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August 26, 2016

VIA E-MAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release Nos. 33-10098 and 34-78086, Modernization of Property Disclosures for Mining Registrants (the "**Proposing Release**")
File No. S7-10-16

Dear Mr. Fields:

Thank you for the opportunity to comment on the above-referenced release.

We strongly commend the Commission and staff on its proposals to modernize property disclosure requirements for mining registrants. We agree with the Commission's decision to update the current disclosure regime for mining registrants in order to provide investors with a more comprehensive understanding of a registrant's mining properties, and to align the disclosure regime more closely with current industry and global regulatory practices and standards. Overall, we believe the Commission's proposal is a positive one.

We are concerned, however, that certain proposals included in the Proposing Release may impose costs for registrants that are disproportionate to the benefits to investors, or may lead to disclosure that is not meaningful or even potentially misleading. In addition, the rules as currently proposed (the "**Proposed Rules**") would impose significant liability on qualified persons that prepare supporting documentation for mining disclosures, which is likely to result in increased compliance costs for registrants and may also have an adverse effect on the quality of their disclosure. Moreover, a number of the proposals would result in reporting requirements in the United States that differ from the requirements in many other jurisdictions, thereby undermining the Commission's stated goal of aligning the disclosure regime more closely with global standards and also increasing compliance costs for registrants that report in multiple jurisdictions. We therefore urge the Commission to:

- make disclosure of material exploration results and mineral resources optional, even if a qualified person has been engaged;

- exclude mineral brines from the scope of the Proposed Rules, as well as any other non-traditional mineral resources that are not estimable on the basis of principles analogous to those used to estimate traditional mineral resources;

- eliminate the requirement to file technical report summaries as exhibits to filings under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") and the Securities Act of 1933, as amended (the "**Securities Act**");

- exempt qualified persons from "expert" liability under Section 11 of the Securities Act;

- allow a qualified person to rely on the reports of subject matter experts and also other qualified persons;

- allow registrants to use forward-looking prices based on a qualified person's view of long-term market trends when evaluating mineral resources and reserves;

- amend the requirements for summary disclosure to capture only mining properties representing 80% of the registrant's mining properties (based on asset value), or representing 80% of the registrants mineral reserves and resources, as applicable;

- limit the disclosure obligations of royalty companies to information that is known or reasonably available to them; and

- allow for an extended transition period of three years, with voluntary early adoption permitted.

We discuss these points in more detail below.

***The Commission should make disclosure of material exploration results and mineral resources optional, even if a qualified person has been engaged.***

Under the Proposed Rules, if a registrant makes a determination that it has mineral resources based on information and supporting documentation prepared by a qualified person, then the registrant would be required to disclose such information.[1] A similar requirement exists for material exploration results.[2] While we generally commend the Commission's proposal to expand the scope of mining disclosure in the United States, we believe that mandating disclosure of material exploration results and mineral resources may not strike the appropriate balance between meaningful disclosure and compliance costs.

Exploration results and estimates of mineral resources involve inherent uncertainties and may not necessarily be predictive of a registrant's ultimate mineral reserves. As a result, disclosure regarding exploration results and estimates of mineral resources may provide less useful information to investors about a registrant's mining operations. The benefits of such disclosure may also be attenuated in some cases, such as when a registrant reports on mineral resources relating to widely available commodities. In addition, the costs associated with preparing such disclosure are potentially significant. For example, there may be significant costs associated with

[1] See the Proposing Release at p. 57.

[2] See the Proposing Release at p. 51.

employing or engaging one or more qualified persons to prepare the requisite supporting documentation for mining disclosures, and with incorporating additional reporting controls into the registrant's current reporting processes. Moreover, mandating disclosure of exploration results may also result in disclosure of commercially sensitive information regarding geology, hydrology, extraction technology or other matters pertaining to a registrant's business, which could result in a registrant losing a competitive advantage. Given these factors, we recommend the Commission make the disclosure requirements relating to exploration results and mineral resources optional under the Proposed Rules rather than mandatory, even if the registrant has engaged a qualified person to prepare relevant supporting documentation. We note that this recommendation is largely consistent with the Commission's current proposal, which permits a registrant to opt not to engage a qualified person, in which case disclosure of exploration results and mineral resources would not be required.[3]

