

September 26, 2016

VIA EMAIL ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))

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

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

Dear Mr. Fields:

The National Stone, Sand and Gravel Association (the “Association”) is the leading voice and advocate for the aggregates industry. We advance public policies that protect and expand the safe, environmentally responsible use of aggregates that build America’s infrastructure and economy. The Association appreciates the opportunity to provide comments on the Proposing Release on behalf of our members.

In brief, our comments focus on the following issues:

- The Proposing Release relies exclusively on sweeping generalizations about the mining sector as a whole and does not consider the unique business model of the aggregates industry.
- The proposed rules depart materially from global Committee for Mineral Reserves International Reporting Standards (“CRIRSCO”), frustrating the Commission’s stated goal of harmonizing the U.S. reporting regime with its international counterparts and making compliance more difficult for reporting companies.
- Due to the Proposing Release’s failure to consider the distinctive business model of the aggregates industry, the proposed rules would (1) require aggregates firms to devote substantial resources and incur significant costs to prepare voluminous, immaterial disclosures that are not well-tailored to the sector or the needs of its investors, and (2) result in the disclosure of competitively sensitive information that would do great harm to issuers without any material benefit to investors.
- The Proposing Release’s economic analysis of the potential impact of the rules is incomplete and highly speculative.

## Overview of the Aggregates Industry

The Association's members – stone, sand and gravel producers and the equipment manufacturers and service providers who support them – quarry the essential raw materials found in homes, buildings, roads, railroad ballast, erosion control systems, filtration systems, bridges and public works projects and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel mined annually in the United States. According to the U.S. Geological Survey, approximate production of aggregates in the U.S. in 2015 totaled more than 2.2 billion metric tons at a value of \$21 billion.<sup>1</sup> The aggregates industry in the U.S. employs more than 100,000 highly-skilled men and women. Our publicly traded members include both multinational corporations, for whom international disclosure standards may be appealing, as well as companies doing business solely in the North American or U.S. market, for whom international disclosure standards may have less importance.

Generally extracted from the earth using surface or underground mining methods, aggregates are produced from natural deposits of various materials such as granite, limestone, sand and gravel, and trap rock. Once extracted, processed and graded, aggregates are supplied directly to their end users or incorporated for further processing into construction materials and products, such as cement, asphalt paving mix and ready-mixed concrete.

According to the U.S. Geological Survey, approximately 1.3 billion metric tons of crushed stone with a value of approximately \$13.8 billion was produced in the United States in 2015, which is in line with 2014 production totals.<sup>2</sup> Sand and gravel production was approximately 931 million metric tons in 2015 valued at approximately \$7.2 billion, up from 904 million metric tons produced in 2014.<sup>3</sup> The U.S. Geological Survey also reported that a total of 1,430 companies operating 3,700 quarries and 82 underground mines produced or sold crushed stone in 2015 in the United States, and 4,100 companies and government agencies from about 6,300 operations produced sand and gravel in the U.S.<sup>4</sup>

Unlike many other minerals and metals produced through similar mining processes, the price per metric ton of aggregates is very low. Based on U.S. Geological Survey data, over the past five years, the average price for crushed stone has ranged from a low in 2011 of \$9.60 per metric ton to a high of \$10.60 per metric ton in 2015.<sup>5</sup> Over the same period, the average price for sand and gravel has ranged from a low in 2011 of \$7.49 per metric ton to a high of \$7.72 per metric ton in 2015.<sup>6</sup>

It appears that one of the animating principles of the Proposing Release is to require that the issuer's assessment of its reserves be as comprehensive as a bankable feasibility study. In asking

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<sup>1</sup> See Dep't of the Interior, U.S. Geological Survey, *Mineral Commodities Survey 2016* (Jan. 2016) at 142, 156, available at <http://minerals.usgs.gov/minerals/pubs/mcs/2016/mcs2016.pdf>.

<sup>2</sup> *Id.* at 156.

<sup>3</sup> *Id.* at 142.

<sup>4</sup> *Id.* at 142, 156.

<sup>5</sup> *Id.* at 156.

<sup>6</sup> *Id.* at 142.



aggregates companies to disclose the data that they rely on to establish whether reserves are proven or probable, it is comparing those processes to one that a precious minerals company would typically produce. However, the use of the funds and the risk in exploration is markedly different when comparing precious minerals and aggregates, and the corresponding disclosure is not material to investors in aggregates companies.

Most precious metals companies mine deep underground, whereas most aggregates facilities are open pit. When used in the aggregates industry, underground mines are typically hundreds of feet below the surface rather than thousands of feet below the surface, and they follow known reserves. Before any mine development starts for an aggregates company, drilling occurs that establishes with certainty the general amount and quality of reserves. Geologists employed or retained by the issuers generally review various exploration data, including the U.S. geologic maps, the U.S. Department of Agriculture soil maps, aerial photographs, and electromagnetic, seismic, or other surveys conducted by independent geotechnical engineering firms. These other sources provide preliminary and back-up data that is consistent with the conclusions reached as to proven and probable reserves.

