

Still a Complex Ore: Dual Listings by Mining Companies

Mining industry efforts to cause the US Securities and Exchange Commission to reform Industry Guide 7 have been ongoing since 2003, but appear to be parked at the SEC for the foreseeable future¹, in no small part because of the burdens placed on the SEC by the Dodd-Frank Act² and by the JOBS Act³. One can also speculate that the recent volatility of trading prices for mining stocks on the Toronto Stock Exchange (TSX) have also slowed the SEC's hand.⁴

On October 1, 2012, the Society of Mining, Metallurgy and Exploration (SME) filed a formal petition with the SEC to amend Guide 7. The SME had been working with the SEC for a number of years prior to filing the petition to try and clarify and update Guide 7. The petition seeks to bring Guide 7 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 economy⁵ as their main reasons for filing the petition.

In summary, Guide 7 is significantly more restrictive as to what mineral resources can be disclosed in a issuer's US prospectus (as well as in its periodic reports filed with the SEC) than would the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) or NI 43-101, most saliently in not allowing the reporting of Mineral Resources as such.⁶ Under Guide 7, reserves cannot be disclosed unless they are "proven" or "probable," in other words, until a "final" or "bankable" feasibility study has been conducted and all needed permits, including environmental permits, have been (or imminently will be)

¹ Based on a discussion with a member of the SEC staff in June 2013; see also October 1, 2012 letter to Ms. Elizabeth Murphy of the SEC from the Society for Mining, Metallurgy and Exploration (the SME Petition), at p. 12.

² Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, (2010).

³ Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306 (2012).

⁴ For example, the S&P/TSX Global Mining Index (^TXGM) has seen a price fluctuation of approximately 50 percent during the last year (July 1, 2012 through July 1, 2013). Stock Market Quotes, TMX Group (July 1, 2013, 5:43 PM), http://web.tmxmoney.com/charting.php?qm_symbol=^TXGM.

⁵ The SME Petition (at page 3) cites that the domestic mining industry accounts (directly and indirectly) for 10 - 14 percent of the US economy.

⁶ 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". CIM Definitions Standard, CRIRSCO (Jun. 26, 2013, 5:55 PM), http://www.cirisco.com/cim_definition_standards_2010.pdf. Contrasted with the SEC's current consent to disclosing certain non-reserve information in SEC filings denominated as "mineralized material" SME Petition at p. 8.

obtained.⁷ Guide 7 generally prohibits disclosure of non-reserve resource information, “unless such information is required to be disclosed by foreign or state law”.⁸ The presentation of resource information by Canadian issuers was permitted by the SEC after NI 43-101 became law in Canada.⁹

This article accepts that the SEC will not on a near horizon reform Guide 7 and presents guidance on how mining companies that are contemplating, or have effected, a dual listing in Canada and the US should publicly make mineralization presentations that will not run afoul of Guide 7. Sample disclosures are included. This article does not critique Guide 7 nor the reforms urged by the SME.

As of June 2012, approximately 88 percent of the market value of all mining companies listed on the TSX was comprised of dual-listed mining companies.¹⁰ In turn, as of December 31, 2012, approximately 57 percent of the world’s mining companies were listed on the TSX (including its Venture Exchange)¹¹. US-organized mining companies, with or without Canadian mineral assets, undertaking a dual-listing in Canada and the US will typically want to have in their US prospectuses the more inclusive (and hence more attractive) mineralization presentations under NI 43-101, in addition to the proven-and-probable presentations mandated by Guide 7 to further a favorable investor reception for the offering in the US.

Canada-organized mining companies, with or without US mineral assets, and whether or not a “foreign private issuer,”¹² undertaking a dual listing in Canada and the US must include Guide 7 information but can also freely include NI 43-101 presentations in their US prospectuses.¹³

⁷ NI 43-101 however permits mineral resources to be disclosed as mineral reserves if a preliminary feasibility study and the issuer has 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 mineralization that have reasonable prospects for economic extraction but have not been demonstrated to be economically mineable as is required to constitute a “mineral reserve.” Finally, NI 43-101 further permits disclosure of “inferred” mineral resources which have less certainty as to quantity and grade than measured and indicated mineral resources.

⁸ See US Sec. and Exch. Comm’n, OMB No. 3235-0069, Industry Guide 7: Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations, para (b)(5)(3) (2007), available at <http://www.sec.gov/about/forms/industryguides.pdf>.

⁹ See Memorandum from Roger Baer, Senior Mining Eng’r, US Sec. and Exch. Comm’n, to Peter Bradford, President & Chief Exec. Officer, Golden Star Res. Ltd. (Mar. 25, 2003) (on file with author) (“With the passage of National Instrument 43-101 into law, your disclosure using non-Commission reserve definitions and ‘resource’ estimates is allowed [for Canadian incorporated companies] under the exception in Instruction 3 to Paragraph (b)(5) of Industry Guide 7.”)

