KATIE SWEENEY
General Counsel

The Honorable Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

RE:SEC Proposed Rule for Modernization of Property Disclosure Requirements for Mining Registrants

Dear Mr. Fields:

The National Mining Association (NMA) appreciates the opportunity to submit comments on the Securities and Exchange Commission's (SEC) proposed rule to modernize property disclosure requirements for mining registrants. 81 Fed. Reg. 41652. NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. Among NMA members are publicly traded companies listed in the United States that will be directly impacted by the proposed rule.

Given the breadth of NMA membership from companies that solely operate domestically to international companies listed on multiple exchanges to companies that only hold royalty interests, the views set forth here are those of the association as a whole, and are not necessarily the views of any individual NMA member.

General Comments

- Proposal Will Not Achieve SEC's Goals

SEC indicates the intent of the proposed rule is twofold: (1) to provide investors with a more comprehensive understanding of a registrant's mining properties and (2) to modernize SEC's disclosure requirements and policies for mining properties by aligning them with current industry and global regulatory practices and standards. Unfortunately, as currently written, the proposal is unlikely to achieve either of these goals. The proposal's failure to improve investor understanding stems in large part from SEC's one-size-fits-all disclosure requirements. The proposal covers a wide range of mining companies, including companies mining precious and base metals, coal, uranium, industrial minerals, sand and gravel, aggregates, crushed rock and dimension stone, and more, in what appears to be an attempt to provide comparable disclosures among mining operations. It also applies in some respects to publicly traded royalty companies and other royalty holders. Uniformly requiring all mining registrants to use identical disclosure formats fails to recognize that all mining operations cannot be made comparable. Mining operations range in size and method of extraction (i.e., *in situ,* open pit, underground, etc.) and produce an extremely wide variety of mineral products from a large range of geological environments. There is little comparability in the details within the broad range of these mining operations and the proposed overly-prescriptive and rigid disclosure formats will result in preparation of expensive and burdensome documentation that will be confusing or immaterial to investors.

The goal of aligning U.S. reporting requirements with global regulatory practices and standards is one shared by many of NMA's members, who are currently disadvantaged by SEC treatment of resources and reserves as set out in Industry Guide 7. As SEC correctly notes, Guide 7 has not been updated for more than 30 years and "during this period, mining has become an increasingly globalized industry and several foreign countries have adopted mining disclosure standards based on the Committee for Mineral Reserves International Reporting Standards (CRIRSCO)." Harmonizing the U.S. disclosure rules with CRIRSCO will help place U.S. mining registrants on a more level playing field with non-U.S. mining companies that are subject to one or more of the CRIRSCO-based mining codes.

However, as discussed throughout these comments, SEC's proposal deviates from CRIRSCO in so many key respects that any similarities are superficial. Instead of aligning with CRIRSCO, SEC seems intent on creating a whole new disclosure regime and, as such, U.S. reporting companies will continue to be disadvantaged. If SEC continues to pursue this rulemaking, it must ensure greater consistency with CRIRSCO[1]. This is particularly true for the definitions of mineral resources, mineral reserves and their modifiers. The currently proposed definitions deviate from CRIRSCO, sometimes by just a word or two but those words are critically important. SEC needs to use definitions identical to the CRIRSCO standards so that a single set of mineral resource and mineral reserve estimates could be made.

- Historic 24-Month Average Price Is Inappropriate for Estimating Resources and Reserves

One of NMA's biggest concerns with the proposal is the requirement that the prices used to estimate both mineral resources and mineral reserves are limited to less than or equal to the average spot price or contract price in effect over a 24-month period

[1] NMA endorses the recommendations of the Society for Mining, Metallurgy and Exploration (SME) for harmonizing the SEC rules with CRIRSCO. *See* SME comments to the SEC dated Aug. 4, 2016 and August 25, 2016.

preceding the date of the estimate. The prescriptive use of a trailing average price precludes the use of experience in price forecasting, and significantly deviates from CRIRSCO. It is unlikely the most recent 24-monthly average price method will be an effective way for the investor to make an informed decision to invest or registrant to manage a long-term business model as short-term price fluctuations notoriously have large standard deviations.