The quarry development process for aggregates companies proceeds relatively systematically in substantially the same manner regardless of whether the quarry is developed through greensite, expansion at existing quarry locations or acquisition. The quarry development process includes the following actions:

- Market analysis is conducted to determine areas of demographic population movement and the anticipated timing of market growth. The timing of increases in market demand will typically drive the nature (either greensite, internal expansion or acquisition) of the quarry development process.
- A determination is made as to whether there are proven and probable mineral reserves that are suitable for use in the issuer's end use markets available near the markets of interest. This assessment examines the soundness, abrasion resistance and other physical properties of the aggregates reserves for suitability to specific customer needs. The amenability of the deposit to mining and processing techniques is not a concern.
- A determination is made as to the economic feasibility of quarrying the aggregates reserves. Reserves are acquired through purchase or lease of surface and mineral rights from private individuals and other companies. The funds required to purchase or lease land on which reserves are present are typically minimal. The key variables in such analysis are the amount and depth of overburden removal and the location of the deposit in relation to the market. Because deposits are generally homogeneous, the total cost of extraction and production of aggregates material do not vary significantly over the life of the quarry. Aggregates pricing estimates are also taken into account.
- Zoning and operating permits are secured from governmental and regulatory bodies before commencing quarry operations.

These procedures for determining proven and probable aggregates reserves are equivalent to the procedures for determining reserves in a final feasibility study in the case of a precious metal deposit. In addition, these procedures for an aggregates deposit result in a reduced risk profile for the mining of the deposit than that determined from a bankable final feasibility study for a precious metal deposit. The following factors contribute to this result: (1) the concentration level of the metal, or ore grade, is not critical in the case of an aggregates reserve; (2) geologic features, such as faults and dissolution zones, occurring at depth in a precious metal deposit, generally do not present a high risk issue or significant cost impact with an aggregates deposit, which is normally shallower in nature, and (3) the pro forma life of an aggregates deposit is spatially much smaller than that for a precious metal and hence the risk profile is lower given the reserves required to sustain the economic life of the deposit.

Financing for expansion or acquisition of quarries or underground mines is typically accomplished through operating cash flows. Aggregates issuers typically do not seek to obtain financing for development of any particular deposit, whether through bank loans, government loans, or advance sales of the mineral products. The cost of the extraction and production of aggregates materials is dollars per ton versus hundreds of dollars per pound or ounce, which is more typical with precious minerals. Accordingly, even if an aggregates issuer's estimates of proven and probable reserves were inaccurate because certain assumptions were in error, the difference would not be material to an investor.

The risk profile for an aggregates project is small compared to a project that would require a bankable final feasibility analysis due to the following factors: (1) the capital for an aggregates quarry project is substantially lower than that for precious metals, (2) the proven reserves of aggregates generally extend beyond the pro forma economic viability of the deposit, and (3) an aggregates operation is not commissioned until it can reasonably stand up to a feasibility analysis.

Aggregates are usually produced near where they are to be used. Otherwise, transportation costs for the large quantities of heavy, bulk material that must be shipped can exceed the cost of the materials themselves, rendering them uncompetitive compared to locally produced materials. High transportation costs contribute to the wide dispersion and large number of production sites nationwide and globally. Where possible, aggregates producers maintain operations adjacent to highly-populated areas to reduce transportation costs and enhance margins.

The unique economics of the aggregates business also impact investor and analyst expectations for publicly traded aggregates firms. In contrast to other mining and extractive industries in which resources are rare and raw materials are highly valuable, stone, sand and gravel are abundant, naturally occurring resources with a relatively low value based on its selling price as compared to the selling price of the downstream products in which it is often a component (e.g., asphalt or ready-mix concrete). And, unlike other mining and extractive industries that place a high premium on exploration activities due to the scarcity of resources, geological survey information for aggregates is widely available in most countries, and commercially desirable minerals can be easily identified by simple tests in the field without elaborate equipment. As a result, investors in the aggregates business do not place much emphasis on the value of mineral

reserves or exploration activities. We agree with the Commission's assessment that "[q]uantifying the anticipated net benefit from [this] proposed disclosure requirements is difficult."<sup>7</sup> For these reasons, aggregates investors instead maintain their focus on profitability margins and other metrics that are indicative of operational efficiency.

The foregoing discussion demonstrates that the aggregates business is substantially different than other industries in the mining sector. We believe a significant shortcoming of the Proposing Release is its erroneous assumption that all mining companies are comparable and should therefore disclose the same categories of information to investors. We echo the recent comments of the Society for Mining, Metallurgy & Exploration ("SME") to the Commission on the Proposing Release:

SME notes that Guide 7 and the Proposed Rules cover a wide range of mining companies, including companies mining precious and base metals, coal, industrial minerals, sand and gravel, aggregates, crushed rock and dimension stone, brines and geothermal energy etc. The proposed disclosure formats are in many cases overly prescriptive, and their implementation will result in preparation of expensive and burdensome documentation that may be misleading or immaterial to investors. Many of these prescriptive formats appear to stem from efforts to provide comparable disclosures in the mistaken view that all mining operations can be made to be comparable. Mining operations range from local sand and gravel pits to huge open-pit mines and deep underground mines producing 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. SME believes that these attempts at comparability should be abandoned.<sup>8</sup>

It is against this backdrop that we provide our comments.

