

National Instrument 43-101: What Issuers Need To Know About Promotional Language And Other Best Practices For Public Disclosure



Promotional Language: Striking a Balance

For mining projects, particularly at the exploration and/or development stage, demonstrating their unique value proposition and commercial viability is important to attract support from the investing public. However, the use of excessively promotional language in public disclosure documents is one of the leading causes for regulatory scrutiny. Accordingly, issuers need to be mindful of the disclosure standards required under applicable Canadian securities laws and exchange rules, and how those interact with National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (NI 43-101).

In accordance with Canadian securities laws, the public disclosure of an issuer must be factual, complete and balanced and not present (or omit) information in a manner that is misleading. Further, unfavourable news must be disclosed as prominently and completely as favourable news. Sufficient detail must be included in the disclosure to enable investors

to understand the “substance and importance” of the information. In addition, National Policy 51-201 – *Disclosure Standards* (NP 51-201) advises against including unnecessary details or promotional commentary.

In the mining industry, using overly promotional language can mislead investors about a project’s true value and risks. For example, it is misleading to state that a project has “huge upside potential” without supporting evidence or discussing associated risks. A clear, factual basis must accompany such statements otherwise an issuer risks, at best, the review of a regulator and, at worst, secondary market liability for misleading investors.

Problematic Descriptors

The use of the term “world class” continues to be popular amongst issuers, but is particularly troublesome for regulators on the basis that it is considered to be subjective as there are many factors and criteria on which it could be based. If a project is truly “world class,” the rationale for why it is “world class” needs to be included in the disclosure, typically in the form of a comparison to other projects. Regulators have also flagged other terms which are often used inappropriately, such as “incredible results,” “abundant visible gold,” “spectacular and extraordinary,” or “best in class.” When drafting disclosure issuers must be cognizant of the use of extra adjectives and bold claims.

Other Mediums of Disclosure

Though issuers frequently conduct thorough reviews of mandatory continuous disclosure documents such as technical reports, news releases and annual information forms against the requirements of NI 43-101, it is important to remember that “disclosure” in NI 43-101 is a broad term capturing all scientific or technical information made by an issuer and NP 51-201 and its legal foundations encompasses all disclosures

made by an issuer. Accordingly, investor presentations are also subject to regulatory scrutiny in respect of NI 43-101 requirements and policy considerations related to promotional language. So too are other forms of digital communication including, but not limited to, websites, blogs and other forms of social media. It is often these voluntary disclosures that can land an issuer in hot water over the use of “overly promotional” language, as issuers may fail to review with the same rigour applied to mandatory filings.

Regulatory Findings

In addition to overly promotional language in public disclosures related to mineral projects, there are additional requirements in NI 43-101 that issuers should keep in mind when preparing filings and other public materials.

The Canadian Securities Administrators (CSA) have indicated the following areas are the most common for non-compliance in mining disclosures:

- frequent dissemination of news releases without disclosure of new material information;
- compensating third parties who use social media and general investing blogs to promote issuers, but do not disclose their agency, compensation and/or financial interest;
- disclosing details about mineral projects that:
 - suggest without direct evidence from sampling or exploration, that a property holds high potential for development including production. For example, including photos of assayed core beside new core, to imply mineralization prior to third party verification;
 - rely on projected peak versus long-term commodity prices; or
 - imply that a property holds a specific fair market value without a feasibility report;

- failing to include reference in the disclosure document containing the scientific or technical information to the qualified person (QP) who assisted in preparing such disclosure and such QP's relationship to the issuer;
- omitting the required cautionary language for historical estimates, exploration targets and preliminary assessments;
- reporting in situ or gross metal values;
- providing unsupported claims about the potential viability of a project or misrepresenting the project's stage of development;
- adding Inferred Mineral Resources to other categories of Mineral Resources (charts and graphs are often overlooked and this is where most issuers inappropriately add categories together);
- stating the quantity of contained metal without associated tonnes and grade;
- not stating the effective date and missing key assumptions, parameters and methods for Mineral Resource and Mineral Reserve estimates; and
- linking third-party reports or providing hyperlinks to reports that are not compliant with NI 43-101 (when posting such third-party reports, it is important to keep in mind that if such reports are posted by the issuer, they are treated as part of the issuer's overall public disclosure records and NI 43-101 applies to it no differently than a technical report of the issuer).