In contrast, CRIRSCO uses forward-looking market forecasts and prices, which has been interpreted to require use of forward-looking price forecasts and marketing studies by multiple institutions to develop a “consensus price” that the qualified person (QP) and the registrant feel is reasonable. Usually the consensus price involves forecasts from multiple sources, and these forecasts in turn may be used by multiple QPs. Thus, the consensus price provides comparability across QPs and projects and reflects the investment community’s view of the long-term price. Consensus prices have been successfully used as credible sources for price disclosure in Canada under National Instrument 43-101 (NI 43-101) for several years.

Further, NMA opposes the requirement to calculate resources at the same pricing used for reserves. This is not standard across other reporting jurisdictions and will leave U.S.-based companies at a substantive disadvantage to issuers in other jurisdictions. This disadvantage would not be mitigated by providing sensitivities to changes in price, as in the end, there will only be one official SEC-compliant resource estimate disclosed. Using prices no higher than the historic 24-month average for both reserves and resources is not always practical as frequently higher quality resources are being mined out, and the newer mines that are being brought on line are of lower quality. Further, because of the time involved in moving a mineral resource to a mineral reserve and ultimately into production, it is reasonable to apply a different pricing structure to mineral resources. Thus, to capture the likelihood of reasonable prospects for eventual economic extraction, mineral resources are routinely estimated at a higher price than that used for mineral reserves. This requirement will also require companies subject to both the CRIRSCO or NI 43-101 and the SEC rules to prepare two reports of mineral resource and reserve estimates for companies listed on multiple exchanges, with mineral resource estimates (and mineral reserve estimates) prepared under the SEC proposal likely to be materially lower.

- Proposal Unlawfully Requires Disclosure of Confidential Business Information

Another significant concern with the proposal is it would require mining registrants to potentially disclose confidential business information, including detailed information on exploration results, costs, production and cash flow. Primarily, the problem arises in the context of the overly detailed technical report summary required for each material site along with the accompanying tables. Mining companies have special partnerships, strategic alliances, and supplier and customer agreements that are legally confidential. Additionally, mining companies work multiple years to develop proprietary information, processes and patents and this should not be subject to mandatory disclosure requirements.

The requirement to disclose exploration results is a prime example of how the proposal raises substantial confidentiality and competitive concerns. There can be sound business reasons for keeping exploration results confidential, including joint venture agreements and retaining a competitive advantage where there are multiple parties performing exploration in the same district. SEC contends that exploration results will be helpful to investors but in fact, often the results are not material and provide limited value to shareholders or prospective investors. Typically, exploration results are highly confidential and speculative, and they do not nor cannot explain grade or quality continuity nor overall geologic uncertainty that is required in a resource estimation. Exploration targets do not always become economic reserves, or even mineral resources; and exploration results do not help quantify the likelihood of success. For these reasons, the disclosure of exploration results should be left to the discretion of the registrant.

While statements of property descriptions, mineral resources and mineral reserves are customary for most mining disclosure standards, the level of detail required by the SEC goes far beyond what is required in other jurisdictions. The proposed tables include detailed data that is often esoteric and not necessarily material, and as a result, will create confusion in even sophisticated investors.

Further, application of this requirement to royalty companies is particularly inappropriate, as they do not participate in the preparation or calculation of the operators' reserves, production estimates or production reports. In fact, royalty companies do not typically have access to the operator's data on which such calculations are made nor do they typically have the right to disclose such information of the operator for public use. Therefore, to require a royalty company to generate a technical report, or to have a Qualified Person sign off on a technical report on behalf of a royalty company that is based on secondary data, for which neither the company nor the Qualified Person have access to the original information, is inappropriate and could be misleading to investors.

