Keith Paul Bishop

January 1, 2020

Via Email (rule-comments@sec.gov)

Vanessa L. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE,
Washington, DC 20549-1090

Re: File No. S7-24-19

Dear Ms. Countryman:

I am writing to comment on the Securities and Exchange Commission's ("**Commission**") proposal to adopt Rule 13q-1 and an amendment to Form SD ("**Proposal**"). The Proposal is set forth in Commission Release No. 34-87783 ("**Proposing Release**").

1. Background.

I am an attorney in private practice in Irvine, California. I am writing in my individual capacity and not on behalf of my law firm or any of my law firm's clients.

I previously served as California's Commissioner of Corporations and in that capacity administered and enforced California's securities laws. I have taught courses at the University of California, Irvine and Chapman School of Law. I have also served as Co-Chairman of the Corporations Committee of the Business Law Section of the California State Bar and Chairman of the Business and Corporate Law Section of the Orange County (California) Bar Association. I am a practice consultant to the leading treatise on California's securities laws, Marsh & Volk, PRACTICE UNDER THE CALIFORNIA SECURITIES LAWS. As indicated above, I am writing in my individual capacity and not on behalf of any other person.

2. The term "minerals" has no commonly understood meaning.

The Proposing Release does not define the term "minerals" even though the term is a key element of the definition of "resource extraction issuer".[1] The Proposing Release asserts, without any support whatsoever, that the term is "commonly understood". In fact, there is no "common understanding" of the term. *Northern Pacific R. Co. v. Soderberg*, 188 U. S. 526, 530 (1903) ("The word 'mineral' is used in so many senses, dependent upon the context, that the

[1] A "resource extraction issuer" is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas or minerals. 15 U.S.C. § 78m(q)(1)(D).

ordinary definitions of the dictionary throw but little light upon its signification in a given case."). The Commission's claim to a "common understanding" is belied by the multiplicity of definitions found in federal regulations, including the following:

> "*Minerals* include oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from "public lands" as defined in section 103 of the Federal Land Policy and Management Act of 1976." 30 C.F.R. § 282.3.
>
> "*Mineral* means clay, stone, sand, gravel, metalliferous ore, non-metalliferous ore, or any other solid material or other matter of commercial value." 15 C.F.R. § 922.3.
>
> "*Mineral* means oil, gas, and sulfur; it also includes sand, gravel, and salt used to facilitate the development and production of oil, gas, and sulfur." 30 C.F.R. § 556.105(b).

Still other definitions can be found in state law. For example, the California Public Resources Code defines "mineral" to mean:

> "any naturally occurring chemical element or compound, or groups of elements and compounds, formed from inorganic processes and organic substances, including, but not limited to, coal, peat, and bituminous rock, but excluding geothermal resources, natural gas, and petroleum". Cal. Pub. Res. Code § 2005.

The California Department of Conservation "mineral" more narrowly as:

> "A naturally occurring inorganic substance having an orderly internal structure and characteristic chemical composition, crystal form, and physical properties."[2]

In contrast, Canada's Extractive Sector Transparency Measures Act (ESTMA) defines "mineral" provides yet another definition of "mineral":

> "*minerals* means all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious minerals and metals. (*minéraux*)"[3]

Thus, according to whom you ask, a mineral must be inorganic or it may be organic; a mineral must have a fixed crystalline structure or it may not; a mineral must be a solid or it may not. Depending upon whom you ask, minerals, may, or may not, include rocks (such as gravel,

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[2] https://www.conservation.ca.gov/cgs/minerals/minerals-glossary#m.

[3] ESTMA, § 2. Canada's definition is circular because it defines minerals as "naturally occurring metallic and non-metallic minerals". Unlike California Department of Conservation's definition, however, the Canadian law includes an organic material (coal) and does not require that the material have a crystal form.

sand and limestone) or vegetable material (such as peat). In short, there is simply no "commonly understood" meaning of the term as claimed by the Proposing Release.

The Proposing Release avoids explaining the basis for its proposed instruction that "minerals" include "any material for which an issuer with mining operations would provide disclosure under the Commission's existing disclosure requirements and policies, including Industry Guide 7 or any successor requirements or polices (*see* subpart 1300 of Regulation S-K (12 CFR 229.1300 *et seq.*)". Guide 7 concerns disclosures by issuers engaged in significant mining operations generally. Guide 7 does not define "minerals", nor does it purport to govern mining of minerals exclusively. Similarly, the Commission's new mining disclosure rules (codified in subpart 1300 of Regulation S-K (17 CFR 229.1300 et seq.)), do not define "minerals". Both Guide 7 and the new mining disclosure rules refer to "coal". Thus, the Commission is implicitly including organic materials within the definition of "minerals". As illustrated above, however, some definitions of "mineral" exclude organic materials, such as coal. The Proposing Release fails to identify any basis (such as legislative history) for including coal as a mineral.[4]

The proposed instruction to Item 2.01 of Form SD is not sufficiently clear for issuers to identify when they are engaged in the commercial development of a mineral. The proposed instruction is terminologically inexact because it neither describes the characteristics of "mineral" nor provides a list of substances that are minerals.

Because the Commission's revised version of Rule 13q-1 and amendments to Form SD (the "**2016 Rules**") were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act, the Commission may not issue a new rule that is "substantially the same" as the 2016 Rules.[5] Including a definition of "minerals" in the final rules would help the Commission satisfy this requirement.[6]

3. <u>The definition of "export" is unclear</u>.

The Proposing Release states that "'export' would be defined as the transportation of a resource from its country of origin to another country by an *issuer* with an ownership interest in the resource . . ." (emphasis added). The text of Item 2.01(d)(4) refers to movement "by a *company*". The Proposing Release does not explain this discrepancy. It also does not explain why Item 2.01(d)(4) also refers to an "entity" rather than an "issuer" or a "company".

[4] Congress has required the Commission to adopt rules relating to disclosure by resource extraction issuers pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"). Notably, Congress refers to coal specifically in the immediately preceding section of the Dodd-Frank Act (15 U.S.C. 78m-2) ("coal or other mine) but not in Section 1504.

[5] 5 U.S.C. § 801(b)(2).

[6] In the Proposing Release, the Commission cites revisions of the definitions of "project" and "not de minimis" as "significant changes to the core provisions of the 2016 Rules".

4. The definition of "extraction" is both ambiguous and circular.

The Commission proposes to define "extraction" as "the production of oil and natural gas as well as the extraction of minerals" (emphasis added"). This is a very ambiguous definition because it could be read to mean that that extraction does not occur unless oil, natural gas and minerals are extracted. Presumably, this was not the Commission's intent. The definition is also circular because it defines "extraction" as "extraction". [7]

5. The Commission should clarify whether "license" includes leases.

The Commission's proposed definition of "commercial development of oil, natural gas, or minerals" includes the "acquisition of a license for any such activity". While this definition is consistent with statute, it is unclear whether "license" includes leases or permits for commercial development of oil, gas, natural gas, or minerals.[8] The Commission should clarify whether the term "license" includes "leases or other permits".

6. The Commission should define "host country".

The Proposing Release repeatedly refers to the "host country" and includes the term in the definitions of "export" and "not de minimis". The term, however, is not found in the statute and the Commission fails to define it. The Commission should either eliminate or define the term.

Very Truly Yours,

/s/ Keith Paul Bishop

[7] It is unclear why the Commission uses the term "production" in reference to oil and natural gas and the term "extraction" in reference to minerals.
[8] See ESTMA, § 2.