U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

September 26, 2016

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

Re: Modernization of Property Disclosures for Mining Registrants; 17 CFR Parts 229, 239, and 249; Release Nos. Release Nos. 33-10098; 34-78086; File No. S7-10-16; RIN 3235–AL81

Dear Mr. Fields:

The U.S. Chamber of Commerce (the "Chamber") created the Center for Capital Markets Competitiveness to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.[1] The mission of the U.S. Chamber of Commerce's Institute for 21st Century Energy is to unify policymakers, regulators, business leaders, and the American public behind a common sense strategy to help keep America secure, prosperous, and clean. The Chamber welcomes the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "SEC" or "Commission"), entitled Modernization of Property Disclosures for Mining Registrants (the "Proposing Release").[2]

The Chamber commends the Commission for continuing its disclosure effectiveness initiative. We support a system of securities regulation in which investors are provided with decision-useful information so that they can deploy capital efficiently and so that businesses can raise the financial resources needed to grow and expand. We also support the goal of reviewing regulations that have been on the books for many years (such as Industry Guide 7 and Item 102 of Regulation S-K) and,

[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.
[2] Release No. 33-10098; 34-78086, *Modernization of Property Disclosures for Mining Registrants*, 81 Fed. Reg. 41,652, 41,703 (June 16, 2016)(hereinafter "Proposing Release").

where appropriate, updating them when necessitated by changes in industry practice and the passage of time.

The Chamber is concerned, however, that the Proposing Release overshoots this goal in many key areas. While we do not object to the modernization of the reporting regime for mining companies, we believe a more measured approach than the one envisioned in the Proposing Release would result in better, more usable disclosure for investors.

As we discuss in greater detail below, the Proposing Release can be improved in the following ways:

- While we do not always favor strict convergence with international standards, we believe that the U.S. regime for mining-related disclosures would be better served by closer adherence to CRIRSCO-based disclosure standards. Many of the Proposing Release's deficiencies would be cured by scaling back or eliminating the various departures from that model, which we believe will in turn produce greater comparability and less complexity in SEC disclosures.

- Materiality should be the guiding principle in formulating these and other public company disclosures. Accordingly, the Commission should eschew immaterial disclosure requirements as well as disclosure animated by social, political, and cultural concerns that stray beyond the Commission's core mission.

- Qualified Persons should not be subject to Section 11 liability.

- The Commission should not impose additional XBRL reporting obligations on registrants without producing empirical evidence that investors in fact use XBRL information on a regular basis.

- The cursory economic discussion contained in the Proposing Release should be supplemented by a more rigorous cost-benefit analysis.

DISCUSSION

An overarching concern we have with respect to the Proposing Release is its misplaced assumption that all mining companies are comparable, which has led the Commission to propose a one-size-fits-all approach to disclosure that is beneficial neither to registrants nor their investors. Indeed, a wide variety of companies engage in mining activities and would be subject to proposed Subpart 1300 of Regulation S-K. Their outputs include not just coal and precious metals but also base metals, nonmetallic minerals, construction sand and gravel, crushed stone, and industrial minerals. Under the proposed definition of "minerals of economic interest," companies would also make disclosure with respect to mineral brines, geothermal fields, and "other resources extracted on or within the earth's crust."[3]

Aside from extracting raw materials from the earth, companies in these various disparate sectors often have very little in common. Across the wide spectrum of mining activities exists a diversity of practices concerning exploration, financing, extraction, refining, production, transportation, marketing, pricing and—eventually—sales. A company that mines copper and a company that quarries stone may have as little in common with one another as do a bank and a retailer. Given these fundamental differences in business models, investors in different mining sectors also have varying expectations of the companies in which they invest. Yet the Proposing Release would require that all companies broadly engaged in mining activities make disclosures that we believe would not only be overly prescriptive and burdensome, but also misleading and immaterial to investors.