## **Discussion**

### **Inapplicability of Proposed Rules to the Aggregates Industry**

As a threshold matter, the proposed rules treat the aggregates industry in the same way as other mining firms that produce commodities possessing a much higher value, pound for pound. Indeed, the proposed rules seem written with precious minerals, not aggregates, in mind. As noted above, with aggregates on average selling over the past five years for between \$7.49 and \$10.60 per metric ton, the economics and corresponding investor expectations regarding aggregates firms are very different from other mining-intensive businesses where equivalent tonnage is far more valuable, on both a refined and unrefined basis.

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<sup>7</sup> 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").

<sup>8</sup> See Letter from David L. Kanagy, CAE, Executive Director, Society for Mining, Metallurgy and Exploration, Inc. to the Commission (Aug. 4, 2016) at 3, available at <https://www.sec.gov/comments/s7-10-16/s71016-6.pdf> (hereinafter "SME Letter").

Similarly, scarcity of resources is a much less frequent problem for the aggregates business as opposed to other rarer, more valuable commodities. Much of the Proposing Release is built on the premise that disclosing detailed information about reserves, resources and related data points is critical to an investor's understanding of the business. This may be a sensible premise for other commodities where global supplies are finite and declining. But the aggregates industry does not face shortages or scarcity of raw materials, which significantly differentiates it from others in the mining sector. In addition, the risk to investors who consider investments in precious metal mines could be significant since those mines are developed less frequently than aggregates sites and funding is often obtained to finance exploration, which may not prove sufficient to develop a mine. The cost of developing an aggregates quarry or underground mine is far less and aggregates issuers typically do not seek external funding for exploration of reserves.

### **Technical Report Summaries**

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. A so-called "qualified person" (each, a "Qualified Person") would be required to summarize information and conclusions for each property in the technical report summary. The technical report summary would include 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. The requirement to file technical summary reports is a significant change to the existing disclosure regime in the U.S. and goes beyond most CRIRSCO-based disclosure regimes, other than Canada and Australia, which do not require filing of expert reports.

The technical report summary and other tables contemplated under Part 1300 would require registrants to collect and report on data that management does not use in its own analysis of the business. For example, Table 1 under the proposed rules would require the Qualified Person to state the relative numerical accuracy of various data fields. Because aggregates deposits are geologically simple, the industry does not typically employ such geostatistical analysis. Requiring a Qualified Person to opine on this data seems both unnecessary and unlikely to provide meaningful information to investors.

Creating these technical report summaries alone will require significant resources, be burdensome, will require repetition of information disclosed under Item 1.04 of Form 8-K, and will place confidential business plans into the public domain without providing material information to aggregates investors. As part of the permitting process, operators of aggregates mines must comply with a host of zoning, planning, environmental and other regulations, which should suffice to determine economic mineability where very significant quantities of low value reserves are held. Moreover, preparation of these summaries is not required by CRIRSCO, which

would seem to undermine the Commission's goal of harmonizing the U.S. disclosure regime with the international standard. Thus, in any final rules we recommend that technical report summaries not be a requirement for annual public disclosures by registrants, at least by registrants that are aggregates companies.

### **Qualified Persons and Liability for Disclosure**

Under the Commission's proposal, all disclosures of mineral resources, mineral reserves and material exploration results that a registrant includes in its filings must be based on a report of a Qualified Person and supporting documentation prepared by that person. Moreover, should the Commission retain some requirement to produce a technical report summary in any final rules, the technical report summary would be filed as an exhibit to the Commission filing 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. The Commission's rules do not currently contain any such requirement.

In addition to the significant costs associated with preparation of a technical report summary, the requirement would also increase the potential liability under the securities laws both for companies and Qualified Persons without any appreciable corresponding benefit for aggregates investors. 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. If enacted, this requirement would create new legal exposure for mining professionals. The Commission's proposed rule is clear on this point:

If the filing that requires the technical report summary is a Securities Act registration statement, the Qualified Person would be deemed an "expert" who must provide his or her written consent as an exhibit to the filing pursuant to Securities Act Rule 436. In such situations, 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 summary under Section 11 of the Securities Act.<sup>9</sup>

Thus, the Qualified Person—an individual—will have liability as an expert under Section 11 of 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 pose the same litigation risk comparable to that facing an expert under the Securities Act. Moreover, the proposed rules make 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 makes no reference to how a Qualified Person might satisfy Section 11(b)(3)(B) of the Securities Act, which establishes the elements of the due diligence defense.

