



bhpbilliton

**SEC Proposed
Rules comments
File S7-10-16
Property
disclosure by
mining registrants**

3 August 2016

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Executive Summary

The US Securities Exchange Commission (SEC) has invited public comment on its Proposed Rules to modernise disclosure requirements for mining properties. BHP Billiton appreciates the opportunity to comment and welcomes further consultation with the SEC if the opportunity is available.

BHP Billiton supports the intent to align the SEC requirements with the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) Template, nevertheless challenges a number of aspects as described further below.

Proposed Rules of particular concern are:

- The two year pricing model for determination of mineral resources and mineral reserves because this will create volatility in our mineral resources statements, duplication of work and disclosure of contract prices would risk triggering antitrust litigation.
- A number of the technical reporting requirements, especially relating to the prescriptive format for material properties, are considered onerous and contain areas of duplication of information.
- The definitions of materiality and fiscal year require additional clarification.
- Several areas relating to the modified application of CRIRSCO-based definitions are questioned, particularly in relation to qualified persons, mineral resources and mineral reserves.

BHP Billiton submits that the SEC should give further consideration to the benefits of aligning the Proposed Rules with CRIRSCO-based Codes in the areas described below. This would create consistency with other jurisdictions, and it would avoid volatility in companies' reported mineral resources and mineral reserves year-on-year.

Purpose

As a leading global resources company, BHP Billiton is dual listed on the Australian Securities Exchange (ASX) and London Stock Exchange (LSE), with two American Depositary Receipt listings on the New York Stock Exchange (NYSE). BHP Billiton has long reported under CRIRSCO-based Codes (for the ASX and LSE) which use a principles based approach. While supporting the modernisation of property disclosures in the US, we consider the prescriptive requirements and areas of deviation from the CRIRSCO template will place considerable burden on our reporting requirements and, more importantly, result in dissimilar information disclosed across jurisdictions.

The comments provided on the Proposed Rules are in direct response to SEC 17 CFR Parts 229, 239 and 249 (File Number S7-10-16) released on June 16, 2016. BHP Billiton provides this response in relation to specific areas (themes and specific items numbered below) and provides supporting data and examples, where possible, to illustrate the likely impact of the Proposed Rules. Areas of alignment are noted, however the focus of this preliminary submission relates to primary areas of concern.

Where we anticipate a major impact, we have provided an indication of personnel cost in terms of Full Time Equivalent (FTE) days of work per annum. This letter outlines the major areas of concern to BHP Billiton for early consideration by Dr Kwame Awuah-Offei, prior to his August 10, 2016 departure. A more comprehensive document will be prepared for the August 26, 2016 submission closing date to respond to questions in more detail.

Areas of alignment

BHP Billiton wishes to highlight the following key areas of support for the Proposed Rules:

- We strongly support alignment to CRIRSCO template nomenclature throughout the Proposed Rules (relevant sections of Proposed Rules Section II Proposed Mining Disclosure Rules Parts C, D, E and F where aligned with the CRIRSCO template).
- We support the introduction of Mineral Resources and Exploration Results reporting for SEC disclosure (Section II Proposed Mining Disclosure Rules Parts D and E).
- BHP Billiton considers the introduction of a 'qualified person' requirement favourably, and we strongly agree that there should be no requirement that the qualified person be independent from the registrant (Section II Proposed Mining Disclosure Rules Parts C page 38).
- We are also in agreement with the proposed changes to assumptions regarding operating approvals for the determination of mineral reserves (Section II Proposed Mining Disclosure Rules Part F page 116), which aligns the SEC with CRIRSCO-based Codes.

BHP Billiton considers the Proposed Rules in the above areas to be consistent with CRIRSCO-based Codes which follow a well-established and globally recognised International Reporting Template for Exploration Results, Mineral Resources and Mineral Reserves that has been tested for many years in global financial markets.

Areas of concern

In this section, we identify a number of specific areas in the Proposed Rules where we consider there is significant divergence from CRIRSCO-based Codes.

BHP Billiton opposes the Proposed Rules' two year pricing model for mineral resources (item 68 and related questions) and mineral reserves (item 79, 80 and related questions) and associated reporting requirements (proposed Tables 3 and 6 and related items 95, 96, 101, 106). We submit that companies should be given the flexibility to estimate mineral resources and mineral reserves using forward-looking prices consistent with business plans and, in our case, aligned with our declarations in other reporting jurisdictions.

We oppose the pricing model because:

- Prescribing the use of a pricing model that applies a ceiling commodity price of the 24-month period prior to the end of the last fiscal year will increase year-on-year volatility in companies' mineral resource and mineral reserve positions.
- To estimate our mineral resources and mineral reserves in the context of historical prices is of no value to management or, we believe, to our investors, and would be completed for SEC regulatory reporting purposes only.
- Our corporate planning objective is to mitigate the risks of fluctuating markets and commodity price volatility. As part of this, our business plans have a forward-looking perspective in line with our strategy to develop long-life and expandable assets. In CRIRSCO-based codes, the selection of commodity price is a prerogative of the Qualified Person in application of professional judgement and supported by a technical justification.
- The majority of our commodity sales are traded on the open market, but in some cases are subject to contractual sales agreements. BHP Billiton contract prices are commercial-in-confidence and unable to be disclosed because that would breach anti-trust requirements.