Many of the proposed disclosures would be far more detailed than the ones they replace. They would require registrants to develop new internal resources, processes, and procedures to collect and report on the various data points. These changes are sure to require registrants to incur substantial reporting costs. Nevertheless, given the significant differences among mining firms, investors would not find disclosures across the mining industry to be comparable, defeating one of the Proposing Release's apparent goals.

---

[3] *See* proposed Item 1301(d)(14) of Regulation S-K; Proposing Release at 41,666.

The Chamber is also concerned about the scant economic analysis contained in the Proposing Release, which limits our ability to comment on the proposed rules in a fully informed manner. The Proposing Release relies heavily on a single study of the Australian market that is based on data from 2005 to 2008,[4] and the Proposing Release does not appear to contain any other empirical analysis of the potential effect of the proposed rules on the mining sector. As you know, the D.C. Circuit Court of Appeals has in the recent past struck down SEC rules that relied "exclusively" on "unpersuasive" studies.[5]

The Proposing Release points to the benefits of harmonization with global standards to support adoption of the proposed rules. But the proposed rules depart in numerous and significant ways from the CRIRSCO standards, including, as discussed below, the requirement to prepare a technical report summary, the pricing model for calculating the value of reserves, and the Section 11 liability of so-called "Qualified Persons." Each of these departures from the CRIRSCO-based standards undermines the Commission's stated objective of modernizing the Commission's disclosure requirements for mining properties by aligning them with contemporary industry and international standards.

Materiality of Disclosure

As a general matter, the Chamber strongly believes that the Commission should stick to the materiality standard as the guidepost for disclosures, which has worked so well for so long for issuers and investors alike. That is why we are concerned by the Proposing Release's emphasis on the disclosure of information that would often be immaterial to investors. The familiar concept of "materiality," as laid out by the Supreme Court in seminal cases such as *TSC Industries v. Northway*[6] and *Basic Inc. v. Levinson*,[7] has been the cornerstone of our American capital markets for decades and has contributed to the formation of the deepest, most diverse, most liquid markets the world has ever known. The ability of businesses of all sizes—from young Main Street entrepreneurs to more mature companies that have employed millions of Americans for generations—to seek appropriate forms of investment from investors

[4] *See* Proposing Release at 41,704.
[5] *Business Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011).
[6] 426 U.S. 438 (1976).
[7] 485 U.S. 224 (1988).

of all walks of life within our disclosure-based regulatory system is the hallmark of American free enterprise.

The proposed rules create the presumption that a registrant's mining operations are material if they consist of 10% or more of its total assets. Although it is theoretically possible to rebut such a presumption, in practice, we believe few registrants would be inclined to make this attempt. The Chamber generally opposes the continued use of special materiality tests (such as 10% of total assets) in the context of individual items under Regulation S-K. These kinds of heuristics create inconsistency across Regulation S-K disclosure items and have the potential to confuse or mislead investors. Instead, for ease of administration, we instead urge the Commission to abandon such special tests in favor of the *TSC/Basic* approach of considering, with other quantitative and qualitative factors, whether the required disclosure would significantly alter the total mix of information available to a reasonable investor. If the test is satisfied, disclosure is required under our present system; if not, it is not.

In this way, materiality long has been the dividing line for determining what should be disclosed and what should not have to be disclosed under the federal securities laws. Materiality is judged through the eyes of a "reasonable investor"—a critical feature of the Supreme Court's test. Materiality does not turn on the needs of an investor that is not representative of return-seeking investors more broadly or that is looking to advance some special interest. This present approach to materiality mitigates the risk that SEC disclosure documents will become too dense and impenetrable for investors by seeking to be all things to all people. It also helps ensure that the SEC, in fashioning and enforcing the disclosure regime under the federal securities laws, focuses on what is best for investors overall and adheres to the agency's mission as the country's capital markets regulator.

In recent years, there have been many efforts to erode this longstanding approach to materiality, usually by special interest activists seeking to hijack the corporate disclosure rules to achieve a political outcome not supported by the legislature. These efforts have complicated and confused what materiality means and threaten to further overload investors with information that few find to be useful when evaluating a company's financial and operational performance. As the Commission considers further reform of Regulations S-K and S-X, the guiding

principle for public company disclosure is, and should remain, materiality as viewed by a reasonable investor.

