

# Blakes Bulletin

## Securities Regulation

### Amendments Proposed to Rules Regarding Standards of Disclosure for Mineral Projects

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The Canadian Securities Administrators (the CSA) have published for comment proposed revisions to the existing rules regarding standards of disclosure for mineral projects (the Current Materials). The CSA are requesting comments on revised versions (the Proposed Materials) of National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (NI 43-101) and the related Companion Policy 43-101CP (the Companion Policy), as well as Form 43-101F1 – *Technical Report* (the Form).

The proposed changes represent the most substantial amendments to NI 43-101 since it was adopted in 2001, and are intended to provide a “more efficient and effective regulation that will reduce issuers’ costs to comply with [the amended rules] without compromising investor protection”. To achieve this objective, the Proposed Materials introduce new definitions and eliminate or reduce the scope of certain current requirements while amending many of the form requirements for technical reports. According to the CSA, the Proposed Materials are intended to provide more flexibility to mining issuers and qualified persons in certain areas, as well as more flexibility to accept new foreign professional associations, professional designations and reporting codes as they arise or evolve. The comment period for the Proposed Materials ends on July 22, 2010.

The most significant changes in the Proposed Materials are:

#### CHANGES TO OBLIGATION TO FILE TECHNICAL REPORT

##### Prospectus Trigger

The CSA are considering eliminating the short form prospectus trigger from the proposed NI 43-101. Under the current NI 43-101, an issuer must file a technical report to support scientific or technical information in a preliminary short form prospectus no later than the time a preliminary short form prospectus is filed, if that information is not supported by a previously filed technical report (the Prospectus Trigger). The CSA state that they understand that the Prospectus Trigger imposes extra costs and limits an issuer’s ability to complete offerings on a timely basis. Accordingly, the CSA are soliciting comments regarding eliminating the Prospectus Trigger, including whether the extra costs and delays to issuers are a significant concern to the industry, and whether investors think they will be disadvantaged if scientific or technical disclosure in a short form prospectus is not supported by a technical report.

##### Written Disclosure Trigger

Under the current NI 43-101, an issuer is required to file a technical report where it has filed a news release or directors’ circular containing first-time disclosure of, or a change in, a preliminary assessment, mineral resources or mineral reserves that constitutes a material change in respect of the affairs of the issuer. The proposed

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### Highlights

- The CSA are considering eliminating the requirement to file a technical report concurrently with the filing of a preliminary short form prospectus containing new scientific or technical information regarding material mineral properties
- More flexibility on qualified person consent requirements, including providing for new exemptions from the requirement to file updated consents and qualified person’s certificates and allowing, in certain circumstances, the consulting firm that employed the qualified person to file qualified person consents
- Changes to the restricted disclosure provisions, including a new definition of “historical estimates” that allows reliance on recent third-party estimates in a wider set of circumstances

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NI 43-101 expands this requirement such that an issuer would be required to file a technical report where *any written disclosure* is made by or on behalf of the issuer that discloses for the first time, or a change in, a preliminary economic assessment, mineral resources or mineral reserves that constitutes a material change in respect of the affairs of the issuer (the Written Disclosure Trigger), other than written disclosure contained in a document whose filing would, independently of the Written Disclosure Trigger, require the issuer to file a technical report.

Under the proposed NI 43-101, an issuer would have 45 days from the date of the Written Disclosure Trigger to file a technical report supporting the written disclosure (the 45 Day Rule) unless the written disclosure is in a directors' circular relating to a take-over bid, in which case the technical report must be filed by the earlier of: (i) 45 days from the date of the Written Disclosure Trigger; and (ii) three business days before the expiry of the take-over bid to which the directors' circular relates. An issuer that files a technical report in reliance on the 45 Day Rule must issue a news release at the time the technical report is filed to alert the market to the filing.

The proposed NI 43-101 provides an exemption from the 45 Day Rule if the preliminary economic assessment, mineral resources or mineral reserves disclosed by the written disclosure was, among other things, prepared by or on behalf of another issuer who holds or previously held an interest in the property and is supported by a technical report filed by the other issuer. In these situations, the issuer has six months, rather than 45 days, to file a technical report supporting its disclosure of the preliminary economic assessment, mineral resources or mineral reserves.

### **Independence Requirement Exemption for Technical Report Authors**

Under the current NI 43-101, the author of a technical report filed by an issuer upon becoming a reporting issuer in Canada must be independent of the issuer (the Independence Requirement). The proposed NI 43-101 provides an exemption from the Independence Requirement for "producing issuers" whose securities trade on a specified exchange (which includes the Australian Stock Exchange, the London Stock Exchange Main Market, the Nasdaq Stock Market and the New

York Stock Exchange). A "producing issuer" is defined in both the current and proposed NI 43-101 as an issuer with annual audited financial statements that disclose gross revenues from mining operations of at least C\$30-million for the issuer's most recently completed financial year or C\$90-million in the aggregate for the issuer's three most recently completed financial years.

### **NEW FLEXIBILITY ON CONSENT REQUIREMENTS**

The CSA have proposed two changes to address the common problem of locating a particular qualified person in a timely manner to meet a filing deadline for a qualified person's consent or certificate. Under the proposed NI 43-101, reporting issuers would no longer be required to file updated qualified persons' consents or certificates for a previously filed technical report that is still current upon a triggering event.