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- For multinational registrants, consideration of foreign exchange rates when compiling historical prices will add significant complexity year-on-year to mineral resources and mineral reserves declarations.
- Investors are likely to be misled by this pricing model during times of inflated market prices. For example lithium and gold prices over the past two years are unlikely to represent long-term sustainable prices or inducement prices for business plans. Use of historical pricing models in such instances confers an unfair advantage on companies whose portfolio is focused on these inflated commodities.

BHP Billiton is required to report to the ASX and LSE under the CRIRSCO-based principles approach using forecast pricing aligned to our business models. If the proposed pricing model is implemented, this would result in duplication of effort in both the estimation and reporting of mineral resources and mineral reserves. Effectively, two sets of numbers for each of our properties (in excess of 200 individual deposits) would need to be estimated and declared annually, along with the associated technical documentation required to support these declarations.

The two year pricing model would materially impact our resource portfolio reported in the US and generate annual variations according to fluctuating commodity prices and foreign exchange rates, whilst in other jurisdictions our resource endowment would remain relatively stable.

BHP Billiton also opposes the application of the same ceiling price for mineral resources and mineral reserves estimation (specifically item 69, page 93; we support item 102). Applying the same price to both resources and reserves does not allow for a resource envelope to be developed around a reserve. Restricting the mineral resources to the same footprint as the mineral reserves does not allow for optimal design aspects for infrastructure development such as access ramps and angled pit walls. BHP Billiton submits that registrants should be allowed to use a mineral price that is higher for mineral resources determination than for mineral reserves to provide transparency for investors on future value.

BHP Billiton is concerned that the Proposed Rules relating to technical reporting are burdensome and differ substantially from technical reports we prepare for other jurisdictions. Areas of concern relate particularly to the requirements for Technical Report Summaries (item 109 and related). We advocate that the SEC should accept CRIRSCO template Table 1 reports as supplied to jurisdictions such as the ASX to replace the SEC-specific Technical Report Summary. Specific concerns relating to requirements for the SEC prescribed Summary Disclosure and Individual Property Disclosure (Section II Proposed Mining Disclosure Rules Parts G-1 and G-2) are also outlined here.

We prefer technical reporting to be aligned with the CRIRSCO template because:

- The Proposed Rules technical reporting requirements related to mineral resources and mineral reserves are considered by BHP Billiton to be overly prescriptive, including a number of areas of duplication which will be onerous, especially for multi-jurisdiction foreign registrants. If a property is deemed material, and has a material change in mineral resources, according to the Proposed Rules that property will be required to be reported in the overview section of the report (Summary Disclosure), the Individual Property Disclosure section as well as triggering a Technical Report Summary. This is in addition to our ASX reporting obligations which are required according to the Joint Ore Reserves Committee (JORC) Code Table 1.
- The proposal on page 129 (and addressed in item 95) to report mineral resources as saleable product in Tables 3 and 6 is considered inappropriate because application of modifying factors to a resource with this degree of granularity is effectively defining a mineral reserve (refer CRIRSCO definition of mineral resources and mineral reserves). The published resource size would likely be reduced / undervalued using this approach.
- BHP Billiton currently reports Mineral Resources inclusive of Ore Reserves, as permitted under CRIRSCO-based Codes because we have significant bulk commodities in our portfolio, for which exclusive reporting does not adequately capture dilution and yield. The prescribed reporting of mineral resources exclusive of mineral reserves would result in significant additional work in estimation and to fulfil specific reporting format requirements (refer to page 129 and item 95; also in relation to Table 6 on page 140 and item 101) and may provide a misleading statement on expected yield.

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- The technical report summary requirement of including annual cash flow forecast for operating mines (page 156) is considered commercially sensitive and may affect a registrant's competitive advantage.

While the definitions for qualified persons, mineral resources and mineral reserves are largely aligned with the CRIRSCO-based Codes, BHP Billiton notes a number of areas of divergence, particularly in relation to mineral reserves (item 76 and related). The definitions of mineral resources, mineral reserves and their modifying factors should be identical to the CRIRSCO template standards to avoid confusion and promote consistency.

Areas where BHP Billiton considers there are critical differences in CRIRSCO-based definitions include:

- The qualified person is required by the Proposed Rule to accept liability for technical aspects outside their field of expertise. CRIRSCO-based Codes allow the qualified person to include a limited disclaimer of responsibility and to rely on other subject matter experts with respect to areas such as legal, marketing, social or other areas where the qualified person is not expert.
- BHP Billiton requests that the SEC recognise the list of Recognised Professional Organisations published by the ASX for qualified person membership.
- The Proposed Rules relating to reporting of mineral reserves excluding allowances for diluting materials and mining losses (item 77) are in contrast to the CRIRSCO template. Removing the inherent dilution for the mineral reserves estimation would not be easily achieved is misleading. This would not provide any additional meaningful investor information as results with dilution will contain higher total contained metal, and application of this rule would undervalue the registrant for US disclosure compared to other jurisdictions.
- The proposal to require disclosure of mineral reserves at three points of reference across the categories of in-situ material, process plant delivered material, and saleable product (item 77) is an unduly complex methodology to attempt to quantify dilution and recovery. Furthermore, in situ material cannot by CRIRSCO template definition be deemed mineral reserves and introduction of new mineral reserves terminology compared to CRIRSCO-based Codes for 'plant / mill feed' (refer to page 105 and item 77; and in Table 6 page 140 and item 101) creates complexity of reporting and should not be considered.

