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BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Registrar of Securities, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Request for Comments on Proposed Repeal and Replacement of National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, Form 43-101F1 *Technical Reports* and Companion Policy 43-101CP

We are writing in response to the request of the Canadian Securities Administrators (the "**CSA**") for comments (the "**Request For Comments**") in respect of the proposed repeal and replacement of National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, Form 43-101F1 *Technical Reports* and Companion Policy 43-101CP and the related amendments, all as published on April 23, 2010. The versions of National Instrument 43-101 and Companion Policy 43-101CP currently in force are referred to as the "**Rule**" and the "**Policy**", respectively, the new proposed versions of same are referred to the "**Proposed Rule**" and "**Proposed Policy**", respectively, and the Rule and Proposed Rule are sometimes collectively referred to as the "**Rules**" and the Policy and the Proposed Policy are sometimes collectively referred to as the "**Policies**".

We appreciate the opportunity to provide comments on the Proposed Rule and Proposed Policy.

Proposed Rule Part 1 Definitions and Interpretation

Paragraph (b) of the definition of "advanced property" in Section 1.1 of the Proposed Rule requires the property to have mineral reserves in respect of which the economic viability has been supported by a pre-feasibility study or a feasibility study. By definition, in order for a reserve to exist it must be economically mineable as demonstrated by at least a preliminary feasibility study. We submit that it should be sufficient if the property has reserves, and that the additional references to economic viability and a pre-feasibility study or feasibility study are superfluous.

Proposed Rule Part 2 Requirements Applicable to all Disclosure

We strongly support the addition of Section 2.1(b) of the Proposed Rule which permits disclosure of scientific or technical information made by an issuer if it is approved by a qualified person. We believe that this amendment, together with Section 3.1(b) of the Proposed Rule, will add much needed flexibility for issuers to disclose scientific and technical information in circumstances where the qualified person that prepared or supervised the preparation of the underlying scientific or technical information on which the disclosure is based is no longer available to the issuer. We believe that approval by a qualified person of scientific and technical information contained in an issuer's disclosure is sufficient to ensure that the public disclosure reflects the underlying information.

In Section 2.3(1)(c) of the Proposed Rule, we suggest that the language be altered to clarify whether the prohibited disclosure refers to the *quantity* (in weight) of contained metal or contained minerals or the *value* (in currency) of the contained metal or contained minerals.

To the extent that Section 2.3(1)(c) of the Proposed Rule is intended to prohibit disclosure of the amount of contained metal or contained minerals, we submit that the reference therein to "deposit" should be removed. We submit that it is standard disclosure practice for international mining companies to include calculations of a deposit's contained metal or mineral and that Canadian issuers may be prejudiced if they are not able to include such disclosure, as their disclosure will not be comparable with their foreign competitors. If Section 2.3(1)(c) of the Proposed Rule is intended to prohibit disclosure of the amount of contained metal or contained minerals, we suggest that it be revised to read as follows:

> "(c) the amount of gross contained metal or mineral of a sampled interval or drill intersection;…".

If the CSA determines to restrict disclosure of contained ounces in mineral deposits, we submit that the Proposed Rule should at a minimum preserve an issuer's ability to disclose contained ounces in mineral reserves. This would ensure that there is no deviation of

approach in this regard between Canadian and United States securities regulators.

Proposed Rule Part 3 Additional Requirements for Written Disclosure

We are concerned about the amount of disclosure required where "exploration information" is included in a document as set out in Section 3.3(1) of the Rules. The definition of "exploration information" in the Rules is very broad and potentially could be interpreted to include even brief statements that broadly indicate the type of results obtained from ordinary course ongoing exploration activities at a producing property. The consequence of disclosing any "exploration information" is that the Rules require all of the information set out in Section 3.3(1) (results/summary of material results; summary of interpretation; description of quality assurance and quality control) to be included. The summary of results and interpretation of information may be appropriate where detailed drill hole results are provided for exploration stage issuers, but it is excessive in connection with brief summaries of exploration activities for producing issuers. Similarly, for brief summary disclosure of this nature, we believe the required disclosure as to quality assurance and quality control is excessive. We submit that the CSA should consider reducing the required disclosure to accompany exploration information where (1) drill hole data is not provided or (2) the disclosure relates to exploration activities on a producing property. We recognize that some of this disclosure can be omitted pursuant to Section 3.5 if reference is made to a previously-filed document that contains the required disclosure. However, we do not believe this is sufficient accommodation in the case of summary disclosure of exploration information for a producing property. In that case, we feel the level of disclosure required (and burden required to meet that standard) in the Rules is disproportionate to the importance of the information.

