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This article originally appeared in [Mining Journal](#) on August 30, 2013.

SEC vs. Canada's NI 43-101

Mineralisation presentations for dual listings by mining companies are still a complex business

Since 2003, the mining industry has been working hard to push the US Securities and Exchange Commission (SEC) to reform Industry Guide 7 (Guide 7). The SEC met with the Society of Mining, Metallurgy and Exploration (SME) to discuss how the two organisations could best work together to clarify and update it.

Following law firm Kaye Scholer's informal conversations with SEC staff, these efforts, however, appear to be parked for the foreseeable future. This is in no small part because of the burdens placed on the SEC by the Dodd-Frank Act and by the JOBS Act.

In October 2012, the SME filed a formal petition with the SEC to amend Guide 7 to bring it more in line with the less stringent disclosure requirements used by other countries, including Canada's National Instrument 43-101 Standards of Disclosure for Mineral Projects (NI 43-101). SME cites the difficulty of coordinating disclosures in multiple jurisdictions for international mining companies, vagueness intrinsic to Guide 7, and the resulting harm to the US stock exchanges, financial markets and the US economy as its main reason for filing the petition.

According to the SME Petition, the domestic mining industry accounts directly and indirectly for 10-14% of the US economy.

Whether the SEC grants this request remains uncertain, however. In the meantime, mining companies contemplating or that have already effected a dual listing in Canada and the US should follow several best practices to comply with current Guide 7 rules.

A comparative overview of Guide 7

Generally speaking, Guide 7 is significantly more restrictive in terms of which mineral resources can be disclosed in an issuer's US prospectus, as well as in its periodic reports filed with the SEC, than those of the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) or NI 43-101. The most salient example being that it does not allow the reporting of mineral resources in quite the same way.

According to the CIM Definitions Standard published by CRIRSCO, a mineral resource is a concentration or occurrence of minerals “in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction.”

This contrasts with the SEC’s current consent to disclose certain nonreserve information in SEC filings denominated as “mineralized material”, according to the SME Petition.

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Under Guide 7, reserves cannot be disclosed unless they are “proven” or “probable”. In other words, not until a “final” or “bankable” feasibility study has been conducted and all required permits, including environmental permits, have been – or imminently will be – obtained.

However, NI 43-101 allows mineral resources to be disclosed as mineral reserves if a preliminary feasibility study and the issuer have a reasonable expectation that governmental approvals will be forthcoming.

NI 43-101 also enables the disclosure of “measured” and “indicated” mineral resources, which are categories of mineralisation that have reasonable prospects for economic extraction, but have not yet been demonstrated to be economically mineable, as is normally required to constitute a mineral reserve.

Finally, NI 43-101 further allows disclosure of inferred mineral resources that have less certainty as to quantity and grade than measured and indicated mineral resources. Guide 7 generally prohibits disclosure of non-reserve resource information, “unless such information is required to be disclosed by foreign or state law”.

According to TMX Group’s Global Leaders in Mining profile, as of June 2012, approximately 88% of the market value of all mining companies listed on the Toronto Stock Exchange comprised dual-listed mining companies. In turn, as of December 31, 2012, approximately 57% of the world’s mining companies were listed on the Toronto Stock Exchange (TSX), including on its junior Venture Exchange. US-incorporated mining companies undertaking a dual listing in Canada and the US, with or without Canadian mineral assets, typically prefer that their US prospectuses be more inclusive (and hence more attractive) mineralisation presentations under NI 43-101, in addition to the proven and probable presentations mandated by Guide 7, to better entice investors to the US offering.

Canadian-incorporated mining companies that are undertaking a dual listing in Canada and the US, with or without US mineral assets, and whether or not described as a foreign private issuer, as defined in Rule 902 under the US Securities Act of 1933, must also include Guide 7 information.

However, they can freely include NI 43-101 presentations in their US prospectuses. This applies to all Canadian mining entities except those that utilise the Multi-Jurisdictional Disclosure System (MJDS) to list in the US, which do not have to comply with Guide 7.

An example of a juxtaposed NI 43-101 and a Guide 7 presentation by a US issuer in a US disclosure document for an exploration stage mining company is outlined in the box below.

Non-Reserves—Mineralized Material; Measured, Indicated and Inferred Resources

Non-Reserves Reported in the United States. The estimate of mineralized material set forth below was prepared by Mine Development Associates, referred to as MDA. The estimate was prepared in accordance with SEC Industry Guide 7.