While the Commission did not propose to require that the Qualified Person be independent of the registrant, the Commission suggests that the addition of a Qualified Person would not

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<sup>9</sup> Proposing Release at 41,660.



significantly alter existing practices for registrants that are already subject to the CRIRSCO-based codes. We respectfully disagree insofar as professionals serving as Qualified Persons in other jurisdictions do not face Section 11 liability. Furthermore, the requirement to use a Qualified Person would be a significant new requirement for U.S. registrants that are not already subject to CRIRSCO codes and would be compounded by the practical litigation risks posed by the Securities Act.

The Association is particularly concerned that the imposition of Section 11 liability on Qualified Persons will serve as a significant disincentive to parties serving in this role, which will have the likely effect of making it substantially more difficult and expensive—if not impossible—to retain the services of a Qualified Person should any final rules retain this requirement. Indeed, the SME has warned that, due to the imposition of Section 11 liability, “many otherwise highly qualified individuals will refuse to serve as Qualified Persons for US registrants.”<sup>10</sup> The problem is compounded by the Commission’s long-standing position, widely followed by the courts, that indemnification for liabilities under the Securities Act of 1933 violates public policy and is unenforceable, which would limit the ability of an issuer to indemnify a Qualified Person against Section 11 liability.<sup>11</sup>

We do not believe this concern is implausible. When Congress amended Commission 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 uniformly (and unsurprisingly) refused to grant their consent to be named as experts in registration statements.<sup>12</sup> The threat of disruption to the market for asset-backed securities was so grave that the Commission’s Division of Corporation Finance took the unusual—though entirely sensible—step of granting class-wide no-action relief to asset-backed issuers who were unable to secure the consent of affected credit rating agencies.<sup>13</sup> The Association has every reason to believe that the imposition of Section 11 liability on Qualified Persons, if enacted as proposed, would be equally disruptive to issuers in the aggregates industry. 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.

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<sup>10</sup> SME Letter at 14.

<sup>11</sup> 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 the Commission’s 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).

<sup>12</sup> *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>.

<sup>13</sup> *Id.*



## **Summary and Individual Property Disclosure Requirements**

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) in turn provides that this disclosure encompasses the 20 largest properties (based on asset value), irrespective of the individual materiality of those properties. In addition, the proposed rule would require that the registrant disclose material exploration results for each of its material properties and more detailed information for each individual property.

Natural aggregates resources typically occur in homogeneous deposits throughout the United States. The existence of natural aggregates resources is well documented and maps of geological surveys are maintained by the U.S. Department of the Interior. There are over 5,500 companies in the United States that produce construction aggregates consisting of crushed stone and active sand and gravel sites. The largest 10 producers only account for approximately 35% of the total market. The challenge facing aggregates producers is to locate an economically mineable aggregates deposit near or in the path of growing markets because of the impact of transportation costs on aggregates producers, which is different from precious metals and other types of mined products that can be shipped around the world. The cost of transporting aggregates to customers is high in relation to the product itself.

We believe most of our publicly traded members would likely be required to provide the summary disclosure table (Table 2) as currently proposed. The nature of the aggregates business is such that most publicly traded firms own or operate hundreds of mining facilities. Few, if any, of these facilities are material on a stand-alone basis to any individual company, and to the extent any particular property (or group of properties) is material, registrants have an existing obligation to provide disclosure about results of operations under Item 303 of Regulation S-K. Additionally, most of the mining facilities are located in different regions of the United States (or the world for international producers), and therefore it is unlikely that any physical, weather-related, economic or other event would impact a registrant's reserves in a manner that would be material to investors. Thus, aggregates firms would have to expend significant resources preparing a table that provides no material information to investors. Although the quantity and quality of aggregates reserves in specific locations would not be material to investors, this information is competitively sensitive as it would provide details regarding costs, mine capacity, product specifications, lease terms and conditions, and other information that other producers would be able to use to in the marketplace to disadvantage the disclosing party.

To avoid this unusual result, 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, even if they number fewer than 20. If no properties meet the materiality threshold, then a registrant should not be required to provide the Table 2 disclosure. We believe the only information relating to the quantity and quality of aggregates reserves that should be required to be included in tabular form is the number of producing quarries, tonnage of reserves available and changed from the previous year for each general type of aggregates, and the percent of reserves owned and leased, each on a state-by-state basis, as well as the total amount in each category for U.S. and non-U.S. properties.

### **Other Tabular Disclosure and Proposed Pricing Model**

Another area where there is a significant divergence between the proposed rules and CRIRSCO-based international standards is the pricing model for mineral reserves. The Proposing Release 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.

The Proposing Release also generates concern with regard to the reporting of historical sales prices. The proposed rules would require reserves to be reported as a dollar value. This implies that a company would not only declare tonnage of material in the ground, but also declare a sales value placed on that tonnage, based on a weighted contract price or a spot price. For example, proposed Table 3 under Item 1303(b)(3) would require reporting on resources and reserves at the end of the fiscal year on the basis of price.