***The Commission should exclude mineral brines from the scope of the Proposed Rules, as well as any other non-traditional mineral resources that are not estimable on the basis of principles analogous to those applicable to traditional mineral resources.***

The Proposed Rules would extend to all "minerals of economic interest," which are defined to include non-traditional mineral resources, such as geothermal fields and mineral brines, as well as "other resources extracted on or within the earth's crust."[4] While we understand the desire to provide for a uniform and consistent framework for disclosures across all types of mining operations, we believe that this definition is overly broad and will capture some non-traditional mineral resources that are not estimable on the basis of principles analogous to those applicable to estimates of traditional mineral resources. For example, mineral brines may be extracted from oceans and other large surface bodies of water or subsurface aquifers which, in some cases, may be effectively limitless (for example, magnesium or bromine extracted from seawater). In this case, estimates of the relevant mineral resources and reserves in the manner contemplated by the Proposed Rules would seem meaningless (and it is not even clear to us that such an estimate can be made). In addition, some mineral brine sources may fluctuate seasonally, or may be subject to replenishment at a rate that can be difficult to predict. The complexity of the factors that drive such fluctuations and replenishment rates may result in resource and reserve estimates under the Proposed Rules that are not well understood by many investors.

As a result, we believe that applying the proposed disclosure regime to mineral brines, or to other non-traditional mineral resources that are not estimable on the basis of principles analogous to those applicable to traditional resources, could result in confusing or potentially misleading disclosure. Accordingly, we recommend that the Commission remove mineral brines from the scope of the Proposed Rules. We also recommend that the definition of "material of economic interest" be further reviewed to remove any other non-traditional mineral resources in respect of which mineral resource and reserve estimation as contemplated by the Proposed Rules would result in disclosure that is incomplete or potentially misleading.

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[3] In this case, the registrant would be deemed to have no reserves, resources or exploration results, and no disclosure of reserves, resources or exploration results would be required. See the Proposing Release at pp. 57 and 194.

[4] See Regulation S-K Item 1301(d)(14)(ii) of the Proposed Rules.

***Technical report summaries should not be required to be filed as exhibits to filings under the Exchange Act or the Securities Act.***

Under the Proposed Rules, registrants would be required to file technical report summaries as exhibits to filings under the Exchange Act or the Securities Act that include disclosure of material exploration results, or of mineral resources or reserves, with respect to a property that is individually material to the registrants business or financial condition.

In general, we commend the Commission's proposals to harmonize the U.S. disclosure regime with current industry and global regulatory practices and standards. We acknowledge that the requirement of supporting documentation prepared by a qualified person should enhance investor protection for the reasons described in the Proposing Release,[5] and would be consistent with most other mining disclosure regimes based on the standards promulgated by the Committee for Mineral Reserves International Reporting Standards ("**CRIRSCO**"). However, the requirement to file a technical report summary with the Commission goes beyond most other CRIRSCO-based disclosure regimes. As noted in the Proposing Release, out of the CRIRSCO-based regimes, only Canada and Australia require the filing of a technical report summary (or technical report summary equivalent).[6] Thus, the proposed changes would result in an incremental reporting burden in the United States relative to most other jurisdictions. Moreover, given the robust nature of the disclosures that would be required under the Proposed Rules, it is unclear to us that the availability of technical information underlying material exploration results and mineral resource and reserve estimations would provide investors with additional meaningful information about a registrant's business or financial condition. It also seems inconsistent with the Commission's stated goals of "streamlining [disclosure] requirements for companies… and focusing on useful and material information for investors."[7] Thus, we believe the additional compliance cost associated with filing of technical report summaries is not warranted, and we recommend that the requirement be removed from the Proposed Rules.

***Qualified persons should not be subject to "expert" liability under Section 11 of the Securities Act.***

If a technical report summary is required to be filed as an exhibit to a Securities Act registration statement, then the qualified person preparing the summary would be required to provide written consent pursuant to Rule 436 under the Securities Act. As a result, the qualified person would be subject to "expert" liability under Section 11 of the Securities Act for any untrue statement or omission of a material fact contained in the technical report summary. Given that virtually every issuer has a Form S-8 or S-3 on file, such liability would extend to almost every securities offering in the United States by mining registrants, unless they elect not to engage a qualified person to prepare the requisite supporting documentation and technical report summary in accordance with the Proposed Rules.

