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September 30, 2016

VIA EMAIL (rule-comments@sec.gov)

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

Re: File No. S7-10-16, Modernization of Property Disclosures for Mining Registrants

Dear Mr. Fields:

We appreciate the opportunity to provide the Securities and Exchange Commission (the "Commission") with our comments on the proposed rules (the "Proposed Rules") to revise the property disclosure requirements for mining registrants and related guidance currently set forth in Item 102 of Regulation S-K under the Securities Act of 1933, as amended (the "Securities Act"), the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Industry Guide 7 ("Guide 7").

I. General Framework for Modernizing Mining Company Disclosure

We strongly support the Commission's decision to propose comprehensive rules governing disclosure by mining companies. In any new rules, the existing disclosure framework should be improved in the following two respects.

First, it should be codified in Commission rules. The existing disclosure requirements are a piecemeal accumulation of unpublished staff policies built on a meager and antiquated published guideline. This patchwork does not have the transparency, clarity and rigor that should characterize requirements of this importance. It should be replaced by published rules adopted after notice and comment, as the Commission now proposes to do.

Second, the Commission's disclosure framework should take account of the disclosure standards that have developed internationally in recent years, and especially the broad international consensus of mining engineers and regulators on the estimation of mineral resources and mineral reserves. It should do so for several reasons: to promote comparability of disclosures across companies and markets, to create a regulatory framework for the information

investors and analysts actually require and to ensure the competitiveness of the U.S. public markets as a venue for securities of mining companies.

In general, the Proposed Rules address these objectives. However, we believe they have three significant flaws.

- Many elements of the Proposed Rules are highly prescriptive, imposing elaborate, specific presentations where a more principles-based approach would be preferable. We provide several examples in Part II below. We believe this level of prescription is misguided and will result in excessively detailed and often immaterial disclosure, which may also become outdated as technology or investor expectations evolve.

- The Proposed Rules do not sufficiently recognize the disclosure challenges of large mining registrants operating in multiple sectors and geographies. An example is the proposed tabular disclosure of exploration results (Table 4), which we discuss in Part II below. The result for a large mining company will be an overly detailed discussion in a standardized format that will obstruct understanding of the material aspects of the registrant's business. This is particularly burdensome for a dual-listed issuer that is already subject to specialized disclosure requirements in another jurisdiction.

- Some aspects of the Proposed Rules are unnecessarily inconsistent with international standards. We recognize that the Commission will require additional information that other jurisdictions do not, but the Commission should not lightly impose an alternative analysis that is inconsistent with what mining companies do for other purposes. The most important example is the requirement to calculate reserves using a price no higher than a 24-month trailing average, which we discuss in Part III. A. below.

If the Proposed Rules are adopted without addressing these issues, there is a risk that the Commission will have replaced a set of uncertain and outmoded disclosure standards with new standards that are clear but highly burdensome and that conflict in some respects with international standards and professional practices. In the long run, this could reduce the impact of Commission disclosure standards and make the U.S. public markets less competitive. Dual-listed international mining companies will have reasons to reconsider their U.S. listing, new issuers with a choice will avoid the U.S. public markets, and investors will have difficulty comparing mining-sector investments across jurisdictions.

II. Adverse Outcomes of Using a Highly Prescriptive Approach

On several points, the Proposed Rules take a one-size-fits-all, highly prescriptive approach intended to provide investors with uniform disclosures. However, registrants engaged in mining operations vary widely in every respect that is important for disclosure—including size, scope of operations, extraction techniques, range of products and many other variables. The use of a uniform format will prevent a registrant from developing a presentation that is suited to its particular circumstances and could instead elicit boilerplate disclosures that include

unimportant information. Following are several significant examples, although this list is not exhaustive.

- Proposed Item 1303 requires summary disclosure, in tabular form, of a registrant's 20 largest properties in decreasing order by asset value. The requirement to present this information in the form of Table 2 all but eliminates the discretion of the registrant and its Qualified Persons ("QPs") to determine the most suitable presentation of material information relating to each property. Although mines with interrelated mining operations may be aggregated, the format of Table 2 does not allow alternative bases for grouping operations that may be more informative, such as geographic region, commodity or reporting segment.

- Proposed Item 1303 requires disclosure of summary mineral resources and reserves in the format of Table 3, which includes the side-by-side presentation of mineral resources and reserves. This presentation disregards the significant differences between the viability of economic extraction of mineral resources and reserves, and could imply to investors that mineral resource and reserve estimates can be aggregated. A registrant should therefore be permitted to disclose its mineral resources and reserves in separate tables.

- The individual property disclosure required in Table 4 of proposed Item 1304 requires registrants to identify the number of drill holes and trenches at an individual property in connection with exploration activities. In our experience, a large production stage mining company's exploration activities can entail thousands of exploration activities in a single year, none of which may result in the reporting of mineral resources or reserves. This requirement may therefore result in a large amount of detailed but ultimately immaterial disclosure.

- Proposed Item 1304 also requires disclosure of the age and physical condition of the equipment associated with a particular property. A large production stage issuer may have an extensive fleet of equipment, ranging from extraction tools to trucks used to transport extracted minerals. This detailed disclosure would not be useful to investors and would be very burdensome to a company with significant mining operations.

