

**THE ROLE OF THE SECURITIES AND EXCHANGE COMMISSION
IN MINE FINANCING**

Address of

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I am honored and delighted to have this opportunity to speak to you today. It always is a pleasure to be in the beautiful State of Colorado and in the majestic City of Denver. Since my first visit here almost thirty years ago, I have said many times¹ that were I to be moved to a new city, where I know few people, I hoped that the city would be Denver.

I vividly remember my first trip to Colorado. A friend took me on a tour in the Rockies of some of your historic mining towns. In the old mining town of Fairplay I was shown a monument which recently had been built to a burro named Prunes. I was told that Prunes was a cussed and headstrong animal, but that he had been good luck to every prospector who owned him. For that reason the people of the town placed a monument on his grave when he was buried a few years earlier. An old miner said

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that Prunes belonged to an "ornery breed" that's about gone. "Maybe," he said, "it's a good thing; we don't fit any more. But, I don't worry about it because I've had fun and never in my whole life did I deliberately do one bad thing to any person." Then he quickly added: "Except, of course, to a few rascals I had to kill." Well, I am sure that every prospector has wished for a burro with what must have been the clairvoyance of Prunes. And this being in the early days of the Securities and Exchange Commission it brought to my mind many fascinating stories of the early days of mining in the West.

We have never had filed with us a registration statement by a promoter who claimed that Prunes had taken him to the claim in years past and for that reason he felt sure that the prospect had great value. However, the Commission in its early days had a few cases in which the possibility of valuable discovery had an even less reliable basis.

Our nation is indebted to those who have earnestly explored and developed the mineral resources of the Colorado Plateau and of other parts of the West. The Commission has over the years recognized that the raising of venture capital from the public for legitimate mining

promotions should be encouraged and not stifled by unnecessary regulations or restrictions.

Mines by their very nature are not self perpetuating. They sometimes become fully exploited and mining, to continue, must turn to the discovery of new deposits. It is, of course, a costly operation to find and develop ore bodies that enable mining to flourish on a continuing basis. The larger successful companies at times are able to finance successful exploration and exploitation of new deposits from internally generated funds, pledges of assets, or other means not involving the sale of securities to the public. However, many file registration statements with the Commission when for one reason or another it is decided to obtain funds by offering their securities to the public.

Government financial assistance to those proposing the exploration of mining properties for new deposits will be discussed by my friends from the Small Business Administration and the Office of Minerals Exploration. Their programs have been and are of great significance to your industry. However, the Commission has no funds to advance,

and most likely you are faced for the first time with our statutes and regulations when you are required to file a registration statement under the Securities Act of 1933, or a letter of notification and an offering circular under Regulation A. These filings I will return to a bit later.

Many of you can recall when the Securities Act was enacted in 1933, and the Securities Exchange Act in 1934. Some said then that further mine financing was a thing of the past and that registration would be impossible. From the beginning the Commission recognized that capital for exploration and the development of new and unseasoned enterprises is an essential ingredient of economic growth. We try to assist those desiring to raise venture capital from the public for legitimate mining promotions, when our advice is sought on questions concerning compliance with the statutes we administer and the rules, regulations and forms adopted thereunder.

Under the Securities Act, speculative or apparently unsound issues can be registered and sold provided the whole truth is told. The Commission does not direct the flow of capital or try to do so, although,

of course, the necessity of disclosing the truth concerning security flotations may affect their reception. It is not our function to attempt to protect investors by insulating them from risk but to see that they are provided the information with which to gauge the risk.

The primary objects sought to be attained by the Securities Acts administered by the Commission is to see that a fair disclosure of material facts is made with respect to the enterprise, the security and the offering, necessary for the prospective investor to judge whether he should purchase the security; and, the prevention of fraudulent, deceptive and unfair practices and methods in the sales of and dealing in securities. The means of disclosure to a prospective investor is a registration statement which includes a prospectus to be used in making the offering, or an offering circular filed in accordance with the provisions of Regulation A.

The Commission does not pass judgment on the soundness or investment value of securities, nor does it guarantee the truth and accuracy of the representations in filings made. Responsibility for representations made in filing with us rests with the issuer and its officials and with experts on whose authority information is included in the filing. I will not go into the matter of liabilities which may be imposed since it is my purpose this afternoon to discuss with you some of the methods and principles which we have developed and applied with particular reference to mining securities in the course of administering the Securities Act.

To assist companies planning to offer securities in furnishing information necessary to comply with the statutory requirements, the Commission has adopted various forms for registration. Each form contains a number of items which call for certain specified information applicable to the company and its securities. For example, a form designated as S-1 is generally used by all large operating companies, including those in the mining business. In filings by such companies disclosure is required among other things concerning the financing and

how and by whom it is to be done; the use to be made of the proceeds; a description of the business and the property; and, a summary of earnings for the last five fiscal years.