In addition, the CSA have proposed a consequential amendment to National Instrument 44-101 – *Short Form Prospectus Distributions* which would allow the consulting firm which employed the author of the technical report to provide a consent to the use of the technical report in the prospectus. The current rules only permit the individual author of the report to execute the consent which can be problematic when that person is not available or has left the employ of the consulting firm retained to write the technical report.

### **AMENDMENTS TO RESTRICTED DISCLOSURE PROVISIONS**

The CSA intend to retain the existing restrictions on disclosure contained in the current NI 43-101, such as the prohibition on disclosure of a quantity, grade or metal or mineral content of a deposit that has not been categorized in accordance with the standards prescribed by the Canadian Institute of Mining, Metallurgy and Petroleum. However, the proposed NI 43-101 adds two additional categories of prohibited disclosure: (i) the gross contained metal or mineral value of a deposit or a sampled interval or drill intersection, and (ii) other than in certain circumstances, a metal or mineral equivalent grade for a multiple commodity deposit, sampled interval or drill intersection. According to the CSA, the inclusion of these additional items to the list of restricted disclosure is simply a clarification to reflect the CSA's interpretation of the current NI 43-101.

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### **Historical Estimate Exemption**

Both the existing and proposed NI 43-101 provide an exemption from the restricted disclosure provisions for disclosure of "historical estimates" in certain circumstances. Under the current NI 43-101, a historical estimate means an estimate of mineral resources or mineral reserves prepared prior to February 1, 2001. The proposed NI 43-101 introduces a new definition of "historical estimate" as "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 acquired, or entered into an agreement to acquire, an interest in the property that contains the deposit." The new definition expands, in certain respects, the scope of the historical estimate exemption by classifying certain third-party estimates as historical estimates, even if such estimates were prepared after February 1, 2001. However, the new definition no longer provides an exemption from the prohibited disclosure rules for estimates made by issuers themselves on their mineral properties prior to February 1, 2001.

The proposed NI 43-101 also mandates additional disclosure, not required by the current NI 43-101, that must accompany the disclosure of a historical estimate, such as the key assumptions, parameters and methods used to prepare the historical estimate, to the extent known, and commentary on what work needs to be done to upgrade or verify the historical estimate as current mineral resources or mineral reserves.

### **NEW EXEMPTION FOR ROYALTY HOLDERS**

The proposed NI 43-101 provides an exemption to royalty holders from the requirement to file a technical report in respect of a mineral project material to the royalty holder. Under the existing NI 43-101, the requirements to file a technical report are equally applicable to royalty holders. However, under the proposed NI 43-101, the royalty holder would be exempt from the technical report requirement where the operator of the project is required to file a technical report under NI 43-101 or is a producing issuer whose securities trade on a specified exchange and the mineral resources and mineral reserves are reported under an "acceptable foreign code", as defined in the proposed NI 43-101.

### **EXPANDED DEFINITION OF "QUALIFIED PERSON"**

The proposed NI 43-101 replaces the prescribed list of acceptable foreign associations and designations for "qualified persons" with a more flexible objective test. Under the proposed test, an individual in good standing with any professional association in a foreign jurisdiction would qualify as a "qualified person" provided that the individual's membership designation, among other things: (i) requires a university or equivalent accreditation in an area of geoscience or engineering relating to mineral exploration or mining; (ii) requires or encourages continuing professional development; and (iii) has certain peer evaluation and recommendation requirements as detailed in the proposed NI 43-101. The existing prescribed list is preserved in the proposed Companion Policy to serve as guidance for issuers and technical report authors.

### **EXPANDED CIRCUMSTANCES WHERE INFERRED RESOURCES CAN BE INCLUDED IN AN ECONOMIC ANALYSIS**

The proposed NI 43-101 expands the circumstances where an issuer can report the results of an economic analysis of a project which includes inferred mineral resources. The current NI 43-101 prohibits an issuer from doing so except in connection with a "preliminary assessment", which is defined as a study of a project taken at an early stage prior to a preliminary feasibility study. Under the proposed NI 43-101, the definition of "preliminary assessment" has been replaced and the exclusion to allow reporting of an economic analysis that includes inferred resources is now applicable to a "preliminary economic assessment", which is defined to include any study which includes an economic analysis of the potential viability of mineral resources that is not a pre-feasibility or feasibility study.

### **AMENDED FORM REQUIREMENTS FOR TECHNICAL REPORTS**

The CSA have substantially amended the current Form in order to make it less prescriptive and more adaptable for advanced stage and producing properties, in addition to giving more discretion to the author of a technical report to exercise judgment in determining the importance given to certain matters in the technical

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report. The proposed Form provides greater detail regarding disclosure for development stage companies and producers. Significantly, it allows producers to exclude an economic analysis for projects in production, unless the technical report includes a material expansion of the project.

Under the proposed Form, a technical report may include a limited disclaimer of responsibility if the qualified person who prepared all or part of the report is relying on a report, opinion or statement of another expert who is not a qualified person or on information provided by the issuer regarding legal, political, environmental or tax matters relevant to the technical report, provided the qualified person identifies, among other things, prescribed information regarding the source of the information relied upon and the extent of the reliance.

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