As noted in the Proposing Release, many of the CRIRSCO-based regimes impose written consent requirements on qualified persons.[8] However, our understanding is that most, if not all,

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[5] See, for example, the Proposing Release at p. 185 - 186.

[6] See the Proposing Release at p. 109.

[7] See the Commission's *Report on Review of Disclosure Requirements in Regulation S-K* (December 2013) at p. 96.

[8] See the Proposing Release at p. 37.

jurisdictions with CRIRSCO-based disclosure regimes do not impose liability on qualified persons akin to the liability that would arise for an "expert" under Section 11 of the Securities Act. In addition, qualified persons subject to Section 11 liability would face significantly higher risk of costly litigation relative to other jurisdictions that may impose liability on experts due to the prevalence of securities class actions and the active nature of the plaintiffs' bar in the United States. For qualified persons that are employees of the registrant, Section 11 liability would be comparable to the liability imposed on the registrant's principal executive and financial officers and directors, even though a qualified person may not (and typically would not) have any management or oversight role with respect to the registrant. In addition, for qualified persons that are employed by consulting firms or other third parties, the imposition of personal liability on the individual qualified person would represent a departure from the Commission's approach with respect to other similarly situated professional firms, such as auditors and engineering firms.

Given the relatively unique liability regime under Section 11 of the Securities Act, we believe that subjecting qualified persons to such liability could have a number of adverse consequences. For example, it is likely to significantly increase the costs associated with estimating resources and reserves for disclosure purposes. Imposing Section 11 liability on qualified persons is also likely to have a chilling effect on the willingness of individuals to serve in that role. Such limitations in the talent pool may lower the overall quality of qualified persons, in turn lowering the quality of the disclosures prepared by such qualified persons. More importantly, concerns about liability may cause registrants to elect not to engage a qualified person,[9] in which case they would not be permitted to disclose relevant material exploration results, or the relevant mineral resources or reserves. These outcomes are contrary to one of the primary purposes of the Commission's proposal, namely to provide investors with a more comprehensive understanding of a registrant's mining properties.[10]

We also believe that the qualifications required under the Proposing Rules provide adequate safeguards to ensure the reliability of supporting documentation prepared by qualified persons. In particular, qualified persons are required to be members in good standing of recognized professional organizations that satisfy the requirements set forth in the rules, including a requirement that the organization establish and require compliance with professional standards of competence and ethics.[11] That requirement ensures qualified persons are subject to an industry-based layer of oversight that we believe should be sufficient to ensure accountability and accuracy of supporting documentation they prepare. Accordingly, we recommend that the Proposed Rules be modified so that qualified persons are not subject to "expert" liability under Section 11 of the Securities Act.

***Qualified persons should be permitted to rely on reports of subject matter experts or other qualified persons.***

In preparing a technical report summary, the Proposed Rules would not permit a qualified person to rely on a report, opinion or statement of another expert. Instead, the qualified person would be required to take responsibility, and also liability under Section 11 of the Securities Act, for any

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[9] As stated in the Proposing Release, there is no affirmative obligation to engage a qualified person to prepare the requisite supporting documentation for the disclosures required under the Proposing Rules. See the Proposing Release at pp. 57 and 194.

[10] See the Proposing Release at p. 1.

[11] See Regulation S-K Item 1301(d)(22)(ii)(C) of the Proposed Rules.

report, opinion or statement provided by another person upon which the qualified person has relied.

The Commission's approach is intended to ensure that the qualified person verifies any information upon which the qualified person has relied.[12] We believe this approach would impose a significant compliance burden, and is also more onerous than other CRIRSCO-based regimes which allow limited disclaimers and reliance on subject matter experts.[13] Much of the work required to estimate mineral resources and reserves is too complex for one individual to have all the necessary expertise. As a result, the approach contemplated by the Proposed Rules does not reflect the practicalities of preparing supporting documentation for mining disclosures. In addition, the Proposed Rules require that technical report summaries include certain infrastructure, permitting, legal, environmental and other matters outside the expertise of an engineer or geoscientist, and which are therefore inappropriate to require a qualified person to verify and assume liability in respect thereof.[14]

Thus, if the requirement to file technical report summaries as exhibits to Securities Act registration statements is retained, we recommend that the Commission allow qualified persons preparing technical report summaries to rely on the reports of subject matter experts, and should expressly allow multiple qualified persons to take responsibility for various portions of technical report summaries.