Mineralized Material Estimate in accordance with U.S. SEC Industry Guide 7

		Silver Grade		Cutoff Grade
	Tons	(Ounces per ton)	Copper Grade	(Silver ounces per ton)
Mineralized Material	81,506,000	2.04	0.75	% 1.0

Non-Reserves Reported in Canada. In accordance with Canada's National Instrument 43-101, the estimate of resources at Montanore as set forth below was prepared by MDA. Steve Ristorcelli, R.P. Geo., C.P.G., and David C. Fitch, C.P.G., acting on behalf of MDA, are the qualified persons under Canada's National Instrument 43-101 for this resource estimate. The technical report containing this estimate can be accessed in its entirety at www.sedar.com.

Cautionary Note to U.S. Investors concerning estimates of Measured and Indicated Mineral Resources

This section uses the terms "measured mineral resources" and "indicated mineral resources." We advise U.S. investors that while these terms are recognized and required by Canadian regulations, the U.S. Securities and Exchange Commission does not recognize them. **U.S. Investors are cautioned not to assume that any part or all of the mineral deposits in these categories will ever be converted into mineral reserves.**

Cautionary Note to U.S. Investors concerning estimates of Inferred Mineral Resources

This section uses the term "inferred mineral resources." We advise U.S. investors that while this term is recognized and required by Canadian regulations, the U.S. Securities and Exchange Commission does not recognize it. "Inferred mineral resources" have a great amount of uncertainty as to their existence, and great uncertainty as to their economic and legal feasibility. It cannot be assumed that all or any part of an inferred mineral resource will ever be upgraded to a higher category. In accordance with Canadian rules, estimates of inferred mineral resources cannot form the basis of feasibility or other economic studies. **U.S. investors are cautioned not to assume that part or all of the inferred mineral resource exists, or is economically or legally mineable.**

Resource Estimate as presented in accordance with Canada's National Instrument 43-101

	Tons	Silver Grade	Copper Grade	Cutoff Grade	
		(Ounces per ton)		(Silver ounces per ton)	
Measured	4,026,000	1.85	0.74	%	1.0
Indicated	77,480,000	2.05	0.75	%	1.0
Inferred	35,080,000	1.85	0.71	%	1.0

Best practices

Kaye Scholer is aware of at least one US mining company that is in the process of a dual listing and that intends to include NI 43-101 information in its US prospectus.

However, unless and until the SEC instructs it otherwise, all mining companies should employ the following best practices:

- Request a pre-filing conference with SEC staff to address the issue with them and establish any and all ground rules for the use of NI 43-101 information in the marketing and sale of the issuer's shares.
- If presenting NI 43-101 estimates in press releases, on websites or in roadshow materials, use the following legend: "Cautionary note to US investors: The US SEC limits disclosure for US reporting purposes to mineral deposits that a company can economically and legally extract or produce. Certain terms, such as reserves, resources, geologic resources, proven, probable, measured, indicated, or inferred, which may not be consistent with the reserve definitions established by the SEC. US investors are urged to consider to review and obtain copies of our filings from the SEC's website at <http://www.sec.gov/edgar.shtml>.

- Similarly, if a US-based mining company is sending an annual report to shareholders that “wraps” its annual report around its Form 10-K, and elects to include in the annual report non-Guide 7-compliant mineralisation presentations, it is highly recommended that the following disclaimer be prominently included in the annual report wrap: “Cautionary note to US investors: The US SEC permits mining companies, in their filings with the SEC, to disclose only those mineral deposits that a company can economically and legally extract or produce. Certain terms in this annual report, such as resources, other resources, and mineralised materials that the SEC guidelines strictly prohibit us from including in our filings with the SEC. US investors are urged to consider closely the disclosure in our Form 10-K included with this report.”

As demonstrated by the very careful language and slightly differing rules governing mineralisation presentations reviewed here, many mining companies may rightfully be confused or frustrated by the SEC’s failure to act on Guide 7.

While nothing will compel the SEC to move forward until they deem it necessary to do so, consulting with an experienced attorney well-versed in both US and Canadian rules governing mineralisation presentations before finalising your prospectus or related materials can help companies protect themselves from potential investigations or fines that could quickly derail a mining venture.

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