

October 5, 2012

## ESMA Launches Consultation on Amendments to CCSR Recommendations for Mineral Companies.

**On October 1, 2012, the European Securities and Markets Authority (ESMA) published a consultation paper setting out its proposed amendments to paragraphs 131-133 of the CCSR Recommendations on the consistent implementation of the Prospectus Regulation (the CCSR Recommendations) governing the content of mineral company prospectus disclosure.**

The consultation follows substantial amendments made by ESMA to paragraphs 131-133 of the CCSR Recommendations in March 2011 (the 2011 Amendments). The key proposals concern exemptions from the requirement for a prospectus to contain a Competent Persons Report (CPR) and an attempt to clarify how the materiality of minerals projects should be assessed. The consultation paper can be accessed [here](#).

### CPR Exemption for Debt Prospectuses

- ESMA has proposed that prospectuses relating to non-equity securities be exempt from the requirement to include a CPR. In the consultation paper ESMA draws a distinction between the levels of information that an investor requires for an investment decision in respect of equity and non-equity securities. ESMA notes that in an equity context the value of shares is directly linked to the value and prospects of the issuer and that this makes it appropriate for mineral companies to include detailed reserves and resources information in the form of a CPR. However, an investment in non-equity securities is generally for a limited period of time, and the value of non-equity securities is more likely to be influenced by factors such as an issuer's liquidity. The exemption would not apply to depositary receipts over shares.

### Changes to the Main Exemption from the Requirement to Publish a CPR

- The 2011 Amendments made significant changes to paragraph 133(ii) of the CCSR Recommendations which sets out the conditions that must be met for an issuer to avail itself of an exemption from the requirement to publish a CPR in a prospectus.
- Currently 133(ii) provides for an exemption where an issuer is listed on a Regulated Market, equivalent overseas market or appropriate MTF, has previously published a CPR (for instance in its IPO prospectus) and has, since that time, continued to report and publish annually reserves and resources data in accordance with one of the ESMA endorsed reporting standards listed in Appendix I of the CCSR Recommendations.
- ESMA proposes to remove the requirement that a CPR must have been previously published, having concluded that a strong recent track record of reporting is of greater importance. Therefore, it is proposed that the exemption will be available to equity issuers listed on a Regulated Market, an equivalent third country market or an MTF who can show annual reporting of reserves and resources for three years in accordance with Appendix I (or, if shorter, and subject to certain conditions for issuers listed on an MTF, the period since admission).

## Assessing of the Materiality of Minerals Projects

- The 2011 Amendments widened the definition of a “mineral company” that fell within the ambit of paragraphs 131-133 from one whose “principal activity” was the extraction of mineral resources, to issuers “with material mineral projects”. Following feedback from market participants and competent authorities, ESMA has accepted the need to provide greater certainty as to how the materiality of mineral projects should be assessed. Whilst providing more guidance than the current iteration of paragraph 131, the assessment will remain fundamentally subjective.
- There is no change proposed to the requirement that materiality of mineral projects should be assessed having regard to all the company’s mineral projects relative to the issuer and its group taken as whole;
- New language expressly modelled on the wording of the Prospectus Directive is proposed under which mineral projects will be material where an evaluation of them is necessary to enable investors to make an informed assessment of the prospects of the issuer; and
- A rebuttable presumption is proposed that such an evaluation will be necessary where the project seeks to extract minerals for re-sale as a commodity or where the materials are to supply an industrial process (without intermediate re-sale to a third party) and there is uncertainty as to quantity or feasibility of recoverability.

## NAEN Mining Code

- The 2011 Amendments established a “menu” of internationally recognised reporting standards acceptable for use in prospectuses. These are set out in Appendix I to the CESR Recommendations. All of the Appendix I mining codes were aligned with the international mining reporting body, CRIRSCO. This approach had the effect of excluding Russian mining codes, amongst others. ESMA is now consulting on a proposal to add the Russian NAEN mining code to Appendix I following the admission to CRIRSCO of the Society of Russian Experts on Subsoil Use.

## Appendices II and III

- Amongst a number of other minor amendments and clarifications ESMA has reiterated that the recommended CPR content introduced by the 2011 Amendments and contained in Appendices II and III to the CESR Recommendations is not compulsory but that a CPR should be prepared “having regard” to Appendices II and III. Similarly, on-site inspections are not compulsory in the preparation of a CPR but are left to the professional judgement of the CPR provider.

Responses to the consultation must be received by December 21, 2012, with a feedback statement and revised CESR Recommendations likely to be published in the second quarter of 2013.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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