***The Commission should allow registrants to use forward-looking prices based on a qualified person's view of long-term market trends when evaluating mineral resources and reserves.***

Under the Proposed Rules, estimates of mineral reserves and resources must utilize commodity prices that do not exceed the applicable 24-month trailing average price (except in the case where an alternative contractual price is in place and that price is reasonable). According to the Proposing Release, this ceiling price is intended to restrict registrants from utilizing an overly optimistic outlook when evaluating mineral resources and reserves.[15]

The Commission's proposed ceiling price model, however, will result in increased year-to-year volatility of disclosed mineral resources and reserves. For example, in periods where commodity prices are rising, the ceiling price would require that qualified persons use a commodity price that would likely be lower than their view of long-term pricing trends. As a result, estimates of mineral resources and reserves may be understated, or may even be deemed uneconomic and therefore not disclosed. Conversely, during times of inflated pricing, the ceiling price may not be effective to achieve the Commission's goal of guarding against overly optimistic pricing assumptions because the historical average may not represent long-term sustainable prices. Accordingly, we

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[12] See the Proposing Release at p. 159.

[13] See, for example, Canadian National Instrument 43-101, *Standards of Disclosure for Mineral Projects*, at Part 6.4(2) and Item 3 of Form 43-101F1, which allow a qualified person who prepares or supervises the preparation of all or part of a technical report to include a limited disclaimer of responsibility if the qualified person relies on a report, opinion or statement of another expert who is not a qualified person, concerning legal, political, environmental or tax matters, gemstone valuations or pricing of commodities for which pricing is not publicly available, if such qualified person identifies certain information regarding the source, extent of reliance, and certain other information.

[14] See Regulation S-K Item 601(b)(96)(iv)(B) of the Proposed Rules.

[15] See the Proposing Release at p. 204

believe the proposed ceiling price model will result in mineral resource and reserve disclosures that may not reflect management's view of the registrant's business and financial condition, and may lead to incomplete and potentially misleading disclosure. Moreover, the proposed ceiling price model is not aligned with international practice. For example, the South African Code for the Reporting of Exploration Results, *Mineral Resources and Mineral Reserves* (2016 Edition) provides that "reasonable forward-looking prices should be used" for commodities traded on exchanges. Similarly, the Pan-European Standard for Reporting of Exploration Results, *Mineral Resources and Reserves* (2013 Edition) provides that "[c]ommodity prices should be based on supportable forward looking estimates" supported by items such as "comparisons with historical and current prices, forward projections, market considerations, exchange rates or any other relevant information." As a result, registrants that also provide mining disclosures in other CRIRSCO-based jurisdictions would need to produce a separate set of mineral resource and reserve estimates for the United States as well as related supporting documentation, thereby increasing compliance costs and undermining the Commission's goal of aligning the requirements in the United States with international practice.[16]

Accordingly, we recommend that the Commission allow registrants to use any reasonable and justifiable price based on a qualified person's view of long-term market trends. Registrants should be required to disclose assumed commodity prices, the factors driving the trends that are reflected in those assumed commodity prices, and a sensitivity analysis that would set out the impact on total resources and reserves of specified changes in price assumptions, in order to allow investors to evaluate the related mineral resource and reserve disclosures. We believe this approach would ensure resource and reserve disclosures appropriately reflect commodity price trends, and it would also provide investors with sufficient information to evaluate the reasonableness of the assumed commodity prices. In addition, the availability of other price indicators (for example, commodity futures or consensus prices published by research analysts) would provide investors with another point of reference against which to assess the reasonableness of assumed commodity prices, and would therefore help guard against the use of overly optimistic commodity price assumptions.[17] Moreover, the fact that the commodity price determination is made by a qualified person, who must be a member in good standing of recognized professional organization and who is subject to that organization's professional standards of competence and ethics,[18] should mitigate the risk that assumed commodity prices may be overly optimistic. Our proposal would also align the approach in the United States more closely with many other CRIRSCO-based disclosure regimes, thereby reducing incremental compliance costs in the United States and promoting consistency of disclosures across jurisdictions for registrants who report in multiple jurisdictions.

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[16] See the Proposing Release at p. 11.

