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Business Law Section
Securities Regulation Committee

March 1, 2011

Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release Nos. 33-9164, 34-63548 – Mine Safety Disclosure
(File No. S7-41-10)

Ladies and Gentlemen:

The Securities Regulation Committee of the Business Law Section of the New York State Bar Association (the "NYSBA Committee") is pleased to have the opportunity to comment on the rule amendments proposed to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The NYSBA Committee is composed of members of the New York State Bar Association, a principal part of whose practice is in securities regulation. The NYSBA Committee includes lawyers in private practice and corporation law departments. A draft of this letter was reviewed by certain members of the NYSBA Committee. The views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Our Overall Perspective

Section 1503 of the Dodd-Frank Act (like its sister provisions Section 1502 and 1504) presents the Commission with a new and unusual challenge. Section 1503 requires that very specific disclosures be added to periodic reports and reports on Form 8-K, but for a purpose that is fundamentally different from the purposes underlying the existing Exchange Act reporting system. Unlike the existing system, which focuses on information that is "material" to investors from a financial perspective, Section 1503 requires disclosure with respect to a variety of mine health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. There is, of course, overlap between these two categories of information – mine health and safety issues, and related proceedings, may well be material to a particular issuer, and the possibility of future changes to regulation in this area may represent a material known trend or uncertainty required to be discussed in MD&A – but to the extent that the overlap, disclosure is already required under existing Exchange Act rules and forms. In our view, Section 1503 is therefore best understood as focusing on other issues, and on dissemination of the required information to a broader audience, not limited to investors. The rules implementing Section 1503 should focus on those other issues, and how best to collect, report and disseminate the information bearing on those matters to the general public. At the same time, the Commission must be mindful of the need to avoid "information overload" in Exchange Act periodic reports, and to promote an organized and clear presentation of material information in those reports for the use of investors.

We think that several principles follow from this perspective. The Section 1503 rules should not be shaped by what may be "material to investors," but should instead aim to disseminate the new required disclosures, in easily accessible form, to the public at large. To the greatest extent possible, Section 1503 disclosures should be kept distinct from currently required Exchange Act disclosures. By the same token, we do not think that issuers should be allowed to satisfy their existing disclosure obligations by reference to their Section 1503 disclosures. Rather, they should be required to distill any information that would be "material" to investors, and present it clearly under the relevant periodic report items. We believe that the foregoing approach would not only

help preserve the focus of the existing Exchange Act reporting system, on information that is material to investors, but is in fact the best way to promote the purposes underlying Section 1503, as well.

"Furnished" vs. "Filed"

Although the proposing release does not discuss the point, we believe that the proposed amendments should be modified to provide that information reported pursuant to Section 1503 will be treated as "furnished", rather than "filed", for Exchange Act purposes. We do not read Section 1503 (and in particular, Section 1503(d)(1)) as precluding such provisions, and believe that a "furnished" approach would be much more sensible. As noted above, the Section 1503 disclosure requirements are not aimed at providing investors with information material to investment decisions (there may be incidental overlap, but that doesn't change the analysis), so application of Exchange Act Section 18 to this information would be strained and unpredictable. For the same reason, Section 1503 information should also not be incorporated into any Securities Act filings. Inclusion of this information in Securities Act filings would unfairly burden directors and underwriters, who would have a theoretical exposure in respect of the new disclosures, and raise nettlesome due diligence issues, with no corresponding benefit to investors (since, for the reasons discussed in detail above, the new disclosures will not result in addition of any new information that is material to investors).

In a similar vein, the Commission should amend Exchange Act Rules 13a-14(a) and (b) and 15d-14(a) and (b) to provide that the officer certifications required by these rules do not extend to exhibits or disclosures provided pursuant to Section 1503. These certifications were designed in the context of the existing investor-focused Exchange Act reporting system, and should not be carried over to the new and different Section 1503 disclosures, at least not without fresh consideration of the likely consequences of such certifications and the purposes being served.

Location of Disclosure

We think the proposed rules embody a reasonable approach in terms of the location of the required new disclosure. Consistent with our overall perspective, we

agree with the Commission's proposal that any disclosure in the body of the periodic report should be limited to a heading, in a precisely specified place, with a cross-reference to an exhibit containing the required Section 1503 information, under a new, special-purpose exhibit number. There should be no need to further detail the Section 1503 information, as such, in the periodic report. Of course, something addressed in the new exhibit might also be required, under existing rules, to be addressed as well in the body of the periodic report, in which case that required disclosure should be set forth clearly in the appropriate places in the periodic report. The presence of the Section 1503 exhibit should not affect the disclosure requirements in the body of the periodic report itself.