Aggregates generally do not have a spot price and would therefore have to report a weighted contract price in Table 3. Reporting these values would result in substantial competitive harm to the Association's publicly traded members, not only because it would reveal proprietary information to their publicly traded competitors, but also because so many of the industry's participants are privately held and would not be required to disclose similar information to their competitors at all. For this reason, market practice in the aggregates industry has largely avoided reporting on such production values. We see no benefit to investors by placing companies in which they invest at a competitive disadvantage. Thus, for aggregates firms, in the tables contemplated by proposed Part 1300, we propose that the Commission require the reporting of tonnage only (and not a dollar amount) on a state-by-state basis as this information alone is sufficient to provide investors with the material information regarding an aggregate company's true ground assets. This is appropriate in the case of aggregates investors since, as explained above, aggregates are of low value compared to other mining assets, especially precious minerals.

Additionally, we note that proposed Item 1303(b)(3) (Table 3) appears to require disclosure of non-reserve mineral resources whereas the Proposing Release elsewhere seems to suggest that a registrant is required to disclose non-reserve resource information only if such resources are determined by a Qualified Person based on the requisite supporting documentation.<sup>14</sup>

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<sup>14</sup> The Proposing Release provides that:

Under the proposed rules, a registrant could not disclose that it has determined that a mineral deposit constitutes a "mineral resource" (or, for that matter, a "mineral reserve") unless that determination is based upon information and supporting documentation prepared by a qualified person. Nevertheless, there would be no requirement that a registrant make such an affirmative determination. For example, a registrant could choose not to engage a qualified person to conduct the analyses and prepare the documentation necessary to support a determination that a mineral deposit is a mineral resource (or reserve). In that case, under the proposed rules, in the absence of

Nevertheless, proposed Item 1303(b)(3) appears to impose an affirmative obligation to disclose mineral resources that do not qualify as reserves. Should the Commission proceed to final rules, we request the Commission to clarify that registrants (at least in the aggregates industry) need not disclose non-reserve mineral resources.

Proposed Tables 4 and 5 seem to suggest that drilling is the only form of mineral exploration, which is simply not the case. Aggregates businesses rely on a variety of exploratory techniques, including use of geologic maps, aerial photographs, seismic data and other survey information. Reconciliation under Tables 6 and 7 could also prove problematic to issuers in the aggregates industry insofar as reconciliation techniques are not uniform due to a variety of technical difficulties and physical hazards associated with site measurements.

### **Economic Analysis**

Many of the new disclosure standards would be far more detailed than the current standards and require the development of new internal resources, processes and procedures to collect and report on the various data points. This reporting would no doubt require our member companies to incur additional reporting costs, and these costs would be substantial. At the same time, given the significant differences among the aggregates business and other mining businesses, as demonstrated herein, investors in publicly traded aggregates firms would not find the additional data points to be material. The Proposing Release stems from the Commission's disclosure effectiveness initiative, but providing more information to investors is distinguishable from the initiative's stated goal of providing more *meaningful* information to investors.

Aside from referencing a single study of the Australian marketplace conducted from 2005 to 2008, the Proposing Release does not appear to contain any other empirical analysis of the potential effect of the proposed rules on the mining sector.<sup>15</sup> Although the Australian study does not disclose which mining companies made up the population of firms it analyzed, it seems focused primarily on firms in the precious minerals industry; none of the words "stone", "sand", "gravel" or "aggregate" even appears in the study. The D.C. Circuit Court of Appeals has previously struck down Commission rulemaking that relied "exclusively" on "unpersuasive" studies.<sup>16</sup>

The Proposing Release in general, and the section entitled "Economic Analysis" in particular, contain no discussion of the unique issues faced by the aggregates industry or the impact of the proposed rules on that sector. In place of such analysis, the Proposing Release instead includes a litany of generalized declarations and suppositions as to the potential effect of the proposed rules on all mining firms without giving careful thought to the diversity of the business models of the numerous sub-industries within the sector. The D.C. Circuit cautioned the Commission in 2005:

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such information and supporting documentation, the registrant would be deemed not to have any mineral resources, and as such, *would not be required to disclose mineral resources in a filing.*

Proposing Release at 41,665 (emphasis added).

<sup>15</sup> See Proposing Release at 41,704.

<sup>16</sup> *Business Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011).



[U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.<sup>17</sup>

The D.C. Circuit has also ruled that “mere speculation” cannot support a Commission rulemaking.<sup>18</sup>

Since the Commission has provided no economic analysis of the proposed rules on the aggregates industry, we are unable to critique that analysis. We can, however, refute a number of the factually-unsupported pronouncements contained within the Economic Analysis section of the Proposing Release.