- Qualified Person Liability and Responsibilities

We are concerned with at least two aspects of the proposed rules with respect to Qualified Persons (QP(s)). As proposed, the rule exposes the QP to significant liability: "the qualified person would be subject to liability as an expert for any untrue statement or omission of a material fact contained in the technical report summery under Section 11 of the Securities Act." While CRIRSCO and NI 43-101 do contain various QP requirements, including signed consents to the inclusions of studies or technical reports in registrants' filings, liability concerns are more pronounced in the U.S. For larger companies that have qualified persons on staff, the requirement for a qualified person to sign individually puts that person in a position similar to that of a principal executive or financial officer signing certifications under the Sarbanes-Oxley Act of 2002 ("SOX"). We believe that were the SEC to allow a sub-certification procedure similar to that allowed under SOX, some of the concerns with respect to disclaimers and liability would be mitigated. However, it is unclear from the proposal whether such a sub-certification procedure would be permitted.

Further, exposing these professionals to individual liability under U.S. securities laws would be inconsistent with the treatment of auditors and other engineering professionals. Other professionals certifying reserves of natural resources such as oil and gas in SEC filings are not required to be individually named. In addition, the Commission recently approved the new Public Company Accounting Oversight Board rules (the PCAOB Engagement Partner Rules) relating to the disclosure of audit engagement partner names. After years of commentary and redrafting, the PCAOB Engagement Partner Rules do not require the naming of the audit engagement partner in any filing with the SEC (or the signature of the audit engagement partner on the audit report). There is no principled reason to treat mining professionals differently than auditors or engineering professionals in the oil and gas industry.

We believe that adequate protection for investors already exists, without the need to expose individual QPs to increased liability, which inevitably will translate to additional expense to registrants. The increased risk may also create something of a chilling effect to the willingness of an individual professional to prepare technical reports for registrants. This would then reduce the already limited number of qualified persons available to mining companies to fulfill their disclosure obligations. Consulting firms which prepare technical reports for mining issuers in the United States are already accustomed to providing written consents from the firm, rather than on an individual basis, under existing SEC requirements.

Equally troubling is the prescription that the QP be solely responsible for all information contained in a technical report or economic study. The technical mineral resource/reserve estimates, themselves, require the work of numerous professionals and the final work product is a collaborative effort of such professionals reflecting the collective experience, education, training and expertise of such professionals. The role of the QP is to oversee this collective effort. See NI 43-101 Sections 5.1 and 8.1; see also NI 43-101CP. Sub certifications and/or multiple persons taking professional responsibility for technical reports should be permitted in the final form of rule.

Moreover, the rule precludes the QP from relying on needed experts in fields for which he/she is not qualified such as legal, marketing, social, and governmental regulations and potentially many other specialties. This proposed restriction (and associated additional exposure to liability) is onerous and unreasonable given the complexity of mining in general and the variety of jurisdictional regulations worldwide. In addition, we do not believe it is necessary to accomplish the SEC's objectives. We urge you to provide for limited exceptions of reliance similar to NI 43-101, whereby the technical qualified person is permitted to rely upon the expertise of legal, environmental or market professionals in such areas as mineral title, regulatory permitting and market conditions and forecasts. See also Comment Letter of Davis Polk, August 26, 2016, at 4-6; Comment Letter of SME, August 3, 2016, at 9-14 and 49-50.

- Overly Prescriptive Nature of the Summary Disclosure and Accompanying Tables

The proposed rule requires that "for each of the properties required to be included in the presentation, the registrant must identify the property, report the total production from the property for the three most recently completed fiscal years, and disclose the following information, using the format in Table 2." The one-size-fits-all prescriptive nature of this provision is problematic when trying to adapt unique aspects of each property into a precise format. As an example, completing Table 2 with the requested level of detail would take several pages for even a single large property due to the significant number of permits and leases. Other examples include: the arbitrary requirement to provide brief description of the 20 mining properties with the highest asset values; adapting the proposed format to include byproduct metal production which would require additional columns to certain tables; fitting a meaningful land description into the narrow table column; and trying to isolate reconciliation variables that are interdependent. To derive some of the items on the proposed tables will require significant additional time and resources, but add little value to investors. Instead of mandating the format, SEC should allow the registrant more latitude on the details of the summary technical information and how to present it; properties which are not material to the issuer should not be required to be included in the disclosure.