With respect to the reporting of Exploration Results, BHP Billiton is concerned by the requirement for disclosure of material exploration results for material mining properties (specifically item 42). Under other reporting jurisdictions (Australian Securities and Investments Commission for example), exploration results are only required to be disclosed if they are deemed to be material to investors and the market capitalisation of the company. The requirement for disclosure of material exploration results for material properties could be onerous with respect to our reporting requirements. Further clarity is sought regarding the intent of this proposed rule.

Omissions

BHP Billiton believes that there are a number of omissions in the Proposed Rules which should be addressed including:

- Subsequent public reporting requirements relating to the written consent of qualified persons. In a number of other jurisdictions when a registrant is re-issuing information previously released with the written consent of the qualified person, it may do so without subsequently obtaining the qualified persons written consent. If this 'streamlined' reporting is not available it can be burdensome for a large company to obtain qualified person consent each time annual data is presented.
- The disclosure framework the SEC proposes should also apply to registrant investor presentations, news releases, website postings and any other release of information to the public relating to exploration results, mineral resources and mineral reserves.

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- There is no rule proposed for the treatment of Exploration Targets as defined by the CRIRSCO template.
- Further clarity is also sought relating to the requirements for historic or foreign estimates.
- Provision for reporting of a Scoping Study is not provided and should be included.
- Further clarity is also sought with respect to the definition of materiality and material property so this is aligned with other jurisdictions.

Finally, the definition of fiscal year with respect to foreign registrants is unclear. Fiscal years are different across a number of jurisdictions. The aim of providing a common two year average price for all registrants to use will not be achieved given the differences in fiscal years.

Assessed Impacts

BHP Billiton questions the economic analysis conducted by the SEC with respect to estimates of additional compliance costs of preparing and filing forms relating to the Proposed Rules. The SEC estimates, for a registrant that is already subject to CRIRSCO-based Code requirements (such as BHP Billiton) an increase of 40 hours (page 226) in the reporting burden relating to its annual report, Form 20-F. We believe this is a significant underestimation for the reasons given below.

- While we understand the SEC cost estimate relates to the average burden for all registrants, both large and small, BHP Billiton has assessed the cost of compliance as significantly more impactful. As mentioned previously, BHP Billiton mineral assets encompass over 200 individual mineral resource and mineral reserve models, which are currently summarised into supporting technical documentation of approximately 20 separate qualified person's reports.
- Our assessment of potential cost reveals that as well as more onerous estimation and reporting requirements described above, additional training of the current Competent Persons will also be necessary. For our portfolio, the increase in FTE would be 12 in the first year and likely to decrease to seven in subsequent years.

The Proposed Rule requiring a ceiling pricing model of 24-months trailing average to estimate mineral resources and mineral reserves would have a material impact on the reporting figures for BHP Billiton. Preliminary analysis of the impact on the Mineral Resources for our material properties indicates a variation of more than 40% to what we currently report to the ASX and LSE following CRIRSCO-based guidelines. The impact on Ore Reserves is not as significant as for Mineral Resources but it may represent material differences (>10%) for some of our assets. Furthermore, some of our assets may be reported in some jurisdictions but may not be able to be reported to the SEC as they may not be considered economic as mineral resources or mineral reserves according to the SEC definition applying the proposed pricing model.

In addition, the differing pricing models discussed above would lead to inconsistency in market information available to investors for the same properties reported in different jurisdictions. This could lead to reputational damage which should be taken into account as a separate category of negative impact.

Conclusions

In summary, as a leading global resources company, with many and varied assets across a number of commodity groupings, BHP Billiton supports the Proposed Rules insofar as they attempt to modernise existing rules and align to a degree with the CRIRSCO template. However, as summarised above we consider the prescriptive requirements and areas of deviation from the CRIRSCO template will not only place considerable burden on our reporting requirements, but also result in confusing information for our investors due to non-aligned reporting of our mineral resources and mineral / ore reserves across jurisdictions.

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BHP Billiton submits that the SEC should give further consideration to the benefits of alignment of the Proposed Rules with CRIRSCO-based Codes, with the advantage that this should allow not only consistency of mineral resources and mineral reserves estimation and reporting with other jurisdictions, but decreased volatility in companies' portfolio position year on year. We have assessed that misalignment of SEC reporting requirements with other jurisdictions could result in a share price differential between the US and other markets that may impact US market credibility.

A more comprehensive response will also be submitted ahead of the submission deadline of 26 August 2016.

A handwritten signature in black ink, appearing to read 'Laura Tyler', with a stylized flourish at the end.

Laura Tyler
Chief of Staff to the CEO,
Head of Geoscience