Other Matters

We agree with the Commission that the Section 1503 requirements apply only to mines covered by the Mine Act, meaning mines located in the United States. This is consistent with the plain language of the statute.

We do not object to the Commission's decision to require issuers to include a brief description of each category of violation, order and citation reported (as queried in question 22 of the proposing release). While this seems like a sensible addition, in terms of the clarity of information being presented, for the reasons described above we disagree (as suggested by the release) that the answer should depend on whether investors will find the information useful. Similarly, question 24 of the proposing release asks whether investors would find additional 8-K disclosure helpful, which again is the wrong question. Rather, the Commission should consider whether additional disclosure is required to meet the informational objectives of Section 1503.

On the other hand, we disagree with the Commission's addition of two disclosure elements that do not appear in the statute: the proposed instruction to Regulation S-K Item 106(a)(vi) to provide the total dollar value of outstanding assessments as of the end of the period, and the proposed instruction to Item 106(a)(4) to report developments that are material to legal actions previously reported pursuant to Item 106. While the proposing release suggests that this additional information would

"provide a clearer picture" and "be useful," it doesn't indicate for whom. The question is not whether investors need this information – the existing rules and forms would already require disclosure of any material information in the covered categories. Rather, the question is how best to implement the objectives underlying Section 1503. That section appears to us to be aimed at generating a stream of real-time information for a general audience. These two instructions require cumulative and updating information that Section 1503 doesn't seem to contemplate. We therefore suggest deleting these additional elements from the instructions.

We agree with the Commission's decision not to extend the current reporting requirements under Section 1503 to foreign private issuers. We think the statutory reference to Form 8-K – a form required to be filed by domestic issuers – justifies this approach.

We also endorse the Commission's decision that untimely filing of a Form 8-K Report under the new item does not affect Form S-3 eligibility. New Item 1.04 of Form 8-K should also be added to the items listed in Rules 13a-11(c) and 15d-11(c) (which provide that no failure to file shall be deemed to be a violation of Section 10(b) and Rule 10b-5). And we suggest that the Commission clarify that failure to file such a Form 8-K Report would not preclude an issuer from satisfying the conditions of Securities Act Rule 502(b)(2)(ii) in connection with an offering effected pursuant to Rule 505 or 506.

In response to the proposing release's question 12, we don't see the purpose served by requiring the full year information, in addition to fourth quarter information, in an issuer's annual report. Although we note the language in Section 1503(a) requiring inclusion in each periodic report of the specified information "for the time period covered by such report," we think that a quarter-by-quarter approach provides a clearer stream of information, with less burden on reporting issuer, and is therefore appropriately responsive to the statutory requirement. Item 5(c) of Form 10-K, requiring quarter-by-quarter reporting of share repurchase information, takes the same

approach and is, we think, a useful analogy. The real-time publicizing of these matters is fully realized by quarterly reporting.

We offer the following thoughts in response to other specific questions in the proposing release:

- Question 6: Majority-owned subsidiaries should be allowed to omit any Section 1503 information if the required disclosure appears in a parent company filing. This would promote cleaner and simpler disclosure, with no resulting loss of information being reported.

- Question 10: We believe that the new disclosure should not be required in Securities Act or Exchange Act registration statements; the statute is clear in this regard, and the statutory purpose is fully met by periodic disclosure.

- Question 13: We think the disclosure should take into account subsequent dismissals or reduction in charges, in the interest of providing the best and most current information.

- Question 14: We think the statute clearly contemplates that only "S&S violations" are to be reported pursuant to Section 1503(a)(1)(A).

- Question 16: Again, in the interest of providing the best and most current information, it seems obvious that the issuer be allowed to note which assessments it is contesting.

- Question 17: Given the clear language of Section 1503, we believe disclosure of fatalities, like the rest of the disclosure, should be limited to fatalities occurring in U.S. mines. We don't see why this single item of information should be treated differently from all of the other categories of information required by Section 1503.

- Question 18: It seems sensible to exclude "non-chargeable" fatalities. The language of Section 1503(a)(1)(G) (which refers to "mining-related fatalities") supports this approach. And since the "non-chargeable" concept is clearly related to the operator's level of responsibility, the Commission's approach also seems quite logical.

Respectfully submitted,

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