

# CtW Investment Group

Nimble Thompson  
Deputy Chairman of the Board of Directors  
Institute of Directors  
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United Kingdom

October 16, 2015

Dear Mr. Thompson:

I am writing to express our disappointment in your decision to appoint Lady Barbara Judge to the position of Chairman. We strongly believe that her failures as a board member and member of the Environmental, Safety, and Public Policy Committee at Massey Energy, an American company, during the tragic explosion that killed 29 miners and injured two more should disqualify her from this position. Investigations into the tragedy by U.S. federal regulators, a State-sponsored investigative panel, and a trade union separately concluded that the disaster was not only preventable, but that top management illegally impeded the efforts of safety inspectors, flouted safety regulations, and instilled a long-standing culture of production over safety. We are unsure if you are aware of the details of this tragedy and Lady Judge's involvement, but we hope that once informed you will ask her to step down from the position of Chairman of the British Institute of Directors (UK IoD).

The CtW Investment Group works with pension funds sponsored by affiliates of Change to Win - a federation of unions representing over six million members to enhance long-term shareholder value through active ownership. These funds have \$250 billion in assets under management, and were substantial Massey Energy shareholders before its acquisition by Alpha Natural Resources following the explosion.

## ***The Deadly Explosion at Massey Energy's Upper Big Branch Mine Was Preventable***

On April 5, 2010, 29 miners lost their lives in a massive explosion at Massey Energy's Upper Big Branch mine in West Virginia. Each of the three distinct investigations<sup>1</sup> into the tragedy found that the explosion was preventable and faulted Massey Energy's deplorable safety conditions at the mine. The explosion was initiated by a spark that ignited a pocket of methane gas that triggered a huge explosion fueled by a buildup of coal dust. Investigators concluded that the ignition of the pocket of methane could have been avoided if the equipment had been watered down to prevent sparks and the mine been properly ventilated as required by United States law. Furthermore, the explosion would have been contained to the small pocket of methane had the mine been adequately rock dusted to prevent the coal dust from building into the illegal concentrations that fueled the explosion that blew through seven miles of the mine.

## ***Top Management Knew that the Mine Was Unsafe, but Put Production First***

Reprehensibly, each investigation concluded that top management cultivated a culture of lax safety by putting a premium on production over safety. The Mine Safety and Health Administration (MSHA), the United States government agency responsible for one investigation into the disaster, found "multiple examples of systematic, intentional, and aggressive efforts by PCC/Massey to avoid compliance with safety and health standards, and to thwart detection of that non-compliance by federal and state regulators." Indeed, MSHA's report concludes that the safety training was inadequate and that there was an ongoing failure to perform examinations of mine conditions and remedy hazards. In addition, the federal investigators found that management intentionally thwarted regulators by keeping two sets of safety books (one with the true safety hazards for the company's own record and one without for the state and federal mine inspectors), operating an illegal system of advance

notice of inspections, and intimidating workers so that they would not report the hazardous conditions. The independent investigation sponsored by the West Virginia state government concluded, “Massey Energy engaged in a process of 'normalization of deviance' that, in the push to produce coal, made allowances for a faulty ventilation system, inadequate rock-dusting and poorly maintained equipment.” The investigation by the trade union, United Mine Workers of America, concluded that “Massey Energy and its management were on notice of and recklessly tolerated mining conditions that were so egregious that the resulting disaster constituted a massive slaughter in the nature of an industrial homicide.”

The fact that investigators found substantial evidence that Massey’s entrenched culture of flouting safety regulations came directly from the top management did not come as a surprise to many who followed Massey in the news and certainly should not have surprised the board. A 2006 fire that took the lives of two miners at Massey’s Aracoma mine, resulted in a MSHA and FBI investigation that concluded in 2008 with Massey pleading guilty to criminal charges including one felony count for willful violation of mandatory safety standards resulting in death, eight counts for willful violation of mandatory safety standards, and one count for making a false statement. In addition, Massey paid \$4.2 million in criminal fines and civil penalties. Three months prior to the fatal fire, in a well-publicized leaked internal memo Blankenship told miners “If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal (i.e., build overcasts, do construction jobs, or whatever), you need to ignore them and run coal.” This is an obvious directive to put production over safety considering an overcast is a ventilation control device.

In fact, the longtime CEO and Chairman of Massey Energy, Don Blankenship, is currently being tried in US federal court and is facing up to 30 years in prison for crimes related to the Upper Big Branch disaster. The indictment adds to the already grim picture of safety at Massey mines. Regarding the Upper Big Branch Mine, it asserts that Blankenship denied a request to build an airshaft to bring the air quality into compliance with federal laws. It claims that mine safety personnel at the mine were cut even as safety violations were on the rise. It also alleges that in a memo to a mine supervisor Blankenship demanded, “You have got to get low on UBB [Upper Big Branch] #1 and #2 and run some coal. We’ll worry about ventilation or other issues at an appropriate time. Now is not the time.”

### ***The Safety, Environmental and Public Policy Committee Failed to Follow Its Mandates and Act on the Copious Evidence of Unsafe Mine Conditions and Impending Disaster***

In 2008, as part of a settlement agreement to a derivative class action suit that accused the Massey board of failing to comply with federal safety and environmental laws, Massey formed a Safety, Environmental, and Public Policy Committee (SEPPC) on the board. Lady Judge, who joined the board that same year, was a member of that committee throughout her tenure. The committee had very specific mandates regarding the oversight of the company’s compliance to safety regulations. The tragic 2010 explosion at the Upper Big Branch Mine exposed the committee for failing to fulfill those responsibilities.

The SEPPC was charged with reviewing, assessing the associated risks, and making recommendations to the board regarding Massey’s safety policies and practices. Furthermore, it was tasked with creating and presenting a quarterly report on the company’s compliance with safety standards. There was ample evidence of a serious safety problem at Massey leading up to the disaster that the board failed to address:

- Massey had the highest number of safety violations among US mining companies between the years 2000 and 2009.
- The number of MSHA issued citations and orders for safety violations at Massey mines increased every year beginning in 2005 and culminating with 10,653 in 2009.
- In 2009, ten Massey mines had above-average injury rates and these mines alone received 2,400 safety citations. The injury rates at four of the these mines was at least double the national rate.

- The Upper Big Branch Mine suffered from a serious spike in safety violations beginning in 2009 and culminating with the deadly explosion in April, 2010. MSHA issued 515 safety-related citations and orders in 2009. Of these, over 39% were for significant and substantial hazards. The elevated number of safety violations continued with MSHA issuing 124 safety-related citations and orders in the first quarter of 2010. These violations were both more numerous and more serious than the average US mine.
- In 2009, safety inspectors issued 48 withdrawal orders at the Upper Big Branch Mine for *repeated* significant and substantial violations that the mine operator either knew, or should have known, constituted a hazard. This was nearly 19 times the national rate.

The citations and orders issued to Massey were very accessible (MSHA makes the information publicly available on its website) and should have been regularly reviewed by the SEPPC. Moreover, MSHA's investigation into the explosion found that Massey was operating an illegal system of advance notice of inspections by federal safety inspectors and uncovered an ongoing failure to perform required examinations of mine conditions and remedy hazards.

Another mandate of the SEPPC was to “develop goals for implementing enhancements to the process utilized to monitor, count and report mine safety incidents and complaints and near misses with high potential for injury.” Here too the SEPPC failed. MSHA found that Massey kept two sets of books: one documenting the true safety hazards for the company's own record and one without for the state and federal mine inspectors. Investigators also discovered that Massey was underreporting the accidents at Upper Big Branch by fifty percent.

The SEPPC was responsible for annually reviewing safety training, recommending enhancements, and reporting findings to the board. Yet, MSHA's investigation found training to be severely inadequate. The agency found 177 instances of the company failing to give miners the required training at Upper Big Branch in the years prior to the explosion. MSHA's investigation report also notes that the company was well aware of the deficiencies, uncovering many of them through an internal audit, and yet failed to resolve the problem.

Finally, the SEPPC was charged with “consulting with senior management regarding their duty and authority to create, implement and oversee a system by which corporate employees, suppliers, customers and advisor professionals can, on a confidential basis and without fear or reprisal, provide information concerning possible illegal or unethical conduct regarding our compliance with safety.” This was a known problem at Massey. In 2007, a Massey internal safety inspector was awarded \$2 million in a whistleblower lawsuit after being terminated in retaliation for reporting safety problems to MSHA. The board failed to resolve this problem, however, and federal investigators found that senior management was intimidating workers so that they would not report the hazardous conditions. Purportedly, one of the victims of the explosion, a mine foreman named Edward Jones, tried to keep his crew out the mine because of the dangerous conditions leading up to the disaster. He was reportedly told, “If you can't go up there and run coal, just bring your bucket outside and go home.”

Clearly, Lady Judge and her fellow committee members failed in their duties by ignoring the copious amount of evidence that Massey Energy had a problem with safety and the warning signs of the impending disaster at the Upper Big Branch Mine. Indeed, a few weeks following the tragedy Lady Judge resigned from Massey's board.

***Investors Were Concerned that Lady Judge Was Not Committing Enough Time to Her Directorship at Massey Prior to the Explosion***

At the May 2009 Massey Energy AGM, Lady Judge received majority opposition (59%) to her re-election. Despite this resounding rejection by shareholders (the lowest level of support for all directors at S&P 500

companies that year), she remained on the board. Shareholders' chief concern was that she was overcommitted and did not have the time to devote the attention necessary to Massey Energy. The company's 2009 Proxy Statement disclosed eight additional public company boards on which Lady Judge sat. This alone would have raised red flags to investors, but this wasn't even the whole of her commitments. She was also Chair of the UK's Atomic Energy Authority, and served on numerous non-profit and private company boards (in 2007 the Telegraph reported that she sat on 30 boards). This kind of over-commitment was particularly egregious at Massey Energy, a company with ongoing safety and environmental compliance problems that required the full attention of its directors. In March of 2010, the CtW Investment Group wrote a letter to the board outlining these concerns and asking that Lady Judge heed the wishes of Massey's shareholders and step down, which she finally did after the deadly explosion.

***Lady Judge's Board Service in Connection with the Tragedy at Upper Big Branch Makes Her a Poor Choice for UK IoD Chairman***

The evidence of widespread safety problems at Massey mines and red flags pointing towards impending disaster at Upper Big Branch were abundant and yet Lady Judge and her fellow board members failed to act. If the board had stood up to CEO Blankenship and demanded a halt in production until the necessary safety improvements were fully completed in all of Massey's problem mines, the 29 miners that lost their lives in the explosion at Upper Big Branch might still be alive today. We believe that Lady Judge spread herself too thin and did not commit the necessary time to effectively oversee Massey Energy during her tenure on the board. Given the dangerous nature of coal mining and Massey's long-standing history of safety problems, this is indefensible.

Lady Judge's failures of oversight were so great during her directorship at Massey Energy that we were alarmed to see her appointment as chair of the UK IoD, a prestigious body that commits itself to setting high standards in the boardroom. Indeed, if Lady Judge had herself followed the guidance set forth in the UK IoD's publication, "Leading health and safety at work: Actions for directors, board members, business owners and organisations of all sizes," the tragedy at Upper Big Branch might have been avoided. We therefore respectfully request that you dismiss her from the position of Chairman of the United Kingdom's Institute of Directors. If you would like to discuss our concerns directly with us, please contact my colleague Emma Bayes at (202) 721-6065 or emma.bayes@changetowin.org.

Sincerely,



Dieter Waizenegger  
Executive Director

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<sup>1</sup> [Report of Investigation Fatal Underground Mine Explosion April 5, 2010](http://www.msha.gov/Fatals/2010/UBB/FTL10c0331.pdf). US Department of Labor Mine Safety and Health Administration. December 2011. <http://www.msha.gov/Fatals/2010/UBB/FTL10c0331.pdf>

<sup>2</sup> [UPPER BIG BRANCH The April 5, 2010, explosion: a failure of basic coal mine safety practices](http://www.npr.org/documents/2011/may/giip-massey-report.pdf). Governor's Independent Investigation Panel. May 2011. <http://www.npr.org/documents/2011/may/giip-massey-report.pdf>

<sup>3</sup> [Industrial Homicide: Report on the Upper Big Branch Mine Disaster](http://www.umwa.org/files/documents/134334-Upper-Big-Branch.pdf). United Mine Workers of America. October 2011. <http://www.umwa.org/files/documents/134334-Upper-Big-Branch.pdf>