¹⁰ See SME Petition, p. 12, footnote 18, citing Global Leaders in Mining, TMX Group (Jun. 21, 2012, 3:32 PM), http://www.tmx.com/en/listings/sector_profiles/mining.html.

¹¹ Global Leader in Mining, TMX Group (Jun. 26, 2013, 2:39 PM), http://www.tmx.com/en/pdf/Mining_Sector_Sheet.pdf.

¹² As defined in Rule 902 under the US Securities Act of 1933, as amended.

¹³ We don’t here address mineral resource presentations by Canadian entities that utilize the Multi-Jurisdictional Disclosure System (MJDS) to list in the United States; such MJDS companies do not have to comply with Guide 7. Some Canadian companies, whether or not NJDS-eligible, elect to reconcile the two sets of presentations but we believe most analysts can make the reconciliations with facility themselves.

*Non-Reserves—Mineralized Material; Measured, Indicated and Inferred Resources*¹⁴

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		Cut-off grade
	Tons	(ounces per ton)	Copper grade	(Silver ounces per ton)
Mineralised 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

		Silver grade		Cut-off grade
	Tons	(ounces per ton)	Copper grade	(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 %

¹⁴ See Form 10-K of Mines Management, Inc. for the fiscal year ended December 31, 2008, filed on March 16, 2009. See also footnote 2.

Yet does the SEC permit NI 43-101 disclosure by US companies in their US prospectuses? A canvassing of SEC staff comment letters¹⁵ through the June 2013 impels us to conclude that US mining companies likely cannot include NI 43-101 presentation in the US prospectuses or in documents “filed” with the SEC¹⁶, nonetheless, they can make publicly available such presentations by:

- posting NI 43-101 presentations on their websites
- submitting the presentations on Form 8-K
- circulating the presentations in a Free-Writing Prospectus¹⁷
- including such presentations in their road-show slides

The SEC staff stated in a comment letter issued in December 2009 that US companies cannot include NI 43-101 presentations in their SEC-filed disclosure documents.

With the passage of National Instrument 43-101 in Canada, disclosure using non-SEC reserve definitions, such as resource estimates, is allowed for Canadian incorporated companies under the exception in Instruction 3 to Paragraph (b)(5) of Industry Guide 7. However, your jurisdiction of incorporation is Idaho and as such, only those terms specified by Industry Guide 7 may be used in U.S. SEC filings. The provisions in Industry Guide 7 preclude the use of any terms other than proven or probable reserves for disclosure in SEC documents.¹⁸

¹⁵ Comment letters here refer to correspondence between SEC staff and SEC filers. SEC staff from the Divisions of Corporation Finance and Investment Management issue this type of comment letter in connection with their review of disclosure filings. The staff’s comments are in response to a company’s disclosure and other public information and are based on the staff’s understanding of that company’s facts and circumstances. In issuing comments to a company, the staff may request that a company provide additional supplemental information so the staff can better understand the company’s disclosure, revise disclosure in a document on file with the SEC, provide additional disclosure in a document on file with the SEC, or provide additional or different disclosure in a future filing with the SEC. There may be several rounds of letters from the SEC staff and responses from the filer until the issues identified in the review are resolved. These letters set forth staff positions and do not constitute an official expression of the SEC’s views. The letters are limited to the specific facts of the filing in question and do not apply to other filings. See <http://www.sec.gov/answers/commentletters.htm>.

¹⁶ The SEC has said that inclusion of 43-101 in the Canadian prospectus but excluding such in the US prospectus would not violate Rule 10b-5, see the May 2008 correspondence to the SEC Comment Letter to Form 10-KSB of Gryphon Gold Corp., in which the company stated that the SEC representatives advised that “compliance with the SEC’s mandate would not result in a violation of the certifications made by the Company’s principal executive and principal financial officers pursuant to Rule 13(a)-14 or Rule 15d-14(a) of the Securities Exchange Act of 1934, as amended”; statement that 10b-5 also not a caption because 43-101 information is generally enhancing information and not negative to an investment decision. See also footnote 21.

¹⁷ Except as otherwise specifically provided or the context otherwise requires, a Free Writing Prospectus is any written communication as defined in Rule 405 that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than: (i) a prospectus satisfying the requirements of section 10(a) of the Securities Act, Rule 430, Rule 430A, Rule 430B, Rule 430C, or Rule 431; (ii) a written communication used in reliance on Rule 167 and Rule 426; or (iii) a written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Securities Act.

¹⁸ See Comment Letter to Form 10-K of Mines Management, Inc., dated December 30, 2009.