The Proposing Release would require a company to file a technical report summary in support of disclosures of mineral resources, mineral reserves, and material exploration results for each material property. Each Qualified Person would be required to summarize information and conclusions for each property in the technical report summary. The requirement to file technical summary reports is a significant change to the current SEC rules and goes beyond most CRIRSCO-based disclosure regimes, other than Canada and Australia, which do not require filing of expert reports.

We are especially apprehensive that the technical report summary would be required to include a litany of matters such as a description of the property, accessibility, climate, resources, infrastructure, property history, geology, hydrogeology, geotechnical data testing and analysis, relevant exploration work, sample preparation methods, mineral processing or testing, assumptions, mining methods, processing and recovery methods, required infrastructure, market for the product, environmental matters, permitting and other factors, capital and operating costs, economic analysis, discussion of adjacent properties and other matters. Beyond the sheer burden of compiling this information and the inevitable difficulties many investors will have in unpacking highly technical disclosures, many (if not most) of these items do not seem intended to provide material information to investors. Instead, they seem designed to satisfy some unstated social or political goal.

We do not believe that SEC-mandated disclosures should be used to further social, cultural, or political motivations that the federal securities laws were not designed to advance. The SEC disclosure regime should not be an avenue for special interests to impose their agenda on shareholders at large, particularly when doing so does not maximize long-term value creation by a company. We urge the Commission to resist the siren song of those who call for new public company disclosures that are not designed to enhance shareholder value for all investors, but rather to achieve some narrow social impact, political goal or pecuniary gain.

Finally, under proposed Item 1301(c) of Regulation S-K, if mining operations as a whole are material, a registrant must provide summary disclosures concerning its mining activities as specified in Item 1303. Item 1303(b)(2) then provides that this

"Table 2" disclosure encompasses the 20 largest properties (based on asset value), irrespective of the materiality of the operations of each of those particular properties. We do not see any benefit to investors in providing them with lengthy but immaterial disclosures, and the costs and burdens of preparing those immaterial disclosures would be substantial for reporting companies. Instead, for a company that triggers Item 1301(c), we believe Table 2 should not extend to the 20 largest properties, but only to material properties, whether that number be less than or in excess of 20. If no properties meet the materiality threshold, then a registrant should not be required to provide the Table 2 disclosure at all.

Qualified Persons and Liability for Disclosure

The Proposing Release provides that all disclosures of mineral resources, mineral reserves, and material exploration results that a registrant includes in its SEC filings must be based on a report of a Qualified Person and supporting documentation prepared by that person. Additionally, the Proposing Release contemplates that the technical report summary would be filed as an exhibit when the company discloses for the first time mineral reserves, mineral resources or material exploration results, or when there is a material change to such reserves, resources or results. Where the particular Commission filing is a registration statement under the Securities Act, a "Qualified Person" would be an "expert" subject to strict liability under Section 11 of the Securities Act of 1933. The current SEC rules do not contain such requirements.

Accordingly, the Proposing Release provides that a Qualified Person will have Section 11 expert liability under the Securities Act for any material misstatements or omissions in the technical report summary. Many other jurisdictions require the identification of a Qualified Person, and some require a signed report, but none impose liability of this kind. Furthermore, the Proposing Release makes clear that the Qualified Person would not be permitted to include a disclaimer of responsibility if he or she relies on a report or statement of another expert preparing a technical report summary, and the Proposing Release does not specify how a Qualified Person might establish a due diligence defense under Section 11(b)(3)(B) of the Securities Act.

