Subject: FILE No. DF Title XV – Specialized Disclosures

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Toy & Brown is a New York City law firm that specializes in energy and natural resource infrastructure. We have written and spoken extensively on real estate investment trust (REIT) applications for energy and natural resource infrastructure. While mineral, oil and gas royalty payments are expressly excluded from the REIT provisions of the Internal Revenue Code (subchapter m), non-mineral natural resources can be owned by REITs. For example, there are a number of publicly-traded REITs whose predominate activities are timber and timber-related. Certain activities with respect to other non-mineral natural resources (such as geothermal and aquifers) can also be conducted by REITs

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amends the Securities Act of 1934 (the "1934 Act") to require additional disclosure from 1934 Act reporting companies that engage "in the commercial development of oil, natural gas, or minerals." We are writing to suggest that, as part of the rulemaking under section 1504, the Commission consider and include a definition of "oil," "natural gas" and "minerals." Our suggestion is motivated by the absence of available definitions for such words.

For example, the Securities Act of 1933 (the "1933 Act"), the 1934 Act and the Investment Company Act of 1940 (the "1940 Act") each include "fractional undivided interest in oil, gas, or other mineral rights" in the definition of "security" without a statutory definition or a definitional framework of reference for the phrase "other mineral."

SEC Industry Guide 7, *Description of Property by Issuers Engaged or to Be Engaged In Significant Mining Operations*, provides some guidance as to the scope of the phrase "mineral deposits." Guide 7 implies that mineral deposits include deposits of "metalliferous minerals" and deposits of "coal, oil, shale, tar, sands, limestone, etc." The SEC has also taken the position that "the term "ore" is applied properly only to mineralized material which may be mined at a profit…"[1] A general definition of "mineral" appears not to have been adopted by the SEC.

Absent an SEC definition of the term "minerals," the most comprehensive Federal definitional scheme is located in the provisions of the Internal Revenue Code relating to depletion allowances. The depletion allowance provisions of the Internal Revenue Code, sections 611, 612 and 613, provide a detailed listing of minerals and other natural deposits for which depletion allowances can be claimed. Relevant portions of section 613 have been excerpted at Annex A hereto.

[1] http://www.sec.gov/alj/aljdec/1970/33-5061.pdf

A section 613 listing approach would result in a lengthy—and dense—section 1504 regulation. Attempts at listing can result in omissions. For example, the section 613 list is not comprehensive especially when non-U.S. deposits are considered. For example, the conflict material "wolframite" (section 1502(e)(4) of the Dodd-Frank Act) is not listed in the percentage depletion allowance provision of section 613 of the Internal Revenue Code. Section 613(b)(1)(b) of the Internal Revenue Code does, however, include, the ores of tungsten, tin and tantalum metals.

The Dodd-Frank Act directs that the rules to be issued under section 1504 "[to] the extent practicable…support the Commitment of the Federal Government to international transparency efforts relating to the commercial development of oil, natural gas, or minerals." International definitions are available that lend themselves to use in the resource extraction issuer rules. The use of accepted international definitions will further the goal of transparency.

--The International Accounting Standards Board (IASB) has outstanding a discussion paper, DP/2010/1, on the scope of extractive activities to be the subject of an international financial accounting standard (IFSR).[2] The discussion paper includes the following as a definitional scope (page 15, 1.2):

> "Minerals are naturally occurring materials in or on the earth's crust that include metallic ores (such as copper, gold, silver, iron, nickel, lead and zinc), gemstones, uranium, and fossilized organic material (coal). Oil and natural gas, often referred to collectively as petroleum, can be defined as a naturally occurring mixture consisting of hydrocarbons in the gaseous, liquid or solid phase (such as tar sands or oils shale)."