This position appears to reverse an earlier tolerance for NI 43-101 presentations by US companies where such information was accompanied by a combination of explanation of the difference of the regulatory requirements between Canada and the US and clarification that investor should not assume that reserves designated with only a pre-feasibility study will be mined.¹⁹

By asserting a “duty to disclose” in Canada and resulting disparate disclosure in the US, certain US reporting mining companies have been able to persuade the Staff to allow them to maintain the then current dual disclosures in their Forms 10-K, on the condition that such be deleted from the Form 10-K to be prepared in respect of the following fiscal year.²⁰

It is difficult for us to envision in the context of an initial dual listing (where an issuer voluntarily elects to list on the TSX and in the US) an issuer persuasively asserting that can there exists a “duty to disclose,” in an effort to enable inclusion of NI 43-101 presentations in its US prospectus.²¹

¹⁹ In the Comment Letter to Form 10SB12G of Dominion Minerals Corp., dated July 19, 2007, the SEC required that the company modify its disclosure to “explain that report compiled in accordance with National Instrument (NI) 43-101 is necessary to report resources and reserves in accordance with Canadian guidelines, a US registered company may not report resources in SEC filings,” to “clarify that for reserves to be designated, a pre-feasibility study has to be completed under the requirements of NI 43-101, while a final or bankable feasibility study is generally required for designation of reserves under SEC’s Industry Guide 7,” and to further “clarify that since banks typically provide financing only after a bankable feasibility study has been completed, investors should not assume that reserves designated with only a pre-feasibility study will be mined.” See also footnote 2.

²⁰ In the Comment Letter to Form 10-K of Coeur D Alene Mines Corp., dated June 12, 2008, the SEC required that the company modify its disclosure in compliance with Guide 7. In its correspondence to the SEC Comment Letter, dated June 23, 2008, the company argued that the company is a reporting issuer subject to the requirements of NI 43-101 and thus should be able to include the inferred resource data in its annual reports on Form 10-K. In the subsequent comment letter, dated July 11, 2008, the SEC proposed a conference call with the company to discuss this issue. The content of the conference call was not publicly disclosed. However, the company maintained the then current dual disclosures in its Form 10-K until it deleted such in its Form 10-K for the following fiscal year. Also see the May 2008 correspondence to the SEC Comment Letter to Form 10-KSB of Gryphon Gold Corp., in which the company mentioned it had a conference call with the SEC and outlined the potential issues with disparate disclosures in the US and in Canada. Thereafter, the SEC closed the review and the company maintained the existing dual disclosures in its Form 10-KSB until it deleted such in its Form 10-KSB for the following fiscal year.

²¹ In a response letter to the SEC dated December 18, 2012, DynaResource, Inc. stated that as they had formally become a British Columbia “reporting issuer”, they were consequently subject to the Canadian securities disclosure laws, specifically, Multilateral Instrument 51-105, a national Canadian law, which required DynaResource to comply with various other Canadian securities laws, specifically, NI 43-101. DynaResource argued that as Multilateral Instrument 51-105 is an “actual law” and not merely a “stock exchange listing requirement,” they fell into the exemption embodied in Section (b)(5)(3) of Guide 7, which would allow for them to include, as a requirement of foreign law, their NI 43-101 information in their filings with the SEC. However, in the Comment Letter to Form 10-K of DynaResource, Inc. dated February 1, 2013, the SEC responded by noting that DynaResource was a Delaware corporation and by stating that, “choosing to list a security on a foreign exchange does not pre-empt you from complying with US securities regulation. Therefore the exemption regarding mineral estimates in Instruction 3 to section (b)(5) of Industry Guide 7 is for companies whose jurisdiction is outside of the United States. The guidance is not new and is applicable to many companies.” The SEC then reissued its previous comment, to which DynaResource responded by amending its Form 10-K to remove all mineral resource disclosure.

While we are aware of at least one US mining company in the process of a dual listing that intends to include NI 43-101 information in its US prospectus until the SEC instructs them to remove such, our recommendations are to:

1. Request a pre-filing conference with the 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.
2. If presenting NI 43-101 estimates in press releases, on websites or in roadshow materials, use the following legend:

Cautionary Note to U.S. Investors - The United States Securities and Exchange Commission limits disclosure for U.S. reporting purposes to mineral deposits that a company can economically and legally extract or produce. We use certain terms in this press release/on this web site, 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. U.S. investors are urged to consider closely the disclosure in our [file name], [file number]. You can review and obtain copies of these filing from the SEC's website at <http://www.sec.gov/edgar.shtml>.

3. 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-complaint mineralization presentations, we recommend the following disclaimer be prominently included in the annual report "wrap."

Cautionary Note to U.S. Investors - The United States Securities and Exchange Commission 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. We use certain terms in this annual report, such as "resources," "other resources," and "mineralized materials" that the SEC guidelines strictly prohibit us from including in our filings with the SEC. U.S. investors are urged to consider closely the disclosure in our Form 10-K included with this report.

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