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Mining 2021 – Market windows and accessing capital

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A key consideration for mining companies seeking capital in 2021 was the elusive "market window." Despite relatively strong commodity prices and market sentiment (particularly with respect to inflation), there were defined periods of inactivity and a rush to raise capital when the market window opened. The market was then strongly biased towards established issuers, leaving junior issuers still seeking much-needed capital.

New entrants to the market generally fared worse, despite a strong initial public offering (IPO) market in Canada, which did not seem to extend to the mining industry. This has forced many companies looking to go to market by means of an IPO or reverse takeover transaction (RTO) to adjust their business plans to maintain financing readiness.

As mining companies seek to access public capital, one of the biggest challenges they face is the need to maintain a current technical report under National Instrument 43-101 – Standards of Disclosure for Mineral Projects (NI 43-101).

IPO/RTO technical report considerations

A key provision of NI 43-101 is the obligation for issuers to file a current technical report to support scientific or technical information relating to a mineral project on a property material to the issuer in certain prescribed disclosure documents. This includes prospectuses and information circulars where shareholders are asked to approve an acquisition, such as an RTO.

To be considered "current," a report must contain all material scientific or technical information about the project; this can make it difficult to determine a cutoff date for the report where issuers are continuing to explore or develop the project. Additionally, the technical report is generally required to be prepared by or under the supervision of a qualified person (as defined in NI 43-101) who is independent of the issuer. While the independence requirement provides an objective verification of the asset, it also means that the timing of the report is not entirely within the issuer's control.

Stock exchange listing rules require an independent technical report to support applicable listing requirements for mining issuers. Stock exchanges also rely on the technical report to support the sources and uses of funds for the issuer based on the recommended work program set out in the technical report. The listing review process requires up-to-date information for the issuer's overall budget which the stock exchange reconciles to the issuer's available cash after giving effect to the financing.

As a result, even the most IPO/RTO-ready issuers require at least a couple of months to prepare for a public filing. With an ideal timeline of two months to complete an IPO/RTO, the overall timing is manageable. However, in 2021 two challenges to these timelines became

apparent. First, issuers were often forced to wait to launch their financings until a favourable market window opened. Further, once the market window was receptive to a financing, issuers found the regulatory review times for public offerings were significantly longer due to the volume of transaction activity occurring at the same time. In some cases, issuers found themselves stalled for six months or more and were required to incur additional costs by continuously updating their technical reports over that time.

The problem is most acute for single project issuers or junior issuers where there is uncertainty whether subsequent developments are material or not. It is virtually assured that, where a technical report does not have a cutoff date in proximity to the disclosure document pursuant to which it is filed, there will be questions from securities regulators or stock exchanges about the currency of the report and whether the requirements of NI 43-101 and stock exchange listing rules have been satisfied.

While there is no magical solution to this problem, there are some steps that issuers can take to minimize the disruption of an extended IPO/RTO process on their projects:

- **Be prepared for delay in work programs** Issuers may need to be flexible in planning work programs taking into account IPO/RTO timing. While this may result in less optimized programs from a technical standpoint, it is likely a better outcome than a delay in an IPO or RTO. Issuers should consider logistical timing for things like permitting and assays to ensure results are reflected in the technical report. Non-material work or interpretative preparations for subsequent work programs can be scheduled after the technical report cutoff. Plan ahead to ensure the technical report remains current in the event of IPO/RTO delays.
- **Quarantine results** It is possible to quarantine exploration results with outside contractors (such as assay labs). This may avoid the need to include them in a technical report. The issuer would disclose that work has been done, but that results are pending. There can be issues around the currency of technical reports where significant results are quarantined, however. Issuers should be prepared to provide the qualified person authoring the report with visuals or other preliminary information to offer comfort that nothing in the pending results would invalidate the conclusions in the technical report. This is more feasible for less material work such as infill drilling than work that is material to the project and will influence subsequent work.
- **Update disclosure outside of the technical report** Where additional work is not considered to be material, the issuer can finalize the technical report with a cutoff date that predates any ongoing work. The issuer can then include an update on work completed after the cutoff date of the report in a disclosure document. This way the issuer's disclosure record is up to date without having to manage moving goalposts for the technical report. However, issuers are cautioned that the qualified person authoring the technical report will need to review all subsequent technical information to ensure that it does not impact their conclusions in the report – even if another qualified person is responsible for the disclosure. In addition, the issuer needs to ensure that the budget and work program set out in the technical report are future-oriented with work to be performed utilizing the proceeds of the IPO or RTO and not past work. Disclosure rules require issuers to reconcile sources of funds up to the month end before the prospectus

(IPO) or information circular (RTO) and the budget must align with such sources.

Unfortunately there is no perfect solution for the technical report currency dilemma. It is often a source of significant frustration for issuers going to market, especially where there are multiple layers of regulatory review (securities regulators and stock exchanges) and no clear delineation of materiality to the project or the issuer.

Financing alternatives without a current technical report ... changes on the horizon

For many junior issuers, a key implication of not maintaining a "current" technical report is the inability to satisfy the requirements necessary to maintain a current annual information form. The most significant repercussion is the resulting ineligibility to complete a public offering using a short form prospectus – something that is significantly more cost-effective compared to a long form prospectus. From a policy perspective, the benefits of accessing the short form prospectus regime are earned by maintaining a current, fulsome continuous disclosure record. For many issuers, that cost is prohibitive, meaning that many junior mining issuers have been practically limited to private placement financings in the exempt market.

For the past few years, the Canadian Securities Administrators (CSA) have been focused on regulatory burden reduction initiatives, including regarding capital raising. One key concern expressed by market participants, particularly in the junior mining market, is the cost of completing a public offering given the ineligibility of most junior miners to use a short form prospectus. As described in our Progressive changes in a historic year for capital markets activity article , one of the most recent initiatives proposed by the CSA is intended to fill the gap.

If adopted, the new Listed Issuer Financing Exemption will allow issuers who qualify to distribute freely tradeable listed equity securities to the public. Qualifying issuers would generally be limited to raising the greater of $5,000,000 or 10% of the issuer's market capitalization to a maximum amount of $10,000,000 in a calendar year. To qualify, issuers must have their securities listed on a Canadian stock exchange, have been a reporting issuer for at least 12 months, have filed all timely and periodic disclosure documents, and have an "active business." Although the proposed revisions to add the Listed Issuer Financing Exemption to National Instrument 45-106 – Prospectus Exemptions do not expressly describe what constitutes an active business, we expect that the CSA will take a reasonably liberal approach to the application of the requirement for mining issuers, such that issuers with early stage exploration properties that have limited work programs will still qualify.

Importantly, the offering document requirement by the Listed Issuer Financing Exemption would not trigger the technical report requirement under NI 43-101. As such, issuers can rely on the exemption to complete a financing through distribution of freely tradeable shares (without the corresponding private placement liquidity discount) without having to assess the currency of their technical reports. We expect that this exemption, if adopted, will offer an excellent financing tool for mining issuers who are not eligible to file a short form prospectus, whose technical reports may not be current and who require capital to fund their work programs in order to advance their projects and technical disclosure.

Financing in 2022?

With new prospectus exemptions on the horizon and a continued focus from securities regulators on reducing regulatory burdens, there are likely to be new options for issuers to

raise capital in 2022, where they have been previously challenged. The new financing exemptions are not affected by technical report currency issues that have historically limited issuers in their ability to complete a public capital raising. While these new exemptions are not going to assist issuers seeking to complete an IPO or RTO in maintaining a current technical report, there are a number of opportunities for issuers to consider managing their programs and results in a way that reduces potential impacts to their pending transaction. We encourage issuers to actively discuss these issues with their advisors to ensure that they are able to hit market windows when they are open.