In CSA Staff Notice 51-364, regulators warn that using terms like "ESG" or "sustainability" without detailed disclosure can be potentially misleading. Issuers should provide specific information on the factors considered and how they are measured and evaluated, ensuring all claims are substantiated. Readers are also reminded of the recent changes to the Competition Act through Bill C-59 which have brought significant amendments targeting greenwashing.

Please see our commentary on Bill C-59 [here](#).

Regulatory Response

Issuers that have been found to have included overly promotional language in their disclosure record will most often be notified by way of a continuous disclosure review conducted by the principal regulator. An issuer will receive a letter that outlines the issues identified with the disclosure and corrective actions the issuer may be required to take to ensure compliance on a go-forward basis. Regulators also have a number of other actions at their disposal depending on the frequency, severity and potential risk to investors. Such other actions include:

- amending website disclosure or investor relations materials;
- amending and re-filing disclosure documents;
- retracting disclosure;
- dissemination of clarifying or corrective news releases;
- noting an issuer in default until the disclosure is corrected to their satisfaction; or
- issuing a cease trade order against the issuer's securities, including if the issuer does not take actions otherwise requested of it.

Best Practices

To navigate the complexities of NI 43-101 and avoid any such regulatory action, it is recommended that issuers follow these best practices:

- 1. Avoid Overly Promotional Language:** Refrain from using exaggerated terms. If promotional language is employed, provide substantial, factual support to back up such claims.
- 2. Balance the Disclosure:** Provide a balanced view of the project by including both favorable and unfavorable

information. Disclosure should be based on facts and give enough detail to allow the reader to understand the substance and importance of the disclosure. This helps in maintaining transparency and credibility with investors.

3. Avoid Misleading Statements: Refrain from false or misleading statements that would be expected to have a significant effect on the price or value of an issuer's securities. Issuers should also avoid acts, practices or conduct relating to securities that result in or contribute to a misleading appearance of trading activity or an artificial price for a security.

4. Identify Investor Relations Activities: Ensure that investor relations disclosure disseminated by or on behalf of an issuer clearly and conspicuously disclose that the record is being issued as such. Additionally, any reports or articles which are paid for by the issuer should disclose such payments. In addition, venture issuers must also issue news releases setting out the material terms of all investor relation engagements.

5. Include Required Information: Clearly state the name and relationship to the issuer of the QP, include necessary cautionary statements and ensure that all forward-looking statements are accompanied by appropriate risk disclosures.

6. Substantiate Forward-Looking Information: When disclosing forward-looking information, (i) ensure that the issuer has a reasonable basis for the information (ii) identify forward-looking information as such, (iii) caution readers that actual results may vary from the forward-looking information and identify material risk factors that could cause actual results to differ materially from the forward-looking information and (iv) state the material factors or assumptions used to develop forward-looking information.

7. Review All Disclosures: Ensure that all forms of public

communication, including promotional materials, websites and social media, are reviewed by a QP for compliance with NI 43-101.

8. Monitor Online Content: Regularly review and update website content and social media posts to ensure consistency with disclosure requirements. All information disseminated through these channels must meet the same standards as formal filings.

9. Avoid Hyperlinks: Hyperlinks can often become broken or fail to work as intended over time, and could link to non-compliant disclosures for which the issuer is then responsible. If something is important enough to be linked, it should be included directly in the disclosure.

10. Maintain Robust Disclosure Policies: Address promotional activities, including the various matters above, within an issuer's disclosure policies and ensure that those preparing news releases, investor relations material and related disclosure content periodically review such policy.

NI 43-101 sets stringent standards to ensure that issuers provide clear, accurate and balanced information to potential investors. By avoiding promotional language, not only within an issuer's technical report but across all forms of communication, including websites and social media and maintaining rigorous review processes, issuers can uphold these standards and protect both their reputation and investor trust. Adherence to these disclosure requirements not only avoids regulatory pitfalls but also fosters transparency and credibility of the issuer and the mining sector in general.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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