Proposed Rule Part 4 Obligation to File a Technical Report

We support the initiative to remove the short-form prospectus trigger in Section 4.2(1)(b) of the Rules and would support the short-form prospectus trigger being fully removed from the Proposed Rule (*i.e.*, Case 1). We believe that the significant cost (both in terms of issuer resources and delay) of preparing a new technical report is not commensurate with the benefit that a new technical report would provide in such circumstances, that is, where the additional information not supported by a technical report does not constitute a material change in the affairs of the issuer. We understand that the CSA is surveying the views of issuers that filed a technical report in connection with a prospectus filing; however, we remind the CSA that issuers may have determined it was more advantageous to undertake a private placement of securities to appropriately "time the market" rather than endure the cost and delay that accompanies the preparation of a technical report. Where this occurs, not only do potential investors not have the benefit of a technical report (there being no independent requirement to file a new technical report for private placements to accredited investors, even if an offering memorandum is used), but existing investors may suffer increased dilution as a result of the less favourable terms of such issuances.

Section 4.2(8) of the Proposed Rule is a critical exception from the requirement to file a technical report. We submit, however, that the condition imposed in Section 4.2(8)(b) of the Proposed Rule is not appropriate. This condition requires that at the date of the filing there is no new material information concerning the subject property not included in the previously filed technical report, as opposed to no new material information concerning the issuer. This has the effect of creating a technical report filing regime that goes beyond supporting the issuer's disclosure. Instead, the technical report trigger goes to the state of the issuer's knowledge of the property. We note that in circumstances where an issuer has multiple mineral projects that are material to it, additional material scientific and technical information not contained in a previously filed technical report will not necessarily constitute material information in respect of the issuer, and may not be required disclosure (and therefore may not be disclosed). In addition, depending on the state of the issuer's exploration activities at the time, it may also require a technical report to be filed prior to the issuer concluding that a deposit constitutes reserves or resources (or meets some other threshold). We submit that the Proposed Rule should be aligned with the disclosure regime; that is, an issuer should only have to support with a technical report information disclosed that is material to the issuer as a whole. Requiring a technical report to support new scientific and technical information that is material to a specific mineral project yet not material to the issuer or not included in the issuer's disclosure document, imposes a burden on issuers that is not commensurate with any benefit to investors. We submit that Section 4.2(8)(b) of the Proposed Rule should be eliminated. In the alternative, we submit that Section 4.2(1)(f)(ii) of the Rule should be restored to at least create a safe harbour for annual information forms that repeat information from a prior annual information form that was supported by a technical report.

We are troubled by the guidance given in Section 4.2(3) of the Proposed Policy relating to property acquisitions. Specifically, we are concerned that the CSA considers that "[p]roperty materiality is not contingent on the issuer having acquired an actual interest in the property or having formal agreements in place. In many cases, a property will become material at the letter of intent stage, even if subject to conditions such as the approval of a third party or completion of a due diligence review." We question how a property not yet owned by an issuer can be material to the issuer, when its very acquisition is still uncertain. Letters of intent to acquire a property are often non-binding and regularly do not lead to a definitive transaction as a result of unsatisfactory diligence, financing issues or the failure to come to binding terms. Forcing an issuer to undertake preparation of a technical report prior to the consummation of the transaction to acquire the property adds another, unnecessary cost to the acquisition of properties, which will discourage otherwise beneficial property transfers. Practically, it will also cause the early stage of negotiations to be dominated by discussions regarding requisite property and data access that an acquirer will need to prepare a technical report, further increasing expenditure of issuer resources to satisfy a filing requirement where no legal right to the property exists.

Proposed Rule Part 8 Certificates and Consents of Qualified Persons For Technical Reports

We submit that the consent requirement in Section 8.3 of the Rules should explicitly consider circumstances where a technical report is not prepared in connection with any filing trigger in Section 4.2(1) but is instead filed voluntarily. For example, an issuer that announces additional reserves or resources that do not constitute a material change to the issuer may wish to update its technical report shortly thereafter, notwithstanding that it is not required. While such voluntary filings of technical reports are referred to in the Proposed Policy, the ability to use an amended consent in these circumstances should be set out in the Proposed Rule similar to that in Section 8.3(2) of the Proposed Rule, subject to the caveat below.

