

## National Instrument 43-101: Part 8 - What Issuers Need to Know About Disclaimers

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**March 14, 2017**

In the past, many technical reports contained some type of disclaimer from the qualified person who authored the report. Disclaimers with respect to legal, environmental, political or other issues were originally not limited in any manner. As disclaimers expanded in scope, securities regulators began to take exception, considering many disclaimers to be contrary to the objectives of securities legislation - not to mention that they can also be potentially misleading.

In some circumstances, securities legislation provides investors with a statutory right of action against a qualified person for a misrepresentation in disclosure that is based upon the qualified person's technical report. This right of action exists notwithstanding any disclaimer in a technical report. As a result, except in certain specified circumstances, a general prohibition on disclaimers in technical reports was added to NI 43-101. The idea behind this addition is that a mining issuer's disclosure reflects the professional opinion of a qualified person and that the qualified person should not attempt to limit his or her responsibility for that opinion. While the incidence of attempts to disclaim reliance or liability have significantly declined, examples of prohibited disclaimers do continue to arise. This installment is a reminder of what is and is not permitted to be disclaimed.

A qualified person is permitted to use a limited disclaimer of responsibility in a technical report if:

- The information is with respect to legal, political, environmental, or tax matters relevant to the technical report and the qualified person is relying on another expert who is not a qualified person or the issuer for this information, and the qualified person discloses: (i) the source of the information (including date, title, and author); (ii) the extent of reliance; and (iii) the portions of the technical report to which the disclaimer applies.
- The information is with respect to diamond or other gemstone valuations, or the pricing of commodities for which pricing is not publicly available, and the qualified person discloses: (i) the date, title, and author of the report, opinion, or statement; (ii) the qualifications of the other expert and why it is reasonable for the qualified person to rely on the other expert; (iii) any significant risks associated with the valuation or pricing; and (iv) any steps the qualified person took to verify the information provided.

Otherwise, regulators will require an issuer to have its qualified person remove any disclaimers in a technical report. For instance, the following are examples of disclaimers that regulators have requested

being removed from a technical report:

- “The authors do not accept any liability for any loss or damage however arising which may directly or indirectly result from the use of this report.”
- “Except for the purposes legislated under securities law, any other use of this report by any third party is at that party’s sole risk.”

Statements such as these are typically flagged by regulators in the context of a continuous disclosure review or when regulators are reviewing public offering documents in the context of a financing. This can be problematic for an issuer, especially in the context of a financing where an amended report filing could be required, potentially delaying the financing.

When a qualified person is updating or preparing a new technical report and certain information has not changed from a past technical report filed by an issuer, which may have been prepared by a different qualified person, disclaimer issues often arise. In these situations, the qualified person preparing the new technical report may refer to information in an old technical report previously filed by the issuer for the subject property if the information is still current and the new technical report identifies the title, date and author of the previously filed technical report. The qualified person must still summarize or quote the referenced information in the new technical report and may not disclaim responsibility for the referenced information. Even if there is a different qualified person, the author or authors must again accept responsibility for the whole of the new technical report. The new report needs to be current and complete.

Also, disclaimer issues can arise when a qualified person wants to cite or summarize another document in the technical report. In these circumstances the qualified person cannot disclaim responsibility for information just because it was in another document unless the information falls within the limited disclaimer of responsibility provided by NI 43-101. As mentioned, the objective of a technical report is that it contain all necessary details so that it is current and complete. We typically suggest that when other report are referred to (especially if this is in the “Reliance on Other Experts” section of the technical report) that the qualified person include a statement (and undertake any investigation or analysis to ensure it is accurate) such as:

- “The author of this report believes that the basic assumptions contained in the information listed above are factual and accurate and that the interpretations are reasonable. The author of this report has to the extent applicable relied on this data and has no reason to believe that any material facts have been withheld. The author of this report has taken all appropriate steps, in her professional judgment, to ensure that the work, information, or advice from the above noted information is sound and the author does not disclaim any responsibility for this report.”

A statement such as this make it clear that there is no disclaimer of information.

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Overall, it is very important that disclaimers be avoided in technical reports unless a disclaimer fall within the permitted disclaimers allowed under NI 43-101. Including inappropriate disclaimers in a technical report can result in regulators requiring press releases explaining the NI 43-101 violations, amendments to the technical report and unnecessary delays.

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