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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 No. 34-63549 – Disclosure of Payments by Resource Extraction Issuers (File No. S7-42-10)

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 proposed rule amendments pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers.

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.

Section 1504 raises a wide range of issues touching upon many business and technical areas, including significant policy issues, many of which are beyond our competence as securities lawyers. In this letter, we therefore focus primarily on those aspects of the proposed rules that touch upon the periodic reporting system under the Securities Exchange Act of 1934.

Our Overall Perspective

Section 1504 of the Dodd-Frank Act (like its sister provisions Section 1502 and 1503) presents the Commission with a new and unusual challenge. Section 1504 adds a new Exchange Act Section 13(q), which directs the Commission to require specific disclosures, 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 13(q) requires disclosure that is designed to increase the transparency of payments made to governments in respect of the commercial development of oil, natural gas and minerals. There is, of course, overlap between these two categories of information – such resource extraction payments may well be material to a particular issuer, and the possibility of future changes to such payments may represent a material known trend or uncertainty required to be discussed in MD&A – but to the extent of that overlap, disclosure is already required under existing Exchange Act rules and forms. In our view, Section 13(q) 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 13(q) 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 13(q) 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 13(q) disclosures should be kept separate from currently required Exchange Act disclosures. Ideally, rather than being "buried" in periodic reports, the Section 13(q) information would be submitted and available in a separate website location, designed to be readily accessible and easily used by the general public. By the same token, we do not think that issuers should be allowed to satisfy their existing disclosure obligations by reference to their Section 13(q) 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 13(q), as well.

<u>Issuers Covered</u>

Given the constraints of Section 13(q), we generally agree with the approach the Commission has taken in terms of which issuers will be subject to the new reporting requirements. While we do not see a principled basis for excluding foreign private issuers, we expect these new requirements will represent just one more strong disincentive for such issuers to access the U.S. markets, which we believe is a negative from the perspective of U.S. investors. This negative impact would be substantially mitigated if, as suggested in the proposing release, foreign private issuers were permitted to satisfy the Section 13(q) obligation by furnishing required "home country disclosure," at least where some such disclosure is required in the home country. We understand that both the European Union and the International Accounting Standards Board are considering standards for such disclosure. Permitting disclosure based on home country standards could therefore be justified, in our view, as "support[ing]…. international transparency promotion efforts" and thus furthering the objective stated in Section 13(q)(2)(E).

In a similar vein, the Extractive Industries Transparency Initiative (EITI), referred to in Section 13(q) and discussed in the proposing release, is clearly a significant "international transparency promotion effort." We believe the Commission could add very meaningful support to the EITI effort, as directed by Section 13(q), by allowing issuers to provide information relating to operations in EITI-compliant countries on the same basis as reported pursuant to the EITI. We would therefore urge the Commission to adopt that approach in the proposed rules.

We see absolutely no basis for extending Section 13(q) reporting requirements to Rule 12g3-2(b) filers, and imposing such an obligation would only serve to discourage use of the Rule 12g3-2(b) mechanism, which we believe would be a net detriment to U.S. investors. Requiring such issuers to add disclosure to their home country reports (as suggested in the proposing release's question 72) would be inconsistent with the basic premise of 12g3-2(b) (which relies on home country disclosure requirements for this category of issuer) and would be at variance with how the rule operates in all other respects. We would strongly urge the Commission not to adopt such provisions.

Although we see no apparent basis for exempting small reporting companies from Section 13(q) reporting, we recommend delayed implementation for such issuers, given the burdens and complexity of the new reporting obligations. We also suggest that majority-owned subsidiaries should be allowed to omit any Section 13(q) filing if the required disclosure appears in a parent-company filing. This would promote clearer and simpler disclosure, with no resulting loss of information being reported. Finally, we suggest that an exemption (or at least greater time to report) should be afforded to an issuer that has recently acquired operations in respect of which resource payments are made, or that holds such operations on a temporary or transitory basis (for example, a lender that forecloses on a company, or on individual assets or operations, in respect of which resource extraction payments are made). Otherwise, Section 13(q) reporting could become a factor in the timing of completely unrelated business decisions, which we think would be an unfortunate and unnecessary result.

Other Definitional Provisions

We urge the Commission to modify the definition of "commercial development of oil, natural gas or minerals", to add a "safe harbor" exclusion for bona fide lenders or other financing sources, which should clarify that customary "negative control" provisions, and the exercise of remedies (at least on some transitional basis), would not result in the lender/financing source being treated as being engaged in "commercial development". We believe that without such an exception, the prospect of a possible contingent reporting obligation under Section 13(q) could be a real disincentive to providing energy- and other resource-related financing, particularly to smaller operators not themselves subject to Section 13(q) reporting obligations.

We also believe that the existing definition of "control" under the Exchange Act should not apply to Section 13(q) reporting obligations. "Control" in that traditional sense is often found to exist in circumstances where "controlling person" lacks any practical ability to compel the "controlled person" to provide information. We believe that a better approach would be for an issuer's reporting obligation to instead extend to those entities which it consolidates for financial reporting purposes. As a practical matter, an issuer is much more likely to have access to such information with respect to consolidated subsidiaries and other consolidated entities.

