

## National Instrument 43-101: Technical Report Considerations for Mining Issuers Pursuing M&A Transactions

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Mining issuers undertaking merger and acquisition (M&A) transactions should always remember to assess their disclosure obligations under National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (NI 43-101) in the context of such transactions, including whether technical report filing obligations are triggered. The disclosure and filing requirements in the M&A context are extremely nuanced and require issuers to consider a number of legal requirements in light of the specific facts at hand. A failure to properly complete such an analysis could delay or otherwise introduce undesirable complications into the transaction plan.

### M&A Technical Report Triggers

It is well known that NI 43-101 requires issuers to file a technical report to support scientific and technical information on a property material to the issuer (or, as described below, the resulting issuer) that is disclosed in specified documents. In the M&A context, this includes:

- **Information Circular Trigger.** An issuer proposing to acquire a mineral property may trigger a technical report if scientific and technical information is included in an information circular that the issuer files to obtain shareholder approval *and* the acquisition involves the issuance by the issuer (or the resulting issuer) of securities as consideration for the acquisition. Similarly, if an acquiror is issuing securities to effect the acquisition of another issuer (the target company), and the scientific and technical information is included in an information circular *filed by the target company (but not the acquiror)* to obtain its shareholders' approval, such disclosure could trigger the filing of a technical report for the disclosure in the target company's information circular. Note here that the required technical report will be in respect of any property that will be material to the resulting issuer. Often, the resulting issuer is not the issuer filing the information circular, and so an issuer (or the target company, as applicable) should consider if the property will be material to the resulting issuer after the completion of the proposed transaction.
- **Take-Over Bid Trigger.** An issuer may trigger a technical report as the offeror in connection with a take-over bid if it (i) files a take-over bid circular for the acquisition that discloses mineral resources, mineral reserves or the results of a preliminary economic assessment on a material mineral property of the offeror, and (ii) is offering its securities as consideration for the acquisition.
- **Other Material Disclosure Trigger.** An issuer may trigger a technical report through any other

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written disclosure made by or on behalf of an issuer (e.g., press releases, MD&A, investor presentations, etc.) in the course of an M&A transaction, if the disclosure constitutes first-time disclosure of, or of a change in, mineral resources, mineral reserves or the results of a preliminary economic assessment (Specified Material Information) that constitute a material change in relation to the issuer.

## Materiality of a Mineral Property

In the context of an M&A transaction, first-time written disclosure of scientific or technical information about a mineral property that an issuer does not yet own but that *will become* material to the issuer (or the resulting issuer) may require the issuer to file a technical report prior to completion of the transaction. Materiality of a mineral property is not always contingent on the issuer having acquired an actual interest in the mineral property or having formal agreements in place. Canadian regulators have taken the position that a mineral property can become material during the letter of intent stage, even if the proposed transaction is subject to conditions such as the approval of a third party or completion of a due diligence review. This is a nuanced area that requires careful evaluation with advisors.

## Timing to File the Technical Report

An issuer that is required to file a technical report due to the Information Circular Trigger or the Take-Over Bid Trigger must generally file the technical report no later than the time it files or makes available to the public the applicable document which the technical report supports (i.e., the filing of an information circular or take-over bid circular related to the proposed transaction). However, under the Other Material Disclosure Trigger, an issuer generally has a period of 45 days after the date of the disclosure within which to file the technical report, though an issuer may have additional time and file the required technical report up to 180 days from the date of such disclosure if all of the following conditions are satisfied:

- such Specified Material Information (i) was prepared by, or on behalf of, another issuer who holds (or previously held) an interest in the relevant mineral property, (ii) was disclosed by such other issuer in one of certain documents specified in NI 43-101, and (iii) is supported by a technical report filed by such other issuer; and
- contains certain prescribed information, including a statement that, to the best of the issuer's knowledge, information and belief, there is no new material scientific or technical information that would make the disclosure of such Specified Material Information inaccurate or misleading.

