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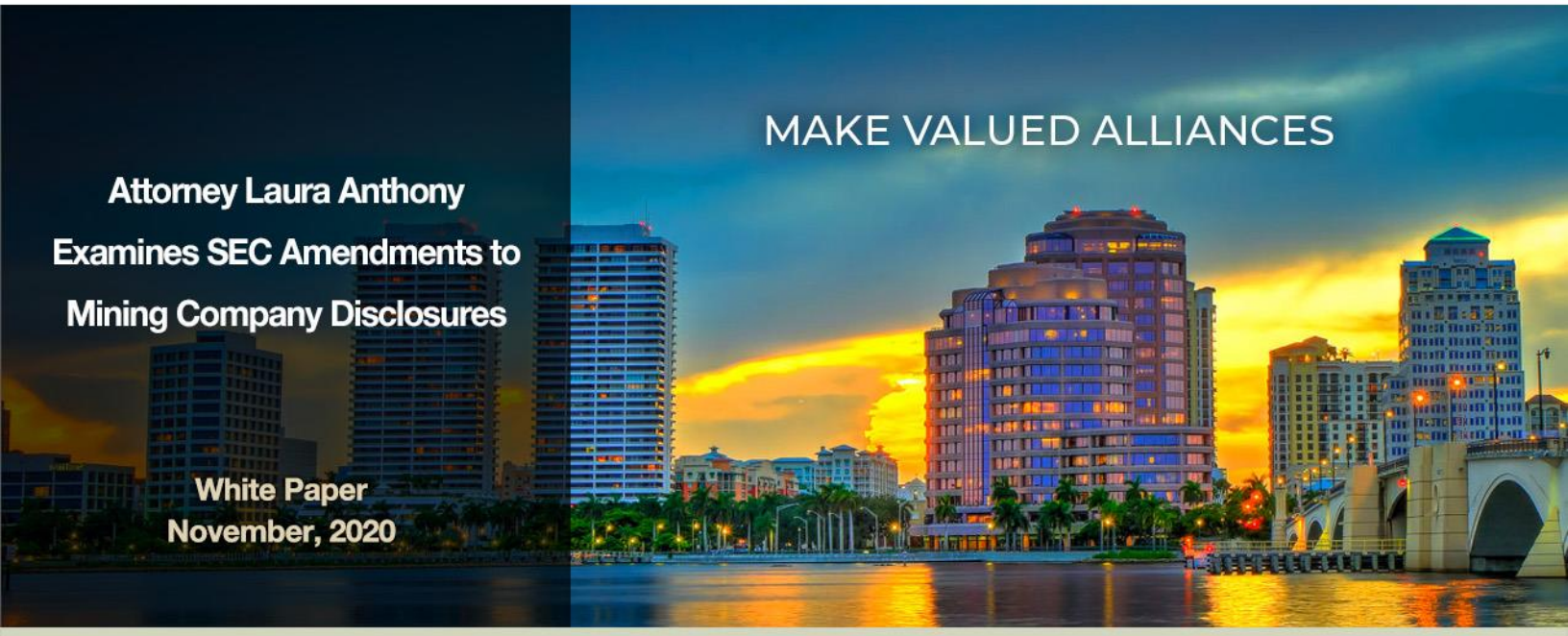

Attorney Laura Anthony Examines SEC Amendments to Mining Company Disclosures

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In the 4th quarter of 2018, the SEC finalized amendments to the disclosure requirements for mining companies under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). See http://securities-law-blog.com/2019/02/05/updated-disclosures-for-mining-companies/?hilite=%27mining%27. In addition to providing better information to investors about a company's mining properties, the amendments were intended to more closely align the SEC rules with industry and global regulatory practices and standards as set out in by the Committee for Reserves International Reporting Standards (CRIRSCO). The amendments rescinded Industry Guide 7 and consolidated the disclosure requirements for registrants with material mining operations in a new subpart of Regulation S-K.

The final amendments require companies with mining operations to disclose information concerning their mineral resources and mineral reserves. Disclosures on mineral resource estimates were previously only allowed in limited circumstances. The rule amendments provided for a two-year transition period with compliance beginning in the first fiscal year on or after January 1, 2021.