The proposed IASB definition would exclude both the production of geothermal energy and the extraction of minerals from seawater (page 16, 1.4):

> "These activities are not regarded as extractive because they either:
>
> > "(a) share a similar process to extractive activities and face similar risks, but they are not strictly non-regenerative resources (eg geothermal energy); or
> >
> > "(b) involve a process of extracting non-regenerative resources, but face risks that are more in the nature of the risks facing manufacturing activities or other production processes (eg the extraction of minerals from seawater) and are so very different from the risks associated with exploring for, developing and extracting minerals or oil and gas."

Section 13(q)(1)(a) of the 1934 Act, as added by section 1504 of the Dodd-Frank Act, defines "commercial development" in words that indicate that Congress was focused on activities that, at least in the oil and gas business, would be considered upstream activities. In the oil and gas business, upstream activities are comprised by prospecting, exploration, evaluation development and production. Section 13(q)(1)(a) includes the function of "processing" and "other significant actions relating to."

[2] The IASB definition most likely parallel's Congress' intent in using the phrase "natural gas" to mean hydrocarbon natural gas There are natural gasses other than hydrocarbon gasses (such as underground carbon dioxide).

Words of this nature seems to cross over into areas that are considered to be mid-stream in the oil and gas industry: processing, storage, marketing and transportation of commodities such as crude oil, natural gas, natural gas liquids (NGLs, mainly ethane, propane and butane) and sulphur. The words "other significant actions relating to" may also encompass downstream oil activities such as refining and selling and distribution and distribution of natural gas and products derived from crude oil. Downstream products include liquefied petroleum gas (LPG), gasoline or petrol, jet fuel, diesel oil, other fuel oils, asphalt and petroleum coke. Even in the oil and gas area the lines are not always clear: with an integrated project such as liquefied natural gas (LNG) is the activity the export of natural gas or the activity of production prior to liquefaction?

The lack of boundary precision cuts across coal and the other mineral types. Is the export of processed iron ore (taconite that has undergone benefaction to concentrate the ore) to be considered participation in the underlying extraction activity? Is the export of refined metals (such as gold, platinum, and palladium) to be considered a significant action relating to minerals? In proposing regulations, the SEC should seek input on the boundary issues.

Section 613(c) of the Internal Revenue Code, excerpted in Annex A, defines the boundary between mining and other activities by defining the term mining to include some but not all post-extraction treatment processes.

If the determination is made to set the boundary of resource extraction issuer disclosure to coincide with upstream activities only, the regulations should not ignore altogether downstream and midstream activities. A significant disclosure area would be purchase obligations[3] that were negotiated as part of, or in contemplation of, the commercial development or financing of an extraction project from which the contracted volumes or quantities would be provided.

Please contact us if you would like us to expand on any of the foregoing.

[3] A "purchase" obligation" is s defined as an arrangement to purchase goods or services that is enforceable and legally binding on the registrant and that specifies all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the timing of the transaction. See, e.g., Item 303(a)(5)(ii)(D) of Regulation S-K.

(b) Percentage depletion rates The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 22 percent

(A) sulphur and uranium; and

(B) if from deposits in the United States—anorthosite, clay, laterite, and nephelite syenite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, beryllium, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, molybdenum, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(2) 15 percent

If from deposits in the United States—

(A) gold, silver, copper, and iron ore, and

(B) oil shale (except shale described in paragraph (5)).

(3) 14 percent

(A) metal mines (if paragraph (1)(B) or (2)(A) does not apply), rock asphalt, and vermiculite; and

(B) if paragraph (1)(B), (5), or (6)(B) does not apply, ball clay, bentonite, china clay, sagger clay, and clay used or sold for use for purposes dependent on its refractory properties.

(4) 10 percent Asbestos (if paragraph (1)(B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 7 1/2 percent Clay and shale used or sold for use in the manufacture of sewer pipe or brick, and clay, shale, and slate used or sold for use as sintered or burned lightweight aggregates.