Despite the foregoing, an issuer that wishes to avail itself of the longer 180-day filing period should remember that certain intervening disclosures containing the Specified Material Information made within the 180-day filing period could accelerate such filing deadline and require the issuer to file the required technical

report sooner. For example, if the issuer files its annual information form<sup>1</sup> or a preliminary short form prospectus prior to the end of the said 180-day period, such filing would override the longer 180-day filing period and require the issuer to file the technical report at the time of the annual information form or preliminary short form prospectus, respectively. A subsequent Information Circular Trigger or Take-Over Bid Trigger (i.e., the filing of an information circular or take-over bid circular related to the proposed transaction) will also accelerate the deadline for the filing of the technical report.

For further details regarding technical report triggers, please see our earlier publication entitled "[National Instrument 43-101: Technical Reports – Materiality, Filing Triggers, Addendums and Other Key Considerations](#)," dated April 30, 2024.

## Exception to Filing Obligations if Other Party Has Filed a Report

The Information Circular Trigger requires the issuer (or the target company, as applicable) to file technical reports for mineral properties that will be material to the resulting issuer. Canadian regulators' current view is that the issuer filing the information circular does not need to file a technical report if (i) the other party to the transaction has filed the technical report, (ii) the information circular refers to the other party's SEDAR+ profile, and (iii) on completion of the transaction, technical reports for all material properties are filed on the resulting issuer's SEDAR+ profile or the SEDAR+ profile of a wholly-owned subsidiary. This would apply equally to an acquiror filing an information circular for a property to be acquired as for a target filing an information circular for a property of the acquiror, provided there is a publicly filed technical report for that property. It is important to remember that if this exception is relied upon, then upon completion of the transaction, the technical report must be filed on the resulting issuer's SEDAR+ profile (unless the profiles are otherwise linked).

## Avoiding the Trigger: Historical Estimates

An issuer proposing to acquire a mineral property in an M&A transaction may wish to disclose for the first time a previous estimate of mineral reserves or mineral resources in respect of the subject mineral property (e.g., as part of its efforts to promote the proposed transaction), which in the absence of certain required disclosure, could trigger the filing of a technical report. However, issuers that make first-time written disclosure of a previous estimate of mineral reserves or mineral resources could avoid triggering a technical report filing if such estimate qualifies as a "historical estimate" and follows the prescribed disclosure regarding same.

A "historical estimate" is an estimate of the quantity, grade, or metal or mineral content of a deposit, that an issuer has not verified as a current mineral resource or mineral reserve and which was prepared *before* the issuer acquiring, or entering into an agreement to acquire, an interest in the property that contains the

deposit.<sup>2</sup>

To rely on the exemption, the disclosure containing the historical estimate must, among other prescribed things, (i) identify the source and date of the historical estimate (including any existing technical report), (ii) comment on the relevance and reliability of the historical estimate and the work required to upgrade or verify the historical estimate as a current mineral resource or mineral reserve, (iii) to the extent known, disclose the key assumptions, parameters and methods used to prepare the historical estimate, and (iv) state with equal prominence that a qualified person has not done sufficient work to classify the historical estimate as a current mineral resource or mineral reserve and that the issuer is not treating the historical estimate as a current mineral resource or mineral reserve.

An issuer that fails to include the required disclosure each time a historical estimate is disclosed risks triggering the filing of a technical report and also risks regulators interpreting such disclosure as treating the historical estimate as current. It is very important to not blur the lines and suggest that a historical estimate is current, as doing so will result in a technical report trigger and attract attention and comment from regulators.

See also our earlier publication entitled "[National Instrument 43-101: What Issuers Need to Know About Historical Estimates](#)," dated March 26, 2024.

Overall, the disclosure requirements in the M&A context are very nuanced and different situations may result in different requirements. Issuers should always remember to consult qualified legal counsel to ensure they are not offside NI 43-101 and inadvertently trigger a requirement to file a technical report that they are not prepared to file.

[For more on NI 43-101, find our previous articles in this series here.](#)

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<sup>1</sup> An issuer intending to file an annual information form and that expects a mineral property to become material to the issuer less than 30 days before the filing deadline for such annual information form should be mindful of additional rules within NI 43-101 that could affect the applicable filing deadline.

<sup>2</sup> An issuer that already holds an interest in a mineral property should keep in mind that a previous estimate of mineral reserves or mineral resources by the issuer would not qualify as a historical estimate. Similarly, any new estimate of mineral reserves or mineral resources that is based on historical data for the mineral property would also not qualify as a historical estimate.

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