Over the years we have had specific forms designed for promotional mining companies and in 1941 the Commission adopted Form S-3 for small mining companies which generally have not had any substantial production. In other words, this form is principally for mining companies in the exploration or development stage. Each of these forms provide for and specify the information to be included in a prospectus which is designed to provide material facts concerning the company and its securities which must be delivered to a purchaser of the securities.

I referred earlier to Regulation A. It was adopted by the Commission pursuant to a statutory provision authorized by the Congress which permits the adoption of simplified rules and regulations for raising a limited amount of capital from the public. If the aggregate amount of the offering price of an issue does not exceed \$300,000, the issue may not be subject to the full registration requirements, but

compliance must be made with the terms and conditions prescribed in Regulation A. These filings are made with our regional offices, whereas all registration statements are required to be filed with our offices in Washington.

All registration statements filed by mining companies with the Commission come to the Division of Corporation Finance for review. Each is assigned to one of our 15 branches, in which there are accountants, lawyers and securities analysts. Each branch is headed by a Branch Chief. The registration statement then is reviewed as to its adequacy and compliance by those in the branch to which the filing is assigned. The portions relating to the property are reviewed by our mining engineers. Ordinarily, a letter of comments is sent to the company filing the registration statement when we have completed our review. These letters designate the areas which appear to require amendment and frequently request further information considered necessary to assist in our analysis and review.

Where there is basis for concluding that the registration statement has been prepared without regard for our requirements and will deceive, the staff does not send a letter of comments. We may urge the company to withdraw the statement. At times it is necessary to recommend to the Commission that an investigation be undertaken. Where there has been an apparent, deliberate attempt to mislead or deceive, a proceeding is recommended that could, where the adduced facts justify, result in a stop order by the Commission. Such an order prevents any sale of securities until the registration statement is properly revised. It is accompanied by findings and an opinion of the Commission. These orders remain in effect until the registration statement has been amended in accordance with the order.

I recall one of the cases in which I acted as counsel for the Division of Corporation Finance. The company had filed a registration statement which, among other things, described its mining properties. The proceedings involved many allegations, one of which might be of interest to you. The company had a property in South Dakota which it

intended to explore. It adjoined the tract owned by Homestake Mining Company on the south. A map was included in the registration statement showing both the company's property and that of Homestake Mining Company. Two parallel lines were drawn on the map through the length of the Homestake property and then into and through the entire length of the registrant's property. The space between the lines was labelled "Trend Of Ore Body As Defined By U. S. Geologic Atlas Folio #219." It was established in the stop order hearing that there was no such representation in any U. S. Geologic Survey publication. Moreover, expert testimony showed that the known location of the Homestake ore bodies closest to the registrant's property was a substantial distance from it and that if the actual trend of the Homestake ore structure continued in its southerly course, it would not enter the registrant's property, but would pass to the east of it instead.

I have referred to the two registration forms used by mining companies. Form S-3 for use by companies in the exploration and development stage is specific and clear as to what is required.

The information about the property can be furnished with the help of a geologist or a mining engineer without difficulty. Information concerning the securities to be offered, the company's promoters and its management is easily understandable to business men. Financial statements required to be certified can be prepared by any qualified independent accountant.

Now, what is advisable procedure by the mining company that contemplates filing a registration statement or a Regulation A filing with the S.E.C.? Representatives of such companies frequently confer with staff members in our offices in various regions and in Washington when they have questions as to what information should be set forth in a registration statement and prospectus. Our staff is frequently consulted on cases where a proxy statement involving a merger is to be filed pursuant to the provisions of the Securities Exchange Act of 1934.

Where mining is involved, our mining engineers generally will want to see as supplemental information the basic data and calculations relating to ore reserve estimates. They will also want sufficient maps and data to ascertain whether any material changes have recently occurred,

are occurring, or are foreseeable at the mine such as those changes that may be associated with increasing depth.

The type of information that is generally given both in the case of large and small mining companies is what you would look for as mining engineers, mining geologists or mining executives in considering whether to acquire a mining property offered to you. In the small mine, the pertinent historical, geological and exploratory facts are important. The description of a large mining operation is, of course, more complex. Such description generally involves appropriate estimates of the tonnage and average grade of proven ore reserves and probable ore reserves as the terms are defined generally and are set forth in instructions to Form S-3 and Regulation A. The Commission has in its formal opinion held the use of estimates of "inferred", "possible" or "geologic ore" to be misleading in view of the uncertainties as to the existence of such ore. As you know, the classification of such ores relates to ore whose existence is premised very largely or wholly on geologic assumption rather than actual drill hole or other testing. To complement the ore

reserve data, tabulations of operating results by quarters over the past several years are generally shown. These tables show for each period, the tonnage of ore produced, the average grade of such ore, the direct operating cost per ton of ore produced and the net smelter return per ton of ore produced. The operating cost figures are footnoted to show what costs are omitted, such as amortization, depletion and depreciation. The foregoing types of information are generally supplemented with a brief statement of the significant geological facts. A statement is also called for showing whether any material changes have occurred during the past several years or are now expected in the nature of the ore bodies mined or being mined or in mining conditions. Where there have been such changes, or they are now expected, the prospectus should, of course, identify them and explain their significance on operations. Examples of such changes would be, lengthening or shortening of principal ore shoots, or changes in width, increase or decrease in ore grade, and worsening ventilation or water problems.