<u>Location of Disclosure</u>

Given our overall perspective on Section 13(q), we feel strongly that the best approach would be to require this new disclosure to be set forth in a new, special-purpose report, which could be kept separate from existing, investor-focused reporting. This would not only minimize disruption to the existing Exchange Act reporting system; in our view, it would also better serve the objectives of Section 13(q) by promoting the accessibility of these new reports to the new and broader audiences interested in this disclosure. By adopting a new special-purpose report, the Commission could also avoid, or at least separately address, many of the serious issues – including, among others, timing of the new disclosure, and treatment of the new disclosure for liability and officer certification purposes – that are the subject of our comments below.

Alternatively, the Commission could add a new item to Form 8-K (and perhaps to Form 6-K) pursuant to which this disclosure could be furnished on an annual basis. This approach would make the new information relatively easy to find, and would also permit the segregation of Section 13(q) information from the balance of the issuer's Exchange Act disclosure which, for the reasons noted above, we believe is important.

That said, if the new disclosure is required to be included in Exchange Act annual reports, we think the proposed rules embody a reasonable approach. Consistent with our overall perspective, we think that any disclosure in the body of the annual report should be limited to a heading, in a precisely specified place, with a cross-reference to an exhibit containing the required information as to resource extraction payments, under a new, special-purpose exhibit number. There should be no need to further detail the Section 13(q) information on resource extraction payments, as such, in the annual 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 annual report, in which case that required disclosure should be set forth clearly in the appropriate places in the annual report. The presence of the resource extraction payments exhibit should not affect the disclosure requirements in the body of the annual report itself.

Other Matters

We believe that there should be an exemption under the new rules for disclosure that would violate the laws of the host country, or a pre-existing confidentiality agreement or other contractual obligation, at the very least on a retrospective basis. We submit that this has nothing to do with "the protection of investors" (as suggested in the proposing release's question 55); it should be determined solely in terms of the transparency objective. However, retrospective application that would place an issuer in violation of the law of another jurisdiction, or of a pre-existing contractual obligation, would be fundamentally unfair. In terms of prospective application, whether the transparency objective requires an effective ban on doing business in jurisdictions that block disclosure (by law, or by required contractual provisions) is a policy question, not a securities law question.

We believe that payments to subnational governments in the U.S. (queried in the proposing release's question 66) are clearly not covered by Section 13(q), and so should not be covered by the new rules.

In terms of the timing of filing the Section 13(q) disclosures, there is no particular reason why this should be tied to the current filing deadlines for Forms 10-K, 20-F and 40-F. Given the novelty and complexity of the new requirements, the filing deadline should be generous. In order to facilitate compliance, the Commission might consider selecting a deadline for Section 13(q) that is out of phase with the Exchange Act annual report deadlines—for example, a date in the second half of the issuer's fiscal year. If the Section 13(q) information is required to be included in annual reports, the Commission should adopt a mechanism for adding the new required information on a delayed basis, similar to the prospective incorporation by reference of information from the issuer's proxy statement contemplated by General Instruction G. (3) of Form 10-K, or the prospective incorporation by reference of separate financial statements of unconsolidated entities contemplated by Item 3-09 of Regulation S-X. Whatever deadline is selected, we urge that the rules make clear that late filing of Section 13(q) information (i) would not affect an issuer's eligibility to use Securities Act Forms S-3 and F-3; (ii) would not render the issuer an "ineligible issuer" under Securities Act Rule 405; (iii) would not cause the current public information condition of Securities Act Rule 144(c) to fail to be met; and (iv) 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.

The Section 13(q) disclosures should not be required to be included in Securities Act registration statements (proposing release question 71) – the purpose of these disclosures is not to inform investors, as such, so there is no logical reason for such inclusion. Also, inclusion would raise nettlesome concerns relating to liability, and directors' and underwriters' due diligence obligations, for no good reason.

We see no basis for imposing an audit requirement in respect of information filed pursuant to Section 13(q), as suggested in the proposing release's question 76. We believe such a requirement would raise a host of fundamental questions – starting with the nature of any such audit, and who might be willing and able to perform it – that would require serious study.

For purposes of tagging payments to business segments (proposing release question 82), as required by Section 13(q), the new rules should rely on the segments that an issuer uses for financial reporting purposes. This seems like far and away the clearest and simplest approach.

We feel very strongly that the new disclosure required by Section 13(q) should be treated as "furnished", not "filed", for Exchange Act purposes (proposing release question 87), and should not be subject to liability under Section 18 (proposing release question 89). This information is not being provided for the purpose of informing investors, as such, but for entirely different and unrelated policy reasons. The remedial provisions relating to this new category of information should be tailored in light of the new and different purposes for which the information is being furnished. It would be illogical and unnecessary to impose liability in respect of this information in favor of 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 those rules do not extend to exhibits or disclosures provided pursuant to Section 13(q). 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 13(q) disclosures, at least not without fresh consideration of the likely consequences of such certifications and the purposes being served.

Respectfully submitted,

SECURITIES REGULATION
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