We submit that a specific consent of the author of a technical report required under Section 8.3(1)(b), (c) and (d) of the Proposed Rule should only be required by Section 8.3(3) of the Proposed Rule where the document contains an extract from or purports to contain a summary of the technical report. Where the document that a technical report supports only includes mineral reserve or mineral resource that is supported by the technical report, we submit that the requirement that a qualified person approve the written disclosure in the document obviates the need for an additional consent to be filed in respect of the document (both where this may be required for a new reporting issuer or where a technical report is filed voluntarily).

Proposed Policy Part 4 Obligation to file a Technical Report

We submit that the additional required disclosure set out in Section 4.2(5) of the Proposed Policy for an issuer that has made a production decision based on technical information that is not a comprehensive feasibility study is not appropriate in all circumstances. In the case of sophisticated mining companies with significant construction and development expertise who are able to self-finance the development of a mine, the cost of completing a comprehensive feasibility study that would be required for third party bank financing outweighs the benefits. The implication of the proposed required disclosure is that a production decision made by such an issuer is less sound. At a minimum, if an issuer is required to disclose that its production decision was made without a feasibility study, the additional supplementary disclosure suggested by Section 4.2(5) of the Proposed Policy (i.e. disclosure of increased uncertainty and specific economic and technical risks of failure) would unduly impugn what is otherwise an entirely appropriate production decision.

Other Comments

We have a number of concerns regarding potential liability for qualified persons and issuers in the area of technical reports and scientific and technical disclosure that are not adequately addressed by the Rules or Policies.

There remains uncertainty regarding whether a qualified person is an expert and therefore is subject to liability under prospectus and secondary market civil liability rules. The corollary would be that the issuer would be relieved of liability for the relevant disclosure. The uncertainty arises from the distinction between what is considered an "expert" portion of a prospectus or other document – namely the part of a disclosure document that "includes, summarizes or quotes from a report, statement or opinion made by the expert" – and the role of a qualified person with respect to scientific and technical disclosure – to prepare or supervise the preparation of information upon which scientific and technical disclosure is based or, in the Proposed Rule, to potentially approve the disclosure.

We submit that the intention of the requirement in the Rules is neither to relieve issuers of liability for disclosure of scientific and technical information nor to impose on qualified persons (who in many cases will be non-executive employees of the issuer) responsibility for all scientific and technical information. The purpose of the involvement of the qualified person is to add additional credibility to disclosure about scientific and technical information. This additional credibility arises because a person with appropriate industry-related qualifications is responsible for preparing, or supervising a team that prepared, the raw technical information that underlies the disclosure. It is a much more onerous proposition and, in our view, inappropriate, in particular in the case of a non-independent qualified person, to treat the qualified person as an expert and shift liability from the issuer to the qualified person for disclosure of all scientific and technical information on material properties.

The Rules make direct or indirect reference in a number of places to use of scientific and technical disclosure of, and technical reports filed by, other issuers. For example, Section 4.2(7) of the Proposed Rule, Section 5.3(4) of the Proposed Rule (which is, for these purposes, the same as Section 5.3(3) of the Rule) and Section 9.2(1)(b) of the Proposed Rule. To the extent that other issuers will be entitled to rely on or extract information from the disclosure of a third party, it should be clear that (a) the issuer has had the information reviewed by a qualified person and has no information that would make the disclosure misleading (similar to the requirement in Section 4.2(b) of the Proposed Rule), and (b) the third party that made the initial disclosure is not responsible to the issuer or its investors for the use of its information. There is already a detailed regime addressing an issuer's liability to its own investors, but we submit that exposing companies to potential liability to other issuers and their investors for technical information appropriated and relied on by the other issuer is onerous.

Please contact either Lisa Damiani (416-367-6905) or Robert Murphy (416-863-5537) if you wish to discuss any of the foregoing.

Yours very truly,

(signed) Lisa C. Damiani
(signed) Robert S. Murphy

Davies Ward Phillips & Vineberg LLP