### **Structure and Detail of Current Disclosure Framework**

This section of the Proposing Release<sup>19</sup> lays out three potential shortcomings of the current disclosure regime for mining companies: (1) potentially overlapping disclosure among Item 102 of Regulation S-K, Form 20-F, and Industry Guide 7, (2) multiple thresholds for disclosure under Item 102 and Guide 7, and (3) the broad level of detail in Guide 7. The Proposing Release posits that the current regime “may give rise to unnecessary compliance burdens for mining registrants” and “may have rendered it unnecessarily complex and confusing for mining registrants.”<sup>20</sup> While these supposed shortcomings may support collecting and recodifying existing disclosure standards in a central place, they do not logically support migration to a new disclosure regime and the addition of burdensome new regulatory requirements.

There are numerous alternatives to adopting a new disclosure regime. For example, as part of its disclosure effectiveness initiative, the Commission recently proposed rules on “Disclosure Update and Simplification.”<sup>21</sup> That release conducts an exhaustive review of existing Commission disclosure requirements applicable to public companies “that may have become redundant, duplicative, overlapping, outdated, or superseded . . . .”<sup>22</sup> At no point does the “Disclosure Update or Simplification” release suggest replacing existing standards with new ones. In fact, its stated objective is to simplify disclosure “without significantly altering the total mix of information provided to investors.”<sup>23</sup> The Commission could have charted a similar course here with the Proposing Release.

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<sup>17</sup> *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

<sup>18</sup> *Business Roundtable*, 647 F.3d at 1150.

<sup>19</sup> Proposing Release at 41,700.

<sup>20</sup> *Id.*

<sup>21</sup> Release No. 33-10110; 34-78310; IC-32175, *Disclosure Update and Simplification*, 81 Fed. Reg. 51,608 (July 13, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 51,609.

Furthermore, in lieu of rulemaking, the Staff in the Division of Corporation Finance could instead have collected its various informal interpretive positions and codified them into a single set of Compliance and Disclosure Interpretations. Since much of the alleged confusion over the current disclosure regime owes to actions taken over the years by the Staff, the Staff could have clarified its positions without the need for Commission rulemaking. The Staff regularly issues C&DIs and other forms of disclosure guidance on a variety of reporting topics.<sup>24</sup> Indeed, the Staff has previously issued a variety of written interpretations on the Commission's Industry Guides, including Guide 7 itself.<sup>25</sup>

### **Consolidation and Harmonization of the Mining Disclosure Requirements**

Here the Proposing Release begins by repeating the argument that new rules will “reduce any confusion or compliance uncertainty that arises from the current multiple standards.”<sup>26</sup> As before, we respectfully dispute the notion that the only solution to this dilemma (assuming *arguendo* that there is a dilemma) is the adoption of new rules, as opposed to better organization of the existing ones. We also challenge the assumption that any “confusion or compliance uncertainty” in fact exists. Our members do not report any confusion or uncertainty as to their current compliance obligations, nor do they report any inquiries from their investors as to any such confusion or uncertainty. After more than thirty years of reporting under the current disclosure regime, our member companies and their investors are comfortable with it, even if it is arguably imperfect around the margins. Replacing the status quo with an entirely new system, however, is sure to breed new “confusion” and “compliance uncertainty” as companies, investors and analysts struggle to unpack the new regulations and make sense of the voluminous new data that would be reported. Over time, the Commission's Staff would undoubtedly issue new informal guidance on any new rules, once again returning us to the position we currently occupy.

The Proposing Release also trumpets the benefits of harmonization with global standards to support adoption of the proposed rules. While some of our multinational member companies use and support international standards such as those advanced by CRIRSCO, others (particularly those who conduct business only in the United States) see less benefit to them.<sup>27</sup> But in any event, the proposed rules depart in numerous ways from the CRIRSCO standards, and several of these departures—such as the requirement to prepare a technical report summary, the pricing model for calculating the value of reserves and the Section 11 liability of Qualified Persons—are material and impose arduous requirements upon registrants. Indeed, as the SME noted in its comment letter, “each material departure from the CRIRSCO-based standards undermines the

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<sup>24</sup> On its Commission web page (<https://www.sec.gov/corpfin>) under the heading “Staff Guidance and Interpretations”, the Staff hyperlinks to the following categories of interpretive guidance: Accounting and Financial Reporting Guidance; CF Disclosure Guidance Topics; Compliance and Disclosure Interpretations; Dear CFO Letters and Other Disclosure Guidance; Division Policy Statements; EDGAR Filer Guidance; Filing Review Process; Financial Reporting Manual; No-Action, Interpretive and Exemptive Letters; Staff Accounting Bulletins; and Staff Legal Bulletins.

<sup>25</sup> A complete inventory of these interpretations is available on the Staff's web page at <https://www.sec.gov/divisions/corpfin/cfguidance.shtml#indguides>.

<sup>26</sup> Proposing Release at 41,701.

<sup>27</sup> Several of our members who conduct business solely in the United States have gone so far as to advise us that they see no benefit for their companies or investors under the proposed rules.