(6) 5 percent

(A) gravel, peat, pumice, sand, scoria, shale (except shale described in paragraph (2)(B) or (5)), and stone (except stone described in paragraph (7));

(B) clay used, or sold for use, in the manufacture of drainage and roofing tile, flower pots, and kindred products; and

(C) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(7) 14 percent All other minerals, including, but not limited to, aplite, barite, borax, calcium carbonates, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, mollusk shells (including clam shells and oyster shells), phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (1)(B) does not apply) bauxite, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc (including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral (other than slate to which paragraph (5) applies) when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses;

(B) minerals from sea water, the air, or similar inexhaustible sources; or

(C) oil and gas wells.

For the purposes of this subsection, minerals (other than sodium chloride) extracted from brines pumped from a saline perennial lake within the United States shall not be considered minerals from an inexhaustible source.

(c) Definition of gross income from property For purposes of this section—

(1) Gross income from the property The term "gross income from the property" means, in the case of a property other than an oil or gas well and other than a geothermal deposit, the gross income from mining.

(2) Mining The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the treatment processes considered as mining described in paragraph (4) (and the treatment processes necessary or incidental thereto), and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which such treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills.

(3) Extraction of the ores or minerals from the ground The term "extraction of the ores or minerals from the ground" includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

(4) Treatment processes considered as mining The following treatment processes where applied by the mine owner or operator shall be considered as mining to the extent they are applied to the ore or mineral in respect of which he is entitled to a deduction for depletion under section 611:

(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

(B) in the case of sulfur recovered by the Frasch process—cleaning, pumping to vats, cooling, breaking, and loading for shipment;

(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and ores or minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, sintering, and substantially equivalent processes to bring to shipping grade and form, and loading for shipment;

(D) in the case of lead, zinc, copper, gold, silver, uranium, or fluorspar ores, potash, and ores or minerals which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore or the mineral or minerals from other material from the mine or other natural deposit;

(E) the pulverization of talc, the burning of magnesite, the sintering and nodulizing of phosphate rock, the decarbonation of trona, and the furnacing of quicksilver ores;

(F) in the case of calcium carbonates and other minerals when used in making cement—all processes (other than preheating of the kiln feed) applied prior to the introduction of the kiln feed into the kiln, but not including any subsequent process;

(G) in the case of clay to which paragraph (5) or (6)(B) of subsection (b) applies—crushing, grinding, and separating the mineral from waste, but not including any subsequent process;

(H) in the case of oil shale—extraction from the ground, crushing, loading into the retort, and retorting (including in situ retorting), but not hydrogenation, refining, or any other process subsequent to retorting; and

(I) any other treatment process provided for by regulations prescribed by the Secretary which, with respect to the particular ore or mineral, is not inconsistent with the preceding provisions of this paragraph.

(5) Treatment processes not considered as mining Unless such processes are otherwise provided for in paragraph (4) (or are necessary or incidental to processes so provided for), the following treatment processes shall not be considered as "mining": electrolytic deposition, roasting, calcining, thermal or electric smelting, refining, polishing, fine pulverization, blending with other materials, treatment effecting a chemical change, thermal action, and molding or shaping.

(d) Denial of percentage depletion in case of oil and gas wells Except as provided in section 613A, in the case of any oil or gas well, the allowance for depletion shall be computed without reference to this section.

(e) Percentage depletion for geothermal deposits

(1) In general In the case of geothermal deposits located in the United States or in a possession of the United States, for purposes of subsection (a)—

(A) such deposits shall be treated as listed in subsection (b), and

(B) 15 percent shall be deemed to be the percentage specified in subsection (b).

(2) Geothermal deposit defined For purposes of paragraph (1), the term "geothermal deposit" means a geothermal reservoir consisting of natural heat which is stored in rocks or in an aqueous liquid or vapor (whether or not under pressure). Such a deposit shall in no case be treated as a gas well for purposes of this section or section 613A, and this section shall not apply to a geothermal deposit which is located outside the United States or its possessions.