Cassels

National Instrument 43-101: What Issuers Need to Know About the Application of NI 43-101

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National Instrument 43-101 – Standards of Disclosure for Mineral Projects (NI 43-101) is now over 20 years old. Created in the aftermath of the Bre-X scandal, NI 43-101 has defined the relationship of mining issuers and the investing public since its inception. While the Canadian securities regulators commenced a review and comment period in 2022 in anticipation of an update to NI 43-101, change takes time and the instrument in its current form continues to govern.

To that end, in order to assist mining issuers, we will be publishing a series of articles throughout 2024 related to NI 43-101. Our aim is to keep mining issuers informed of the NI 43-101 disclosure rules, touch on certain themes and persistent areas of concern raised by Canadian securities regulators and highlight emerging NI 43-101 issues and developments. This is the first installment in the series.

Application of the Instrument

NI 43-101 has a very broad reach as it applies to any disclosure of scientific or technical information made by an issuer. The use of “issuer” rather than “reporting issuer” in this instance means that NI 43-101 is not limited to public companies. Private companies who are making disclosures to prospective investors and the public must also be aware of NI 43-101 and its requirements.

The point at which disclosure becomes subject to NI 43-101 is dependent on its availability to the public. The concept of the “public” has been interpreted broadly by regulators and the determination will be based upon the facts of each case. Some factors for consideration are: (i) the number of persons the disclosure is provided to, (ii) the experience of such persons and their access to advice, (iii) their net worth and ability to handle risk and (iv) their relationship to the issuer. A common test in Canada is to consider if the persons have common bonds of interest or association with the issuer or its personnel, which could include friends, family and business associates. As the concept of the “public” is viewed in a broad manner, if there is any doubt, compliance with NI 43-101 is recommended.

The key to understanding the application of NI 43-101 is understanding “disclosure” and its subset “written disclosure.”

Disclosure includes any oral statement or written disclosure made by or on behalf of an issuer and intended

to be, or reasonably likely to be, made available to the public in a jurisdiction of Canada, whether or not filed under securities legislation.

The provisions of NI 43-101 that apply to both oral statements and written disclosure are as follows:

- scientific and technical information must be based upon information prepared by or under the supervision of a qualified person, or approved by a qualified person; and
- issuers must use applicable mineral reserve and mineral resource categories and report each category separately.

Furthermore, when making any oral statement or written disclosure, issuers must remember *not* to:

- add inferred mineral resources to other categories;
- disclose gross values of metals or minerals;
- disclose metal or mineral equivalent grades unless it also discloses the grade of each metal or mineral used to establish the metal or mineral equivalent grade;
- base economic analysis on inferred mineral resources (except for a preliminary economic analysis, provided required disclaimers and qualifications are included as required by NI 43-101); and
- disclose the quantity, grade or metal or mineral content of a deposit that has not been categorized as a mineral resource or a mineral reserve.

Written disclosure includes any writing, picture, map or other printed representation, whether produced, stored or disseminated on paper or electronically and includes websites.

The provisions of NI 43-101 that apply to written disclosure (not oral statements) of a scientific or technical nature on a mineral project on a property material to the issuer include:

- issuers must name the qualified person who has prepared or supervised the preparation of the information that forms the basis for the written disclosure or approved the written disclosure;
- issuers must disclose the data verification steps undertaken along with a statement of whether a qualified person has verified the data disclosed; and
- when disclosing exploration information, issuers must disclose the material results, interpretation, and quality assurance and quality control measures applied during the applicable work and specific information on any sample, analytical and testing results.

Additionally, for written disclosure of mineral resources or mineral reserves on a material property, issuers must disclose (i) the effective date of each estimate of mineral resources and mineral reserves, (ii) the quantity and grade or quality of each category of mineral resources and mineral reserves, (iii) the key assumptions, parameters and methods used to estimate the mineral resources and mineral reserves, (iv) the identification of any known legal, political, environmental or other risks that could materially affect the

potential development of the mineral resources or mineral reserves and (v) if the disclosure includes the results of an economic analysis of mineral resources, an equally prominent statement that mineral resources that are not mineral reserves do not have demonstrated economic viability.

These additional requirements for written disclosure are dependent on whether the scientific and technical information on the mineral project is material to the issuer. There is not a bright line test for materiality in NI 43-101 and issuers will generally need to assess whether a property is material in the same way they assess materiality in their disclosure generally, noting the guidance put forth by the regulators in the companion policy.

NI 43-101 is designed to enhance the accuracy and integrity of disclosure to investors and potential investors in the mining sector. To this end, and as noted above, NI 43-101 has a broad reach – this means it applies to the disclosures of all mining issuers making information available to the public in Canada. The practical implication is that NI 43-101 application goes beyond documents filed on SEDAR+ and applies to content found on websites or disseminated to the public through other channels, including fact sheets, investor presentations, conference call transcripts and recordings. It extends to third party content that an issuer links to or includes within its own disclosure. It also applies to content that issuers disseminate through social media or through news releases or marketing content generated by investor relations professionals. All of the foregoing are captured as written disclosure. Some of the basic requirements of NI 43-101 also apply to oral statements made in interviews, speeches or conference calls. There are obvious compliance challenges in the evolving digital world, where space and time constraints may limit the ability to satisfy the required disclosures and disclaimers.

On this note, issuers need to be mindful when producing novel or unique materials for engaging with their investors. Beyond ensuring general compliance with NI 43-101 for public disclosures, foot faults can result in significant consequences, such as an obligation to file a technical report or issuing clarifying or retracting news releases. Materiality, technical report triggers as well as other comments made in this introductory article will be discussed in more detail in later installments of this series.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.