Commission's stated objective to 'modernize the Commission's disclosure requirements and policies for mining properties by aligning them with the current industry and global regulatory practices and standards.'"<sup>28</sup>

Additionally, the Proposing Release claims that a potential benefit is "that by providing the classification at the property level, the proposed rules would provide more precise information to investors about the nature and risk of registrants' mining operations."<sup>29</sup> We have no view as to whether this statement is possibly true for other companies in the mining industry, but it most certainly is false when applied to the aggregates business. As we noted above, in light of the unique cost structure of the aggregates business, even if an aggregates issuer's estimate of proven and probable reserves were inaccurate because certain assumptions were in error, the difference would not be material to investors.

### **Qualified Person and Technical Report Summary Requirement**

This section begins with a lengthy, nonspecific defense of the requirement that mining issuers retain the services of a Qualified Person. Once again, the Proposing Release makes a broad, unfounded assertion about the mining industry as a whole:

[E]stimates of mineral resources and material exploration results are typically associated, for technological reasons, with a higher degree of uncertainty compared to estimates of mineral reserves.<sup>30</sup>

As we detailed above in our introductory overview of the aggregates industry, this assumption is untrue in the case of stone, sand and gravel due to the ease of estimating mineral reserves.

The Proposing Release then acknowledges that any supposed benefits of the Qualified Person requirement "are not without associated costs."<sup>31</sup> Before cataloging some of those costs, in a footnote the Proposing Release makes the admission that:

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 States [sic] or other countries), which would help us estimate the marginal cost of hiring a Qualified Person with the minimum level of expertise versus professionals that do not qualify as Qualified Persons.<sup>32</sup>

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<sup>28</sup> SME Letter at 2-3.

<sup>29</sup> Proposing Release at 41,702.

<sup>30</sup> *Id.* at 41,702.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* n. 443.



Given this significant blind spot, the Association respectfully questions how the Commission can form any informed opinion as to the desirability or necessity of a Qualified Person.

The Proposing Release next makes several assumptions about the potential pool of professionals who would be available to serve as a Qualified Person. But nowhere does the Proposing Release consider the chilling effect of strict liability under Section 11 as a likely 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 commensurate with the legal risk they have assumed. It is only several pages later that the Proposing Release concedes that “the resulting increase in legal liability could also raise the cost of hiring a Qualified Person.”<sup>33</sup>

The Proposing Release hypothesizes that foreign professionals may step in to serve as Qualified Persons.<sup>34</sup> 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 it, as is typically the case when non-U.S. persons confront the U.S. civil litigation system.

Another shortcoming of the Proposing Release is its failure to analyze or 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 argument totally disregards the Section 11 effect.<sup>35</sup>

### **Treatment of Mineral Resources**

Again, the Proposing Release overgeneralizes about the mining sector when it declares:

Industry participants have raised concerns regarding the adverse competitive effects potentially stemming from the inability of U.S. registrants to disclose mineral resources. These industry participants have stated that mining companies and their investors consider mineral resource estimates to be material and fundamental information about a company and its projects.<sup>36</sup>

These concerns may apply to other mining sectors, but they most certainly do not apply to the aggregates business. Again, the value of reserves and resource estimates is not a driver in investor and analyst assessment of publicly traded aggregates firms. Instead, the aggregates business is a cyclical, commodity business that invests in long-term reserves, ranging generally from 10 to 50 years. Profitability depends on the maturity of the quarry, maturity of the market, macroeconomic supply/demand characteristics and the economic cycle. Long-term financial success depends on owning a portfolio of quarry assets at different points along the maturity

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<sup>33</sup> *Id.* at 41,709.

<sup>34</sup> *Id.* at 41,702.

<sup>35</sup> *See id.* While it is certainly possible that a small population of willing professionals will remain, neither issuers nor their investors benefit from the diminished choice and higher costs associated with this reduced pool.

<sup>36</sup> *Id.* at 41,704 (citations omitted).

curve. For this reason, the myriad of other potential benefits to investors discussed in the Proposing Release<sup>37</sup> that derive from enhanced resource disclosure are not germane to aggregates firms.

### **Summary Disclosure**

As noted above, we believe the proposed Summary Disclosure Table would disclose only immaterial information about aggregates issuers. Under current market practice, aggregates issuers typically disclose gross tonnage of proven and probable reserves, but do not usually attribute a dollar value to those reserves. Accordingly, we take issue with the Proposing Release's assertion that "the proposed requirement for summary disclosure would align with what most registrants already provide in their SEC filings . . . ."<sup>38</sup>

### **Impact on Efficiency, Competition and Capital Formation**

Contrary to the Proposing Release's prediction that the proposed rules could "have a positive effect on efficiency and capital formation,"<sup>39</sup> we believe the proposed rules would materially adversely affect competition and capital formation in the aggregates industry by chilling the market for public offerings and registrations. The requirements embodied in the Proposed Rules to disclose voluminous, competitively sensitive information would serve as a strong disincentive to seeking or maintaining a public listing. This effect would be especially acute on smaller companies that lack the internal resources to compile and report on all the proposed Item 1300 information and who would be placed at a significant competitive disadvantage if they were required to disclose sensitive operational information to larger competitors. Given these dynamics, privately held aggregates issuers may well seek to remain private or pursue a sale of the business rather than access the public markets in light of the substantial burden presented by the proposed rules. This chilling effect on aggregates firms seeking or maintaining a public listing would increase the cost of capital and decrease enterprise values of all aggregates firms.