In addition to the foregoing, I wish to make a few suggestions for those who intend to make filings with the Commission:

Keep in mind that even though the facts are not favorable to the sale of securities, distortion of the picture by dressing up the portrayal must be avoided. Distortion can but lead to difficulties. It is our job and the statutory mandate under which the Commission operates to see that the investing public is furnished adequate truthful information.

Don't engage in predictions, conjecture or unjustified implication that a successful venture is assured. Imagination, boldness and a reasonable degree of optimism by mine promoters may seem needed to initiate mine financing, but the average shareholder or prospective shareholder does not have your abilities and is not able to separate fact from enthusiasm or optimism. He must be afforded the opportunity to base his actions on objective factual information.

Don't use unsupported estimates of ore reserves.

Estimates of ore reserves should be limited to those of proven and probable ore which have been reasonably established on the basis of adequate data and sound engineering practice. Ore, such as "possible ore" whose presence is not established but rather is predicted on the basis of geologic possibility, may obviously and justifiably encourage further exploratory work. However, the implication that a valuable ore deposit exists and will be found, and the assignment, even on a contingent basis, of tons, grade or dollar value to such undiscovered material should be avoided.

Don't engage in excessive geological descriptions and terminology, particularly when the geology is of no economic significance.

It is not uncommon for us to receive in filed material lengthy and detailed descriptions of the regional and local geology of the area in which properties of interest are located. Sometimes this type of presentation appears designed to draw a corollary between successful mines which have been found in broadly similar geologic environments.

At other times, such information appears to have been included merely as "padding" to fill out the description of a mere prospect. In any event, it should be borne in mind that the average reader of this information is unlikely to be expert in the field of geology and is therefore incapable of sifting through a maze of technical terms to determine what information, if any, is of economic substance. In other words, and with no intent to minimize the value of geology, we advise the use of geologic description only to the degree it is necessary to provide an understanding of the material aspects of the property being described.

Don't neglect to show costs of production when showing returns from ore production.

It is apparent that a mining company which has experienced production should wish to show the receipts from such production, and in fact such income figures are seldom withheld. However, the equally important disclosure of production costs, necessary to understand the financial outcome of operations are often conspicuously absent and must be elicited by our staff with an attending loss of time.

Don't fail to disclose recent or anticipated changes in mining or other operating conditions when such changes are material.

Although there is an adage to the effect that "the past is prologue," this may not hold where description of a mine is concerned. Every mine "bottoms out" some day, the extreme instance of mining change, but in the interim other changes in conditions may occur which could render yesterday's profit today's loss. For instance, a mine which initially operated as a low cost open pit operation may be forced to extract its deeper ore by a higher cost underground operation, or a mine which to date has operated without adverse water conditions may enter into a zone which requires expensive pumping and water control measures. A variety of changes can occur or be anticipated in a mining operation materially affecting net smelter returns or costs of production, and without knowledge of such changes, evaluation of a mining operation on past production and earnings records alone may be on an unsound basis.

One last suggestion is an obvious one, not always followed.

Read the requirements and respond appropriately to them.

Aside from the registration processes, the Commission also has the responsibility of preventing fraud in the sales of securities involving any use of interstate facilities. Where there is need, our staff investigates possible fraudulent sales and where the results justify, the Commission refers the case, appropriately documented, to the Justice Department for possible indictment and trial. When a trial results, our attorneys assist and, at times, our staff experts testify.

Before closing, I would like to touch on a matter that seems to have caused uncertainty among officials of mining and other companies. This arose, probably, as a result of the Commission's civil suit against Texas Gulf Sulphur Company, tried last year and now being appealed by the Commission and certain individual defendants. An impression was apparently gained by some that the Texas Gulf case arose in part by the company's failure to announce the results of its outstanding initial drill hole shortly after it received such results. This is not so. The Commission did not bring suit for the failure to disclose that information, but because a number of the top officials of that company,

including its head mining men, bought shares and calls for shares of Texas Gulf Sulphur Company without divulging to the sellers of the stock the information they had as to the drill hole results. (The hole averaged over \$30 per ton in silver, copper and zinc over a length of 600 feet.) In other words, had there been no buying by insiders, the failure to disclose the drill hole results would not have been the subject of the Commission's suit.

I have one last point. Of late, there have been a number of press releases by various companies including mining companies, concerning corporate happenings. At times, this involves discoveries or alleged discoveries of important ore bodies. The Commission is, of course, concerned in any case where a press release distorts the facts or contains false information. At times, it has become necessary to inquire into the facts and, where warranted, the Commission has suspended trading in the company's securities until a corrective statement is made.

While there are no formal requirements for the submission of a proposed press release to the public, a number of companies do consult with our staff prior to releasing a statement to the press. We are glad to be of assistance in these cases and in any other matters relating to our responsibilities under the Acts administered by the Commission.