[17] Such consensus prices have already been used as credible sources for commodity price disclosure in Canada. See Item 19 of Form 43-101F1 under Canadian National Instrument 43-101, *Standards of Disclosure for Mineral Projects*, which requires a qualified person to confirm that he or she has reviewed relevant market studies and analyses (including commodity price projections) and that the results of such studies and analyses support the assumptions in the technical report.

[18] See Regulation S-K Item 1301(d)(22)(ii)(C) of the Proposed Rules, which requires that a qualified person be a member in good standing of a recognized professional organization that satisfies the requirements set forth in the rules, including a requirement that the organization establish and require compliance with professional standards of competence and ethics.

***The Commission should require summary disclosure only with respect to mining properties representing 80% of the registrant's mining properties (based on asset value) or representing 80% of the registrant's mineral reserves and resources, as applicable.***

As currently proposed, registrants with material mining operations would be required to provide summary disclosure of certain specified information, in tabular form, with respect to the 20 mining properties with the largest asset value, regardless of materiality. In addition, registrants with material mining operations would be required to provide summary disclosure for mineral resources and reserves for all of their mining properties, regardless of materiality.

The Proposing Release notes that, for registrants with a higher number of properties, the Commission believes that "the 20 largest properties based on asset value are likely to capture most of [the] material properties and as such provide an appropriately comprehensive overview of the registrants' mining operations."[19] However, for registrants with few material mining properties but numerous immaterial mining properties, this approach would result in extensive disclosure with respect to assets that are immaterial to the business and financial condition of the registrant. This would likely involve significant recurring costs for the registrant, and we believe the resulting disclosure would not provide investors with meaningful additional information about the registrant's business and financial condition. Thus, we believe the balance between compliance costs and effective disclosure would be more appropriately struck by mandating summary disclosure only with respect to mining properties representing (i) 80% of the registrant's mining properties (based on asset value), in the case of summary disclosure required under Regulation S-K Item 1303(b)(2) of the Proposed Rules and (ii) 80% of the registrant's total resources and reserves, in the case of the summary reserve and resource disclosure required under Regulation S-K Item 1303(b)(3) of the Proposed Rules. In each case, we would recommend that registrants be permitted to voluntarily provide summary disclosure with respect to additional mining properties in excess of these thresholds.

***The Commission should limit the disclosure obligations of royalty companies to information that is known or reasonably available to them.***

Consistent with current guidance, the Proposed Rules would require that royalty companies provide mining disclosures with respect to the mining properties underlying their economic interests, if material to the royalty company's operations as a whole. Disclosure by royalty companies would be required only with respect to portions of the underlying mining properties which contribute to the royalty company's revenue stream. However, the ability of royalty companies to comply with this obligation, even as currently circumscribed, may be limited by their inability to access the requisite information and supporting documentation required by the Proposed Rules. For example, royalty companies may not have access to supporting documentation prepared by qualified persons to support estimates of mineral resources and reserves, or such supporting documentation may not exist and the royalty company may not be able to have such documentation prepared (for example, because of lack of access to the relevant properties and mining operations). Even if appropriate supporting documentation does exist, the qualified person that has prepared it may be unwilling to consent to its use by the royalty company for liability reasons. Thus, consistent with the Commission's current rules,[20] we

[19] See the Proposing Release p. 124

[20] See Rule 409 under the Securities Act and Rule 12b-21 under the Exchange Act.

recommend that the Proposed Rules be clarified to limit the disclosure obligations of royalty companies to information that is known or reasonably available to them.

***The Commission should allow for an extended transition period of three years, with voluntary early adoption permitted***.

Given the substantial amount of time and resources that will be required for registrants to comply with the Proposed Rules, we recommend that the Commission allow for an extended transition period of three years before the new regime becomes mandatory, while permitting voluntary early adoption of the new regime. We believe that this extended transition period will provide registrants, particularly domestic registrants who may not be subject to similar disclosure requirements in other CRIRSCO-based regimes and may not have the necessary personnel and processes in place, with an appropriate period of time to prepare for the increased disclosure requirements under the new regime.

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We would be pleased to discuss our comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Bruce K. Dallas, Joseph A. Hall, Michael Kaplan, Richard D. Truesdell, Jr., Marcel Fausten or Eugene Baek at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP

Davis Polk & Wardwell LLP