We believe that the imposition of Section 11 liability on Qualified Persons will significantly discourage otherwise qualified parties from serving in this role, which will in turn make it substantially more difficult and expensive(if not impossible) to retain

the services of a Qualified Person should any final rules include this requirement. Because the Commission takes the position that indemnification for liabilities under the Securities Act of 1933 violates public policy and is unenforceable, the ability of an issuer to indemnify a Qualified Person against Section 11 liability may be limited, which exacerbates the problem.[8]

As the Commission knows, following the amendment to SEC Rule 436(g) in 2010 to impose Section 11 liability on credit rating agencies in connection with the public offer and sale of asset-backed securities, these firms refused to grant their consent to be named as experts in SEC registration statements.[9] This refusal to be named as an expert threatened to disrupt the market for asset-backed securities, and to avoid disaster the Division of Corporation Finance was compelled to grant class-wide no-action relief to asset-backed issuers who were unable to secure the consent of affected credit rating agencies.[10] The Chamber has every reason to believe that the imposition of Section 11 liability on Qualified Persons, if enacted as proposed, would present the same risk to issuers in the mining sector. We urge the Commission to eliminate the proposed requirement that Qualified Persons be named as experts and face Section 11 liability in any final rules.

The Proposing Release admits that the purported benefits of the Qualified Person requirement "are not without associated costs",[11] then concedes:

> Quantifying these cost are challenging due to data limitations. For example, we do not have access to data that would allow us to more precisely measure the current supply of mining professionals meeting the definition of a "Qualified Person." We also do not have access to readily available data sources of comprehensive compensation data for geologists and mining engineers (in the United Sates [sic] or other countries), which would help us estimate the marginal cost of hiring a Qualified Person with the

---

[8] *See, e.g.*, Item 512(h)(3) of Regulation S-K, 17 CFR § 229.512(h)(3); *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969) (relying on SEC position against indemnification to uphold the district court's refusal to permit indemnification for claims under section 17(a) of the Securities Act and section 10(b) of the Securities Exchange Act).
[9] *Ford Motor Credit Company LLC*, Commission No-Action Letter (Nov. 23, 2010), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm.
[10] *Id.*
[11] Proposing Release at 41,702.

> minimum level of expertise versus professionals that do not qualify as Qualified Persons.[12]

In light of this admission, we do not see how the Commission is able to formulate an informed opinion as to the desirability or necessity of a Qualified Person.

The Proposing Release also makes various assumptions about the potential pool of professionals who would be available to serve as a Qualified Person. But the Proposing Release does not consider the chilling effect of strict liability under Section 11 as a disincentive to serving as a Qualified Person, nor does it analyze whether the resulting small pool of professionals who could serve in this role will price their services to offset the legal risk they have assumed. Eventually, the Proposing Release acknowledges that "the resulting increase in legal liability could also raise the cost of hiring a Qualified Person."[13]

The Proposing Release theorizes that foreign professionals may elect to serve as Qualified Persons.[14] However, when faced with the prospect of strict liability under Section 11, we believe most foreign professionals who are not otherwise subject to the federal securities laws will not voluntarily subject themselves to U.S. law, as is usually the case when foreign persons face the U.S. civil litigation system.

Another shortcoming of the Proposing Release is its failure to consider the anticompetitive effect that imposing Section 11 liability on Qualified Persons will have insofar as it drives most, if not all, potential candidates away from fulfilling this task. To the contrary, the Proposing Release erroneously draws the opposite conclusion that costs will be low because competition would be intense, but again, this assertion does not consider the Section 11 effect.[15]

Proposed Pricing Model

The Proposing Release further diverges from CRIRSCO-based international standards in the proposed pricing model for mineral reserves. The Proposing Release

---

[12] *Id.* n. 443.
[13] *Id.* at 41,709.
[14] *Id.* at 41,702.
[15] *See id.* While a small number of willing professionals may remain, neither issuers nor their investors benefit from the diminished choice and higher costs associated with such a diminished pool.

requires the use of a price that is no higher than the trailing 24-month average spot price, except in cases where sales prices are determined by contractual agreements. Guide 7 does not include a specific pricing model for the estimation of mineral reserves, although existing guidance generally contemplates the use of a price no higher than the trailing three-year average price. The proposed rules also differ from CRIRSCO, which permits the use of any reasonable and justifiable price based on a view of long-term market trends.

