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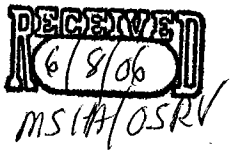

June 7, 2006

Re: Interpretative Bulletin regarding Limited Liability Companies

Dear Patricia:

The following comments are submitted on behalf of International Coal Group, Inc. (ICG) in response to the Interpretative Bulletin regarding Limited Liability Companies issued on May 9, 2006. The Secretary of Labor now interprets Section 110 (c) of the Federal Mine Safety and Health Act , 30 USC 820 (c), to impose liability upon members of LLCs. We respectfully disagree with this interpretation for the following reasons:

- It is inconsistent with the ruling in *Sec'y of Labor v. Guess and Shirel, Employed by Pyro Mining Company, 15 FMSHRC 2440 (1993), aff'd 52 F.3d 1123 (D.C. Cir. 1995) (unpublished)*, which holds that section 110 (c) applies only to directors, officers or agents of corporations. As in the Interpretative Bulletin, the Secretary contended that a literal reading of the section "thwarts the purpose of that provision and the Mine Act's overall purpose of protecting miners." The Commission rejected this argument finding that the plain language of the statute applies only to corporations.

- The Bulletin implicitly concedes that an entity must be a corporation to fall under Section 110 (c) by contending that LLCs are, in fact, corporations. This interpretation is counter to case law in other contexts holding that LLCs are neither corporations nor partnerships. They are distinct entities. The legal organizational requirements for LLCs vary from state to state but are distinct from

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corporations. Likewise, as noted by the Secretary, they are taxed differently.

- The Bulletin is not an interpretation of the statute's language. Rather, it is a rewriting of the statute. Taken to its logical conclusion, this interpretation applies Section 110 (c) to all limited liability entities which are not partnerships (presumably, this limitation is only because *Pyro* ruling specifically holds that it cannot apply to partnerships). The Secretary, under the guise of interpretation, is not empowered to add language to the statute or read into words which are not there. The Bulletin is an expansion of the statute's language and beyond the scope of an interpretative rule. In *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980), the Secretary issued an interpretative bulletin that employees were entitled to pay for walk around time accompanying inspectors. The statute was silent on this point. The Court of Appeals found this to be legislative action and thus subject to the notice and comment requirements of 5 U.S.C. Section 553: "It is clear to us that the Administration has attempted through this regulation to supplement the Act, not simply to construe it, and therefore the regulation must be treated as a legislative rule." *Id.* at 464. Here, the Secretary is supplementing the Mine Act to cover entities other than corporations. This is beyond the proper scope of its interpretative powers.

- If an interpretive rule has legal effect, it is legislative and not interpretive. In *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the court recognized that one question to ask is "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties..." If the answer is "yes" it is a legislative rule. Without the current interpretive rule, there is no basis for an enforcement action against LLCs under Section 110 (c). The interpretation broadens the scope of the section. Thus, it is legislative.

- As reflected in the *Pyro* decision, Congress intended to impose individually liability only upon agents of corporations. Contrary to the Secretary's contention, the statute is not silent as to Congress' intent. The language is unambiguous. It applies only to corporations. If Congress had intended it to apply any form of limited liability entity, the statute would have included such language. Congress' intent is plainly stated. The section applies **only** to corporations.

- This is the same expansive reading of Section 110 (c) urged by the Secretary in *Pyro*. There, the Secretary contended that Section 110 (c) applied to partnership whose partners were corporations because of the insulation from personal liability. The Commission found that a partnership—regardless of its partners—is not a corporation. There is little question that if this Bulletin were directed toward limited liability partnerships, which provide many of the same protections as LLCs, this interpretation would be rejected by the courts. The only basis for the current interpretation is the existence of limited liability. Potential limited liability does not convert an entity into a corporation. *Pyro* recognizes that the Secretary cannot read the statute to apply to any entity but a corporation.

International Coal Group, Inc appreciates the opportunity to comment of this issue and respectfully submits these comments for serious consideration. If you have any questions, please contact me at 606-920-7746 or at tmartin@intlcoal.com.

Sincerely,

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