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MINING

All that glitters – 2020 mining review

Despite all of the uncertainties of the global pandemic (or perhaps because of them), 2020 saw a resurgence in the mining industry. While travel restrictions and due diligence limitations made it difficult to complete large cap multi-asset transactions, a steady strengthening of commodity prices (especially gold) acted as a catalyst for smaller financings and property transactions. Notably, this past year also ushered in the most favourable market conditions for mineral exploration since the end of the last commodity cycle boom, with many (but certainly not all) issuers able to finally raise some much needed capital. Flow-through shares in particular have been popular with investors in light of the loosening of specific obligations associated with incurrence and renunciation obligations. As discoveries become scarcer and many large mines around the world enter the later stages of their mine life, there is renewed focus on mineral exploration. Much of the market attention has been on gold, but financing windows have also emerged for base metal and battery metal projects.

In 2020, improved conditions also enabled a number of mining issuers to complete “go public” transactions through initial public offerings or reverse takeovers. This trend is expected to continue, given the dearth of new issuers over the past five years. With the return of financing prospects and a steady

flow of money fueling mineral exploration projects, there is also a renewed focus by regulators on technical disclosure and technical reports. In prior years, when there were fewer transactions and financings, correspondingly fewer technical report triggers were encountered, so many mining issuers now find themselves with dated technical reports. In addition, with higher commodity prices, mining issuers now have greater incentives to update mineral resource and mineral reserve estimates. Managing these processes effectively is important for mining issuers to realize their business plans.

Two key regulatory developments from 2020 are highlighted below.

Confidential prospectus filings

As described in our article [Reducing the regulatory burden: Positive developments in corporate and securities law in 2020](#), the Canadian Securities Administrators (CSA) have adopted a staff notice permitting confidential pre-filing of prospectuses by Canadian issuers.

In the mining space, this follows the 2019 issuance by the Ontario Securities Commission of [OSC Staff Notice 43-706](#), which announced the adoption of a pre-filing technical review program for mining issuers. The Ontario program, which followed a [similar pre-filing review program](#) in British Columbia, was intended to reduce execution risk for issuers and investment dealers seeking to launch public offerings under a short-form prospectus by providing a means to correct technical disclosure deficiencies prior to commencing a public offering. Both review programs focused on technical reviews prior to a short-form prospectus offering.

With the adoption of a broader confidential prospectus pre-filing program, mining issuers will now have the ability to have both their prospectuses and related technical reports reviewed in advance of a potential offering. Mining issuers seeking to benefit from the pre-filing program should note that the staff notice provides that generally, staff will use their best efforts to provide initial comments within 10 working days, which is the same standard as for a long-form prospectus filing. For issuers looking to complete an initial public offering, there is limited downside to taking advantage of the program. For reporting issuers, accessing the program requires potentially significant advance planning that may not be possible if a financing transaction is launched on a short timeline to capitalize on market opportunities.

Given the difficulties dealing with technical disclosure issues and technical reports in the middle of an offering, the pre-filing review program allows mining issuers to be proactive in clearing technical disclosure prior to launching an offering. It also enables mining issuers to meaningfully engage with regulators with respect to the currency of previously filed technical reports to support a public offering.

Resource estimate disclosure expectations

On June 4, 2020, the CSA [announced](#) the publication of [CSA Staff Notice 43-311](#), which summarized the results of a review on mineral estimate disclosure in 86 technical reports. The review found that most disclosure in relation to

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mineral resource estimates (MRE) was satisfactory. The staff notice is intended to provide issuers and qualified persons (QP) with a degree of certainty about how securities regulatory authorities assess disclosure of MRE in technical reports. It provides specific guidance intended to assist issuers to address areas of deficient disclosure identified by the review and potentially reduce the need for regulatory intervention.

The CSA identified the following areas where they found the MRE disclosure to be inadequate:

- Reasonable prospects for eventual economic extraction (Reasonable Prospects): A mineral deposit is not a mineral resource unless it has demonstrated Reasonable Prospects. Some technical reports lacked adequate disclosure with respect to metal recoveries, assumed mining and processing methods and costs, and constraints applied to the MRE to demonstrate that the mineralized material had the potential to be mined and processed economically.
- Data verification: Data used to support an MRE needs to be adequately verified and determined suitable by the QP for use in the MRE. It is common for mineral projects to pass through the hands of several property holders, each generating exploration and drilling data. Using legacy data from former operators is legitimate, but this data needs careful verification that is documented in the technical report.
- Risk factors: Each mineral project has its own set of risks, any of which could affect the MRE. Many technical reports only provided boilerplate disclosure about potential risks and uncertainties that are generic to the mining industry. Failure to set out meaningful known risks specific to the mineral project may make MRE disclosure potentially misleading.
- Sensitivity to cut-off grade: Variations to the cut-off grade to indicate the relative robustness of the MRE can be useful information. However, all estimates resulting from each of the cut-off grade scenarios must meet the test of Reasonable Prospects and the base case or preferred scenario must be highlighted.

In providing the notice, the CSA has indicated that these will be areas of focus going forward. As market conditions improve and more capital comes back into the mining sector, we anticipate more regulatory scrutiny of disclosure of mineral resource estimates. Issuers are advised to carefully review their technical disclosure, discuss it with their QPs and external counsel, and consider the need for improvements to head off any potential regulatory issues.

Given robust commodity prices and positive market sentiment, we expect that 2021 will bring continued activity across the mining sector. Considering their prominence in the Canadian market, gold issuers are likely to drive capital raising and project exploration and development. New discoveries will ultimately be critical in order to sustain long-term strength in the industry and to promote the much needed growth of new companies. At the same time, while 2019 and early 2020 saw a number of M&A transactions, consolidation slowed as a result of the COVID-19 pandemic, although the mining sector was not significantly affected as operating mines and exploration projects managed

to continue working. Hopefully the industry will continue this resilience in 2021 and issuers looking to transact will find a way to do so safely.

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