investment decisions by providing a more comprehensive understanding of a Registrant's mining operations. Adopting Release supra note 3, at 1.
[27] A QP is permitted to rely on information provided by the Registrant in preparing its findings and conclusions regarding the following aspects of some of the modifying factors: (i) macroeconomic trends, data, and assumptions, and interest rates; (ii) marketing information and plans within the control of the Registrant; (iii) legal matters outside the expertise of the qualified person, such as statutory and regulatory interpretations affecting the mine plan; (iv) environmental matters outside the expertise of the QP; (v) accommodations the Registrant commits or plans to provide to local individuals or groups in connection with its mine plans; and (vi) governmental factors outside the expertise of the QP. 17 CFR 229.1302(f)(1).
[28] Adopting Release supra note 3, at 76.
[29] E.g., SEC Comment Letter, Sisecam Resources LP ¶2 (June 30, 2022); SEC Comment Letter, Aluminium Corp. of China Ltd ¶10 (July 7, 2022).
[30] E.g., BHP Group Ltd, Annual Report (Form 20-F) at Exh. 96.1 (September 6, 2022); Freeport-McMoran Inc, Annual Report (Form 10-K) at Exh. 96.1 (February 15, 2022); Aluminum Corp. of China Ltd., Annual Report (Form 20-F) at Exh. 96.1 (April 22, 2022); Hycroft Mining Holding Corp., Annual Report (Form 10-K) at Exh. 96.1 (March 31, 2022).
[31] Adopting Release supra note 3, at 73-74.
[32] E.g., SEC Comment Letter, SSR Mining Inc. ¶9 (May 2, 2022); SEC Comment Letter, Aluminium Corp. of China Ltd ¶10 (July 7, 2022).
[33] Staff did not require deletion of general disclaimer language following response by Registrant that general disclaimers as to estimates and approximations serve to "inform users of the technical report summary that estimates and approximations are by their very nature not exact." SEC Comment Response Letter, SSR Mining Inc. ¶7 (May 27, 2022); SEC Comment Letter, SSR Mining Inc. ¶3 (June 22, 2022).
[34] Adopting Release supra note 3, at 8-9.
[35] Adopting Release supra note 3, at 18-19.
[36] SEC Comment Letter, Westwater Resources, Inc. ¶1 (March 22, 2022).
[37] SEC Comment Letter, Odyssey Marine Exploration Inc. ¶2 (July 6, 2022).