A principles-based approach would provide registrants and their QPs with greater flexibility to determine the most appropriate presentation to provide investors with meaningful disclosure of material information. Enabling registrants and their QPs to exercise greater judgment in determining the most suitable format and content of mining disclosure would also better align the Proposed Rules with CRIRSCO-based codes and further the Commission's overarching objective of improving the quality of disclosures for U.S. investors.

The Commission should also consider that mining disclosure involves not only the disclosure of existing, available information, but also the preparation for disclosure purposes of complex analyses of engineering and economic information. Disclosing the location of a

mining property is one thing; estimating mineral resources or determining the feasibility of further development is quite another, involving specialized techniques from a range of disciplines. We urge the Commission to revise the Proposed Rules with these considerations in mind, and to take full account of the comments provided by professional mining engineers.

III. Other Specific Concerns with the Proposed Rules

A. The Proposed Rules should permit a registrant to use a reasonable and justifiable price, based on the view of the QP or management of short-term and long-term market prices, to estimate mineral reserves and resources.[1]

The Proposed Rules provide that the price used to estimate mineral reserves and resources can be no higher than the average spot price for the 24 months prior to the end of the fiscal year covered by the filing, with the sole exception of prices determined by a sales contract. Estimates of mineral reserves and resources are, by their nature, forward-looking, and relate to commodities that will generally be extracted over a long period of time and whose prices are cyclical. Registrants should therefore be allowed to use long-term price projections in their estimations of mineral reserves and resources.

The proposed 24-month average ceiling price is inconsistent with the long-term commodity cycle, which increases the likelihood of frequent and potentially abrupt adjustments to reported mineral resources and reserves. This, in turn, may impede investors' ability to fairly assess the long-term prospects of a mining company. To avoid exposing mineral reserve and resource estimates to short-term fluctuations of commodity prices, the global mining industry has adopted methodologies to estimate long-term price projections. Each of the CRIRSCO Template, JORC Code and Canada's NI 43-101 permits a QP to use a reasonable and justifiable price, based on the view of the QP or management of short-term and long-term market prices, to estimate mineral reserves and resources.[2] Consensus among international reporting standards increases the comparability of mineral reserve and resource reporting and allows for comparisons of registrants' future price expectations, as well as those of independent brokerage and financial institutions. The Commission's adoption of this broadly accepted standard would further its stated objective of more closely aligning U.S. disclosure rules with international standards.

The Commission notes that the proposed pricing model for the estimation of mineral reserves and resources aims to strike a balance between transparency, affordability and comparability. However, the alternative pricing models described in the comments on the Proposed Rules already submitted to the Commission by professional mining engineers and registrants demonstrate that the 24-month historical trailing average ceiling is not the exclusive means of achieving this objective. Instead, the Commission could require a registrant to disclose its future price assumptions or, alternatively, describe its methodology and whether reported mineral resources or reserves would be extractable based on a cash flow test.

Companies will continue to prepare the analyses they require to manage their businesses, and to disclose the information that analysts and investors expect and request and—

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[1] Requests for Comment 67, 68, 69, 79, 80.

[2] See CRIRSCO Template, page 31; JORC Code Table 1 Section 4; SME Guide 2014 ¶¶ 51-54.

for dual-listed companies—that other regulators require. Accordingly, if the Commission were to remain an outlier by codifying the 24-month historical trailing average ceiling, it is likely that major mining companies subject to U.S. rules will continue to prepare mineral reserve and resource information based on international standards. This could have three significant consequences. First, investors would receive inconsistent information from the same mining company, with the potential for confusion. Second, the burdens of complying with divergent reporting standards (particularly in light of the prescriptive nature of the Proposed Rules) could cause mining companies to favor unregistered offerings and offerings and listings in other jurisdictions to raise capital, rather than subjecting themselves to the Commission's rules. Third, the Commission would miss an opportunity to become a leader in developing reporting standards for the global mining industry, while running the risk of its requirements becoming less relevant.

The Commission should therefore allow registrants to use a reasonable and justifiable price, based on the view of the QP or management of short-term and long-term market prices, to estimate mineral reserves and resources.

B. A QP's potential liability should be limited.[3]

The Proposed Rules require a registrant to base its disclosure of mineral resources or mineral reserves on supporting documentation prepared by a QP, and when the rules require that a technical report summary be filed as an exhibit to a registrant's Securities Act registration statement (or an Exchange Act report incorporated by reference into a registration statement), the QP's signed consent must be obtained. This would subject a QP to liability as an expert under Section 11 of the Securities Act for any material misstatement or omission in the technical report summary. Unlike the current regime, and unlike the Commission's oil and gas disclosure rules, the Proposed Rules would not give a mining company the option of reporting mineral resources or mineral reserves without naming the QP. The Proposed Rules are silent as to the permissibility of a registrant indemnifying its QP and, unlike Canada's NI 43-101, prohibit a QP from relying on the report, opinion or statement of another expert.[4]

The practical litigation risk facing an expert under the Securities Act is unlike that of any other jurisdiction that requires the identification of a QP and filing of a signed technical report. In light of the uniquely litigious environment in the United States, the adoption of requirements that give rise to Section 11 liability for additional persons is not simply a matter of aligning the Commission's mining disclosure rules with those of other jurisdictions. Section 11 liability is of an entirely different nature.