In April 2020 the SEC issued three new compliance and disclosure interpretations (C&DI) providing guidance on the new rules.

The C&DI focus on when a company must comply with the new rules. The SEC clarifies that a company engaged in mining operations must comply with Subpart 1300's disclosure rules beginning with its Exchange Act annual report for the first fiscal year beginning on or after January 1, 2021. Until then, staff will not object if the company relies on the guidance provided in Guide 7 and by the Division of Corporation Finance staff for the purpose of filing an Exchange Act annual report. To be clear, a company with a fiscal year end of December 31 would not have to comply with the new rules until its annual report for the year ended December 31, 2021.

The second C&DI clarifies requirements for Securities Act registration statements for mining companies. In particular, where a company qualifies to utilize incorporation by reference (see http://securities-law-blog.com/2019/10/29/incorporation-by-reference/?hilite=%27incorporation%27), it may do so when filing a Securities Act registration statement, even if the Exchange Act report being incorporated does not satisfy the requirements of the new Subpart 1300 disclosure requirements.

Until annual financial statements for the first fiscal year beginning on or after January 1, 2021 are required to be included in the registration statement, the SEC will not object if a Securities Act registration statement incorporates by reference disclosure prepared in accordance with Guide 7 from an Exchange Act annual report for the appropriate period filed by a company engaged in mining operations if otherwise permitted to do so. The SEC also reminds companies to consider all SEC rules related to incorporation by reference when doing so, including that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing.

Likewise, the third C&DI drills down on the "when" for compliance with the new Subpart 1300 rules. An Exchange Act or Securities Act registration statement that does not incorporate by reference mining property disclosure from an Exchange Act annual report filed by a registrant engaged in mining operations must comply with the new mining property disclosure rules set forth in Subpart 1300 of Regulation S-K on or after the first day of the first fiscal year beginning on or after January 1, 2021.

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For example, a calendar year-end company would be required to comply with the new mining property disclosure rules when filing an Exchange Act registration statement or a Securities Act registration statement that does not incorporate by reference from its Exchange Act annual report on or after January 1, 2021, while a company with a June 30 fiscal year-end would be required to comply with the new mining property disclosure rules when filing an Exchange Act or Securities Act registration statement that does not incorporate by reference disclosure from its Exchange Act annual report on or after July 1, 2021.

Refresher on Subpart 1300

In amending the disclosure rules for mining companies, the SEC considered that many companies are already subject to one or more of the rules and that by aligning the SEC reporting requirements to these rules, the compliance burden and costs for these companies could be reduced while still providing the necessary investor protections.

Under the final rules, a company with material mining operations must disclose specific information related to its mineral resources and mineral reserves on one or more of its properties. The rules define “mineral reserve” to include diluting materials and allowances for losses that may occur when the material is mined or extracted. The rules also amend the definition of “mineral resource” to exclude geothermal energy. Consistent with CRIRSCO standards, a company must disclose exploration results, mineral resources, or mineral reserves in SEC filings based on information and supporting documentation prepared by a mining expert referred to as a “qualified person.”

A company must obtain a dated and signed technical report summary from the qualified person related to mineral resources and reserves determined to be on each material property. The report must be signed either directly by the qualified person or the firm that employs them. Moreover, multiple qualified persons may take part in preparing the final technical report summary. The qualified person may conduct either a pre-feasibility or final feasibility study to support a determination of mineral reserves even in high-risk situations. The report must be filed as an exhibit to the company’s SEC report when first disclosed and subsequent changes or amendments to the report must also be filed as exhibits. A technical report on exploration results may also be voluntarily filed as an exhibit.

The final rules require the qualified person to use a price for each commodity that provides a reasonable basis for establishing estimates of mineral resources or reserves. The price may be either historical or forward-looking, but the report must disclose and explain the reasons for using the selected price, including any material underlying assumptions. Similarly, instead of requiring a specific point of reference, the qualified person may choose any point of reference subject to disclosure and explanations. The technical report summary may disclose mineral resources as mineral reserves as long as it also discloses mineral resources excluding mineral reserves.

A qualified person is not subject to expert liability under Section 11 of the Securities Act of 1933 (“Securities Act”) for information and factors that are outside that person’s expertise, even if discussed in the technical report.