Estimates of mineral resources and mineral reserves are intrinsically forward-looking. Backward-looking prices such as the current three-year trailing average or the proposed 24-month trailing average do not provide meaningful information to investors. Using this methodology also tends to result in increased year-to-year volatility of disclosed mineral resources and reserves. We recommend that any final rules on this topic grant issuers the flexibility to use either historical or forward-looking prices, so long as they clearly disclose which methodology they have elected to employ.

XBRL Disclosure

The Proposing Release requests comment as to whether the new Subpart 1300 disclosures should be required to be made available in the XBRL format. By doing so, the Proposing Release posits that "investors and other data users (e.g., analysts) can more easily retrieve and use the information reported by registrants and perform comparisons of common disclosures across registrants and reporting periods."[16] As detailed above, we believe that comparability across the mining sector will be limited due to the diversity of operations and business practices that mining companies employ. With little to no comparability among companies making disclosure under Subpart 1300, we see little benefit to compelling the use of XBRL.

The Proposing Release also hypothesizes that investors, through the use of XBRL, "can download information directly into spreadsheets or statistical analysis software, which eliminates the need to enter the information manually and minimizes the time burden and risk of errors associated with data entry."[17] Implicit in any

[16] *Id.* at 41,709.
[17] *Id.*

requirement to use XBRL tagging is the assumption that investors widely use XBRL data in this way, but our own experience is contrary to this assumption. While XBRL tagging may seem beneficial in theory, if the data is not actually being used by a significant number of investors, then the tagging requirement places a burden on registrants without a commensurate investor benefit. Without empirical evidence that investors are making widespread use of XBRL data, we do not support expanding the use of data tagging to any new Subpart 1300 disclosures.

Impact on Efficiency, Competition and Capital Formation

Although the Proposing Release asserts that the proposed rules could "have a positive effect on efficiency and capital formation,"[18] we believe the proposed rules will instead materially adversely affect competition and capital formation in the mining sector by chilling the market for public offerings and registrations. In fashioning any new expanded disclosure regime, the Commission should remain aware that over the past two decades the number of companies seeking capital from the public markets has diminished by half. The requirements embodied in the Proposed Rules to disclose large quantities of competitively sensitive information will discourage many companies from seeking or maintaining a public listing. This effect would fall hardest on smaller companies that lack the internal resources to compile and report on all the proposed Subpart 1300 information. Smaller companies will also be placed at a significant competitive disadvantage if they were required to disclose sensitive operational information to larger competitors.

In light of the foregoing, privately held mining companies are likely to seek to remain private or pursue a sale of the business rather than access the public markets due to the substantial burden presented by the proposed rules, should they be adopted. Multinational companies with dual listings on U.S. and foreign exchanges would also find no advantage under the proposed rules. Multinationals would still be required to prepare one set of disclosures under international standards and a separate set under the new U.S. regime.

[18] *Id.* at 41,710.

CONCLUSION

We again commend the Commission for its ongoing efforts under the disclosure effectiveness initiative. The Chamber continues to believe that Regulation S-K should be modernized in a way that streamlines disclosure and emphasizes materiality, to ensure that investors are provided with meaningful, non-repetitive information and registrants are not burdened with overwhelming disclosure requirements.

In the SEC's continuing efforts to modernize Regulation S-K, we caution against the use of rigid, one-size-fits-all disclosure methods, which we believe would perpetuate existing problems with lengthy disclosure that is of limited use to investors. We also urge the Commission to avoid compelling disclosure animated by social, political and cultural concerns that are beyond its core mission.

Finally, we also believe that it is incumbent upon the SEC to perform an analysis on how any proposed modifications will impact capital formation and competition prior to releasing proposed rules. To that end, the Proposing Release would benefit greatly from a more rigorous cost-benefit analysis.

We thank you for your consideration of these comments and are available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness

Dan Byers
Vice President, Policy
Institute for 21st Century Energy

cc: The Honorable Mary Jo White
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar