

## National Instrument 43-101: Part 1 - What Issuers Need to Know About the Application of the Instrument

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Numerous Canadian mining companies have recently found themselves publicly correcting or retracting disclosures made regarding their mineral projects. These corrections and retractions are the result of more detailed and frequent reviews by Canadian securities regulators and evidence certain themes and persistent areas of concern. To assist mining companies, we will be providing an overview of certain of the requirements of NI 43-101 and the areas in which issuers appear to be failing to meet the requirements of the rules. Our aim is to provide guidance that will help issuers avoid regulator intervention in the future. This is the first installment in the series that we expect will be periodically released over the coming months.

### Application of the Instrument

The reach of NI 43-101 is very broad. NI 43-101 applies to *disclosure* of scientific or technical information made by an *issuer*. Importantly, unlike other securities laws, NI 43-101 does not limit itself to disclosure made by public companies.

An **issuer** is a person or company who has outstanding, issues, or proposes to issue, a security. It is hard to imagine that any mining company would not be caught. The definition is not limited to reporting issuers. This is an important point for companies in the pre-public stage who are making disclosures to prospective investors.

*Disclosure* by an issuer may trigger the requirement to file a technical report. But even without a technical report, NI 43-101 governs how mining issuers communicate to the public. The key to understanding the application of the rules 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 and written disclosure include:

### DO's

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- Scientific and technical disclosures must be based on information prepared by or under supervision of a qualified person
- Issuers must use applicable mineral reserve and mineral resource categories and report each category separately

## DO NOT's

- Issuers must not add inferred mineral resources to other categories
- Issuers must not disclose gross values of metal or minerals
- Issuers must not 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
- No economic analysis may be based on inferred resources (except for a preliminary economic analysis), on targets, or on historical resources

**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 include:

- Issuers must name the qualified person who has reviewed and approved the scientific and technical disclosure
- Issuers must disclose the data verification steps undertaken along with a statement of whether a qualified person has verified the data disclosed
- Results, interpretation and quality assurance and quality control must be disclosed for any exploration information
- Specific information on any sampling results, such as location, azimuth and dip of drill holes is required
- Key assumptions, parameters and methods used to estimate mineral resources and reserves must be included
- The effective date of each estimate of mineral resources and reserves must be included
- A discussion of any known legal, political, environmental or other risks that could materially affect the potential development of the mineral resources and reserves
- If the disclosure includes the results of an economic analysis, an equally prominent statement that mineral resources that are not mineral reserves do not have demonstrated economic viability

The point at which disclosure becomes subject to NI 43-101 is availability to the public. The concept of **the public** has been interpreted broadly by the courts. The determination will be based upon the facts of each case and has been interpreted. Some factors for consideration are: the number of people the disclosure is provided to, the experience of such people and their access to advice, their net worth and ability to handle risk, and their relationship to the issuer. The most common test accepted by the courts in Canada is to

consider if the persons are friends or associates of the issuer or if such persons have common bonds of interest or association with the issuer. As the concept of the “public” is viewed in a broad manner, if there is any doubt, compliance with NI 43-101 is recommended.

## Commentary

NI 43-101 is designed to enhance the accuracy and integrity of disclosure to investors and potential investors in the mining sector. NI 43-101 applies to the disclosures made by all mining companies making information available to the public in Canada, and it reaches beyond continuous disclosure filings such as prospectuses, AIFs and press releases 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 such as Twitter and Facebook or through press releases or marketing content generated by IR professionals. All of the foregoing are written disclosures. Some of the basic requirements of NI 43-101 also apply to oral statements made in interviews, speeches or conference calls. These basics include the requirements to use only the permitted mineral reserve and resource categories, to not disclose a gross value of a mineral in a deposit, to not add inferred resources to other categories, and to not disclose results of an economic analysis that includes inferred resources (except in a preliminary economic assessment).

Mining companies should assume that, if a regulator reviews their technical disclosure, it will review the disclosure on their website and disclosure their website links to. Information available through or on at issuer’s website will be considered to be endorsed by the issuer and will form part of its disclosure record. Express permission, attribution and disclaimers may not be sufficient to avoid regulators taking issue with website disclosures that are not compliant with NI 43-101. Mining companies should ensure that disclosure policies and procedures address website content, specifically third party information. If the benefit of inclusion or linking is considered to be significant, then the third party information must be reviewed for compliance with NI 43-101. Issuers can then publish or link, if the information is compliant, or decline to do so or seek corrections prior to publishing or linking. In any case, issuers should be wary with respect to analysts’ reports and quoting or linking to media coverage.

Issuers should also proceed conservatively when producing materials for potential investors and for presentations and websites. In addition to the question of whether the audience is the public, thus requiring general compliance with NI 43-101, disclosures could also trigger the requirement to file a technical report. Technical report triggers will be discussed in a later edition of this series.