Although the proposed rule amendment provided for quantitative presumptions as to when mineral resources or reserves will be deemed material, the final rule did not include this provision, instead allowing management to rely on a principles-based approach in determining materiality. Likewise, management can determine when a change in previously reported estimates of mineral resources or reserves is material. Also, the proposed rule would have required a table with certain information on a company’s top 20 properties, but the final rule instead also uses a principles-based approach, again leaving it to the company to determine material disclosures of its properties and mining operations.

Materiality relating to mineral resources and reserves has been modified to consistently rely on a principles-based approach. A principles-based approach requires the company to “rely on a registrant’s management to evaluate the significance of information in the context of the registrant’s overall business and financial circumstances” and to “exercise judgment” in determining whether disclosure is required. The SEC has shown a trend towards this principles-based

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approach for determining materiality for purposes of disclosure in its recent reviews and amendments to Regulation S-K and Regulation S-X (see, for example, http://securities-law-blog.com/2016/05/03/sec-issues-concept-release-on-regulation-s-k-part-i-3/ and http://securities-law-blog.com/2016/05/17/sec-issues-concept-release-on-regulation-s-k-part-2/). Practitioners, including the American Bar Association ("ABA"), have advocated for principles-based disclosure over quantitative or bright line tests (see http://securities-law-blog.com/2018/05/01/aba-comment-letter-on-disclosures-under-regulation-s-k/) believing that a quantitative guideline results in lengthy, and often immaterial, information.

The number of summaries and tables that are currently required has been reduced from seven to two and the company may now choose to make its disclosures using either tables or a narrative format. A company is permitted to voluntarily disclose exploration targets in its SEC reports as long as they are accompanied by certain specified cautionary and explanatory statements. Disclosure of exploration activity and results is mandatory once the company determines the information is material to investors. Also, the qualified person may include inferred resources in their economic analysis as long as certain conditions are met.

A company may now use historical estimates of mineral resources or reserves in SEC filings pertaining to mergers, acquisitions, or business combinations if they are unable to update the estimate prior to the completion of the relevant transaction, provided that the company discloses the source and date of the estimate, and does not treat the estimate as a current estimate.

Finally, the amended rules allow a company holding a royalty or similar interest to omit any information required under the summary and individual property disclosure provisions to which it lacks access and which it cannot obtain without incurring an unreasonable burden or expense.

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Palm Beach securities attorney Laura Anthony and her experienced legal team provide ongoing corporate counsel to small and mid-size private companies, OTC and exchange traded public companies as well as private companies going public on the Nasdaq, NYSE American or over-the-counter market, such as the OTCQB and OTCQX. For more than two decades Anthony L.G., PLLC has served clients providing fast, personalized, cutting-edge legal service. The firm's focus includes, but is not limited to Regulation D and Regulation S and PIPE Transactions, securities token offerings and initial coin offerings, Regulation A/A+ offerings, as well as registration statements on Forms S-1, S-3, S-8 and merger registrations on Form S-4; compliance with the Securities Exchange Act of 1934, including registration on Form 10, reporting on Forms 10-Q, 10-K and 8-K, and 14C Information and 14A Proxy Statements; all forms of going public transactions; mergers and acquisitions including both reverse mergers and forward mergers; applications to and compliance with the corporate governance requirements of securities exchanges including Nasdaq and NYSE American. Palm Beach attorney Laura Anthony is also the author of SecuritiesLawBlog.com, the producer and host of LawCast.com, Corporate Finance in Focus, and a contributor to The Huffington Post and Law360.

Ms. Anthony is involved throughout the community of Palm Beach. She is on the board of directors for the American Red Cross for Palm Beach and Martin Counties, and provides financial support to the Susan Komen Foundation, Opportunity, Inc., New Hope Charities, the Society of the Four Arts, the Norton Museum of Art, Palm Beach County Zoo Society, the Kravis Center for the Performing Arts and several other organizations. She is also a financial and hands-on supporter of Palm Beach Day Academy, one of Palm Beach's oldest and most respected educational institutions. She currently resides in Palm Beach with her husband and daughter.

Ms. Anthony is an honors graduate from Florida State University College of Law and has been practicing law since 1993.

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