Multinational aggregates companies with dual listings on U.S. and foreign exchanges would fare no better under the proposed rules. They would endure the burden of preparing one set of disclosures under international standards and a separate set under the onerous new U.S. regime. While it is true that some of these firms currently report under two or more systems, this obligation is manageable under the present system because of the tenor of the current U.S. rules.

The biggest losers under the Proposing Release are aggregates investors. They face the prospect of fewer investment choices in the sector as currently-listed companies inevitably explore ways to exit the public reporting system and privately traded firms avoid new listings. Investors would struggle to make sense of the avalanche of immaterial information supplied by aggregates firms, unsure of what is wheat and what is chaff. They would also see the value of their current aggregates investments decline as privately held firms not subject to the new rules use the new treasure trove of competitive information concerning their public peers to out-price and out-

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<sup>37</sup> See generally *id.* at 41,705-41,706.

<sup>38</sup> Proposing Release at 41,708.

<sup>39</sup> *Id.* at 41,710.

perform them, and publicly held firms deploy substantial resources and incur significant cost to comply with the new rules.

### **Compliance Costs**

We reiterate a common complaint about the average professional fees the Proposing Release uses to estimate compliance costs in that those estimates are incredibly low. For example, the Proposing Release assumes that the cost of a professional services firm is \$400 per hour.<sup>40</sup> This figure may represent the going rate for junior employees at these firms, but it does not at all approach the \$1,000 per hour or more that experienced partners and other senior employees of major law and accounting firms now regularly charge. We also believe that the Commission has significantly underestimated that the proposed rules, if adopted, would cause a registrant that is not already subject to CRIRSCO requirements to incur a mere increase of 96 hours in the reporting burden for each Securities Act registration statement and a mere 95 hours in the reporting burden for each Exchange Act registration statement or annual report.<sup>41</sup> In light of the proposed detail and complexity of the proposed technical report summary and all the other proposed tables, these figures simply are not credible and are likely to be orders of magnitude higher.

### **Conclusion**

In sum, aggregates material is abundant all over the United States and broadly available with many competitors. There is no scarcity of the material, and once found, it exists in a relatively large area. By contrast, precious minerals are relatively scarce and typically are found in veins that have limited supply. Aggregates companies generally do not keep the types of records that would provide the information required in the proposed rules as it is not relevant to its business operations, exploration, development or expansion of mines, or funding of projects. Moreover, we believe that the type of information requested would not be material to investors, and would not aid the transparency of the financial statements or position of a registrant that mines aggregates. If adopted as proposed, implementation of the proposed rules would significantly increase the volume of immaterial information regarding aggregate issuers' mining operations included in Commission filings. For aggregates issuers, we believe these changes would be costly, and the new disclosures would not be beneficial to aggregates investors.

Additionally, the proposed rules go beyond requirements in other CRIRSCO-based disclosure jurisdictions in important areas that would diminish harmonization between the U.S. and other jurisdictions. If enacted, the proposed rules would have the effect of increasing liability concerns for public companies due to the extensive nature of the proposed disclosure requirements, as well as for Qualified Persons that would have to be engaged to prepare supporting documentation for

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<sup>40</sup> *Id.* at 41,713 n. 496.

<sup>41</sup> *See id.* at 41,713 n. 495. For companies subject to CRIRSCO reporting, the Proposing Release estimates that less than half that time would be required. *Id.* at 41,713. Again, since the technical report summary is not part of the CRIRSCO requirements, we likewise believe that the Commission has significantly underestimated the proposed preparation time for these registrants as well.



mining disclosures under the proposed regulations. And, if enacted, the proposed rules would also have a chilling effect on competition and capital formation for aggregates issuers.

We respectfully request that the Commission differentiate the aggregates business from other minerals businesses, and believe that, at a minimum, the full panoply of proposed requirements should not apply to the aggregates business, as detailed above. Such an approach is consistent with the tiered approach to regulation that the Commission takes in other areas, e.g., its recently proposed rules implementing Section 956 of the Dodd-Frank Act regarding incentive-based compensation plans,<sup>42</sup> and carries the benefit of tailoring varying degrees of regulation as necessary to different types of companies and activities.

We thank you for your consideration of these comments, and the Association would be pleased to discuss these issues further with the Commissioners or the Staff. You may reach the Association at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael W. Johnson', with a long horizontal line extending to the right.

Michael W. Johnson  
President and CEO

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

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<sup>42</sup> See Release No. 34-77776; IA-4383, *Incentive-Based Compensation Arrangements*, 81 Fed. Reg. 37,670 (May 6, 2016).