Without this latitude, companies that are registrants in more than one jurisdiction will be required to report similar information in a variety of formats, creating undue burdens for the registrants and confusion for investors. For example, under the proposed rule a U.S. registrant that also is publicly traded in Canada will be required to file the SEC technical report summaries for each of its material properties in addition to filing technical reports in the format specified by the Canadian government (NI 43-101). With the currently proposed rules, these two reports are neither identical nor interchangeable and both will require significant time, effort and cost to prepare. In addition, Canadian registrants qualifying for the Multi-Jurisdictional Disclosure System (MJDS) will be at a competitive advantage as they will be allowed to continue to disclose their mineral resources and mineral reserves solely according to NI 43-101/CRIRSCO standards and only provide the technical reports specified by NI 43-101F1. NMA believes, and strongly recommends, that the technical report summaries filed with the Commission should be interchangeable with technical reports prepared under NI 43-101.

- Expansion of Reporting Requirements Related to Environmental and Social Considerations Are Unnecessarily Duplicative of Existing Sustainability Reporting Regimes

In several contexts, the proposed rule would dramatically expand disclosure requirements related to environmental and social considerations and mandate detailed analysis of the requirements or interests of agencies, *NGOs, communities and other stakeholders*." The proposed rule specifically requests comment on expanding the disclosure requirements to include a more detailed discussion of environmental, health, safety, climate and other sustainability issues. While requiring a general overview of environmental, permitting and community factors is similar to other codes, NMA does not believe a greater level of detail is needed especially in light of existing sustainability reporting frameworks. Requiring the QP to opine on "…the adequacy of current plans to address any issues related to environmental, permitting and social or community factors" goes beyond the requirements of other codes as does including details of local procurement and hiring efforts. Instead, SEC should limit disclosure pertaining to sustainability to reasonably available information on environmental, permitting, and social or community factors related to the project, and where the QP deems relevant and material, include specific details for these factors.

Furthermore, to require registrants to provide a detailed analysis of the requirements or interests of NGOs and other stakeholders would introduce an unworkable and inappropriate disclosure mandate that does nothing to further the SEC's objectives in proposing the rule. The concept of "requirements" for those third-party entities has no basis in law or regulation. An SEC rule suggesting that NGOs and other stakeholders are able to impose "requirements" on how mining companies develop mineral deposits would be unprecedented and inconsistent with CIRSCO. Additionally, the term "interests" is undefined and so vague that is would be impossible for the qualified person to determine. Beyond identifying such groups, capturing the "interests" of such groups with the level of professional judgment and comfort necessary to give a certification is impossible. These requirements transcend the stated goals of the proposed rule and would have the effect of using SEC rules to require mining companies to give those entities a seat at the table in order to satisfy their disclosure requirements in determining mineral resources and mineral reserves. While mining companies may choose to do so, it is inappropriate to use the SEC's disclosure requirements to force that result.

Additionally, the proposal fails to address the costs of this aspect of the proposal, or how those costs relate to any potential benefit of this proposed new disclosure mandate. While the economic analysis accompanying the proposal acknowledges that there could be costs associated with the new disclosure requirements, it provides no analysis specific to the likely increased costs associated with a requirement to identify and analyze the "requirements or interests of agencies, NGOs, communities and other stakeholders." These costs – both direct and indirect – would be quite high and need to be appropriately considered.

Finally, given the issues identified above, NMA believes SEC should not move forward with this requirement. Not only do these provisions fail to promote accurate and uniform disclosure but they are also simply unnecessary given that much of the information that the SEC appears to be trying to elicit regarding sustainability issues is already publicly available. First, in Item 1A of the Annual Report on Form 10-K, publicly traded mining companies are already required to include information about the most significant risks that apply to the company or to its securities. To the extent any sustainability issue is material and a significant risk, it will be included in that section. Furthermore, mining companies already disclose material environmental, social and governance (ESG) information for investors and stakeholders in their corporate social responsibility (CSR) reports. Additionally, companies utilize a variety of internationally accepted frameworks to report on ESG including but not limited to the Global Reporting Initiative (GRI) and the International Organization for Standardization 1400 (ISO1400). We urge the SEC to avoid the duplication of information already available in other publicly available documents or the addition of new burdensome requirements to disclose information that would not be material to our investors.

- Treatment of Inferred Resources Places U.S. Registrants at a Competitive Disadvantage

The proposed rule does not allow economic value to be attributed to inferred mineral resources in an initial assessment or in pre-feasibility or feasibility studies. Further, preliminary economic assessments are not allowed. This approach is contrary to CRIRSCO standards and will deprive investors of the company's opinions regarding the potential economic value of inferred resources for a project. The inability to disclose such information would put U.S. reporting companies at a significant disadvantage in the market.

The proposal should be amended to better recognize inferred in the development cycle of a resource and provide for the disclosure of cash flow estimates from inferred Resources, with appropriate cautionary language. It is worthwhile noting that the U.S. Generally Accepted Accounting Principles (GAAP) allows for the use of inferred when calculating purchase price allocation and in impairment testing as Value Beyond Proven and Probable. In addition, long term royalty liabilities are calculated using inferred. The ability to disclose the results of cash flows that include inferred is an important method for junior miners and exploration firms to raise capital for ongoing programs. Without this provision, U.S. listed companies will be at a distinct disadvantage in raising capital as compared to those listed in Canada and elsewhere.

For example, Canadian MJDS registrants will continue to make preliminary economic assessments including assignment of value to inferred mineral resources. Given the prevalence of Canadian registrants in the mining industry, investors and analysts expect and rely on preliminary economic assessments that include or are based on inferred mineral resources. Disclosure recipients can be sufficiently cautioned about the potential unreliability of such preliminary economic assessments. In the absence of such disclosure, investors have historically made, and will continue to make, uninformed estimates of the value of inferred mineral resources. The inability of U.S. domestic registrants to provide preliminary economic assessments that include or are based on inferred mineral resources will cause capital to flow to Canadian registrants who provide indications of value, rather than U.S. registrants, in the case of similarly-situated early stage projects. This will place U.S. registrants at a significant disadvantage and deprive investors of information they have historically found relevant and material to their investment decisions.

- Treatment of Dilution and Losses Is Overly Prescriptive

The proposal defines a mineral reserve as the economically mineable part of a measured or indicated mineral resource, net of allowances for diluting materials and for losses that may occur when the material is mined or extracted. For most companies, dilution and losses are an integral part of the mineral extraction process and are reflected in the company's financial results. To report the resources and reserves undiluted and without losses will introduce a discrepancy between declared resources and reserves and actual production. Removing this dilution would not be an easy step, nor would it provide any useful information to the investing public. Current and future production include dilution and losses which form the foundation of earnings. Dilution and losses are fundamental to the modifying factors that go into making an estimate of resources and reserves. As such dilution and losses should be included in reporting resources and reserves.

The rule's provisions on dilution also highlight the problems with the one-size fits all approach advocated by SEC. The manner in which these provisions are written appear to be primarily based on metal mining where block models and selective mining units (SMUs) are used to calculate resources and reserves. In fact, dilution is a complex calculation that varies in different mines and across commodities based on the deposit characteristics, operational aspects and economic cut-off grade. The proposed rule's overly simplistic approach does not work well for other types of mining, particularly coal. The coal industry uses different terminology than the base metals and precious metals industry, and the proposed rule, consistent with CRIRSCO, should include these differences for clarity for the reporting registrants.[2]

[2] For coal mining registrants, many of the provisions of the proposal are unworkable. Other examples include the requirement to disclose numerical estimates associated with each class of mineral resource and reserve and prohibition on the use of USGS Circular 891 for classification of laterally continuous deposits like coal.

- Use of Historical Estimates Must Be Allowed

reads the proposal as prohibiting the use of estimates of the quantity, grade, or metal or mineral content of a deposit that a registrant has not verified as a current mineral resource or mineral reserve, and which was prepared before the registrant acquired, or entered into an agreement to acquire, an interest in the property that contains the deposit (an "historical estimate"). This prohibition on the use of historical estimates is also inconsistent with CRIRSCO standards and could significantly and negatively affect U.S. registrants as compared to their non-U.S. peers.

The proposed rule appears to require the preparation of a new technical report summary before the registrant is allowed to disclose any historical estimates. In contrast, Section 2.4 of NI 43-101 permits issuers to disclose historical estimates in certain limited circumstances, namely where the disclosure:

- identifies the source and date of the historical estimate, including any existing technical report;
- comments on the relevance and reliability of the historical estimate;
- provides the key assumptions, parameters, and methods used to prepare the historical estimate to the extent known;
- comments on what work needs to be done to upgrade or verify the historical estimate as current mineral resources or mineral reserves; and
- states with equal prominence that a qualified person has not done sufficient work to classify the historical estimate as current mineral resources or mineral reserves and the issuer is not treating the historical estimate as current mineral resources or mineral reserves.

The ability to disclose historical estimates in connection with an acquisition is a critical piece of information for investors to have prior to availability of a technical report, particularly given the significant delay, effort and cost required before a technical report (or technical report summary) is available. In some circumstances, the inability to disclose historical estimates can render a proposed acquisition a practical impossibility. For example, consider a potential acquisition by a U.S. registrant of a company owning a property that would be material to the registrant, for a value equal to approximately 50% of the registrant's pre-transaction value, in which the registrant would propose to offer consideration consisting of stock registered on Form S-4. The proxy statement/prospectus requires disclosures about the combined company on a pro forma basis. However, if the registrant cannot rely on the historical estimates prepared by the target company, it cannot satisfy this disclosure obligation because there is insufficient time in typical acquisition timeline for a qualified person to complete an independent estimate of mineral reserves and resources for the acquired property. The same obstacles would arise when a U.S. registrant seeks to raise capital in a registered offering to pay for a material acquisition. In this example, there is a meaningful risk that a U.S. registrant will be shut out of the market for new properties, other than acquisitions that are immaterial on a pro forma basis.

Conclusion

NMA appreciates the opportunity to submit these comments. NMA's extensive and substantive concerns with the proposal demonstrate the need for SEC to rethink the current approach, and continue its work to address these concerns and other comments received during the comment period. As written, the proposed rule fails to achieve either of SEC's articulated goals: investor education and modernizing SEC's disclosure requirements by aligning them with global standards. The timeframe for the implementation of these proposed requirements is unclear and, because of their impact on the mining industry, must be carefully considered and well defined when issued.

The heavily prescriptive nature of the proposed rules is unworkable across the mining industry, and the one-size-fits-all framework will create confusion for investors. As the above examples reveal, there is little comparability in the details within the broad range of mining operations. Rather than moving forward with the rule as proposed, NMA recommends that SEC hold a series of workshops with interested stakeholders to fully understand and address the concerns expressed by industry and mining professionals and discuss potential paths forward that meet the objectives of the SEC, Industry and investors. Finally, as noted, when SEC moves forward to finalize the rulemaking (presumably with extensive edits to address the substantive concerns expressed in numerous comment letters), it must provide a workable timeframe before requiring compliance by registrants. NMA recommends a minimum three-year period between finalization of the rule and the date that registrants must comply.

If you have any questions regarding these comments, please contact Katie Sweeney at [redacted] or [redacted]g or Veronika Kohler at [redacted] or [redacted]

Sincerely,

Katie Sweeney

Katie Sweeney