The Commission's justifications for requiring the filing of a signed technical report summary and the consent of a QP (incentivizing QPs to verify information included in the report, establishing the authenticity and relevance of the technical report summary and ensuring the QP's actual knowledge of the inclusion of the report in the filing) do not require the imposition of Section 11 liability. In its adopting release for the current oil and gas disclosure

[3] Requests for Comment 33, 114.

[4] *See* NI 43-101 Technical Report on Form 43-101F1, Item 3, Reliance on Other Experts ("Item 3 of Form 43-101F1"), which is available at https://www.bcsc.bc.ca/Securities_Law/Policies/Policy4/PDF/43-101F1__F__June_24__2011/.

rules, the Commission acknowledged the important difference between Section 11 liability and rules intended to improve the quality and accuracy of technical disclosure: "[t]he concept of an expert under the Securities Act is different from the disclosures that we seek regarding the qualifications and objectivity of persons responsible for the preparation or audit of oil and gas reserves."[5] This distinction should also be made in the context of QPs involved in the preparation of mining disclosure. The Proposed Rules provide safeguards, apart from Section 11 liability, to ensure the reliability of a registrant's determination and reporting of exploration results, mineral resources and mineral reserves, including the rigorous requirements to qualify as a QP, the requirement to have a QP sign a technical report summary and the requirement to obtain a QP's acknowledgement that his or her report is included in a Commission filing.

Accordingly, with respect to QPs, the Commission should follow the approach taken with respect to reports on unaudited interim financial information under Rule 436(c) of the Securities Act. Under this rule, an auditor's report based on a review of such financial information is not a "report" within the meaning of Section 11, and therefore its inclusion in a registrant's registration statement does not require a consent or subject the auditor to expert liability. Instead of filing a consent with respect to the inclusion of an auditor's report on unaudited interim financial information, a registrant files an awareness letter from the auditor confirming the auditor's awareness of the use of its unexpertized report in the registrant's registration statement. A similar approach to QPs would safeguard the reliability of a QP's technical report summary without imposing the onerous liability risks of Section 11.

If the Commission maintains expert liability, the Proposed Rules should limit the breadth and costs of this liability, including by eliminating the requirement that a QP assume responsibility for all information included in a technical report summary. Instead, consistent with Canada's NI 43-101, the Proposed Rules should allow a QP to disclaim responsibility for expert reports, opinions or statements by subject matter experts that cannot meet the QP definition.[6] Multiple QPs should also be permitted to sign off on a technical report summary, identifying the sections of the report for which each QP is responsible.

Finally, we would strongly urge the Commission to state its view that indemnification of employee QPs by their employers is not contrary to Commission policy. If the Commission were to take the position that indemnification policies of QPs are unenforceable, the cost of engaging QPs would likely be materially impacted, significantly increasing the financial burden on registrants in the United States relative to foreign jurisdictions.

C. Disclosure of material exploration results should not be required for production stage registrants.[7]

In our experience with large production stage mining companies, the disclosure of exploration results is unlikely to provide useful information indicative of the company's future prospects. The final rules should therefore not require this disclosure. Even with proper

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[5] *See* Modernization of Oil and Gas Reporting; Final Rule, Federal Register, Vol. 74, No. 9, January 14, 2009, at 2175, which is available at https://www.sec.gov/rules/final/2009/33-8995fr.pdf.

[6] *See* Item 3 of Form 43-101F1.

disclaimers, the sheer quantity of a major mining company's exploration results could easily suggest a greater likelihood of increased mineral resources and reserves in the future than is reasonably expected.

The mandatory disclosure of exploration results also risks sharing confidential, strategic information with a registrant's competitors. This may not only impair a registrant's competitive position, but also risks revealing its outlook with respect to a particular commodity, which, in the case of a major mining company, could potentially impact the market price of that commodity. Making this kind of disclosure optional for production stage issuers balances the need for investors to have access to the material exploration results of an exploration or development stage issuer, for which this disclosure may be the only available information. Production stage issuers should therefore be responsible for determining whether or not disclosure is appropriate and material to investors, in line with CRIRSCO-based codes, which encourage, but do not require, disclosure of material exploration results.[8]

D. The transitional rules should provide for a transition period of at least two years.

Given the magnitude of the changes contemplated by the Proposed Rules, we believe a transitional period of at least two years should be provided before registrants are subject to the final rules.

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We thank you for the opportunity to comment on the Proposed Rules. We welcome the opportunity to discuss our comments with the staff of the Commission. Please do not hesitate to contact Nicolas Grabar at [redacted] or Sandra L. Flow at [redacted].

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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[7] Requests for Comment 42, 45.

[8] *See* CRIRSCO Template, which is available at: http://www.crirsco.com/templates/international_reporting_template_november_2013.pdf.