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April 3, 2006

Nancy M. Morris
Federal Advisory Committee Management Officer
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. 265-23; Final Report of the SEC Advisory Committee on Smaller Public Companies

Dear Ms. Morris:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to offer comments on the draft Final Report of the SEC Advisory Committee on Smaller Public Companies (the "Advisory Committee").

Background

On March 23, 2005, the SEC appointed the Advisory Committee to assess the current regulatory system for smaller companies under the securities laws of the United States, and make recommendations for changes. With members drawn from a wide range of professions and backgrounds, the Advisory Committee held five public hearings and formally sought comment on three occasions concerning the impact of the securities laws on smaller public companies. ICBA testified at one of the public hearings of the Advisory Committee and filed comments on all three instances that comments were requested. Now the Advisory Committee is requesting public comment on its draft Final Report to the Securities and Exchange Commission on recommendations to scale securities regulation for smaller public companies.[2]

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[1] *The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to representing the interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.*

With nearly 5,000 members, representing more than 18,000 locations nationwide and employing over 265,000 Americans, ICBA members hold more than $876 billion in assets $692 billion in deposits, and more than $589 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

[2] We use the term "smaller public companies" throughout this letter in the same way the Advisory Committee uses it in its Final Report. Smaller public companies are comprised of two groups—the micro-cap and small-cap companies--and consists of those companies whose outstanding common stock in the aggregate comprises the lowest 6% of total U.S. equity market capitalization.

ICBA's Position

The Advisory Committee should be commended for its fine work with preparing and drafting the Final Report and including more than thirty recommendations for scaled or proportional securities regulation for smaller public companies. **With the exception of its recommendation to amend SEC Rule 12g5-1 to interpret "held of record" to mean held by actual beneficial holders, ICBA endorses all of the recommendations made by the Advisory Committee.**

The Advisory Committee's Primary Recommendations

Among the Advisory Committee's primary recommendations, ICBA strongly endorses (a) exempting micro-cap companies (with equity capitalizations of $128 million or less) and revenue of less than $125 million from the internal control attestation requirements of Section 404 of the Sarbanes-Oxley Act of 2002 (SOX) and (b) exempting small-cap companies (with equity capitalizations of between $128 million and $787 million) that have revenue of less than $250 million from the external audit requirements of SOX Section 404. We agree with the Advisory Committee that with more limited resources, fewer internal personnel and less revenue with which to offset the costs of Section 404 compliance, both micro-cap and small-cap companies have been disproportionately impacted by the burdens associated with Section 404 compliance. We also agree that the benefits of documenting, testing and certifying the adequacy of internal controls, while of obvious importance for large companies, are of less value for micro-cap and small-cap companies, who rely to a greater degree on "tone at the top" and high-level monitoring controls, to influence accurate financial reporting.

The proportionately larger costs for smaller public companies to comply with Section 404 adversely affect their ability to compete with larger public companies and even with foreign competition. This reduction in the competitiveness of U.S. smaller public companies hurts their capital formation ability and, as a result, hurts the U.S. economy. For community banks, Section 404 costs have been particularly significant. ICBA's 2005 survey of Section 404 costs for community banks revealed that the average community bank would spend during 2005 more than $200,000 and devote over 2,000 internal staff hours to comply with the Section 404.[3] These costs far outweigh the benefits for these small companies. Furthermore, there has been little attempt by either the SEC or the PCAOB to tailor, or "scale" regulation to address the disproportionate costs and burden that micro-cap and small-cap companies now experience.

We agree with the Advisory Committee that part of the problem with the high costs of SOX Section 404 is due to the fact that neither Auditing Standard No. 2 (AS2)[4] nor any other source provides a clear definition or guide for management as to what constitutes adequate internal controls. Moreover, even though auditors maintain that they are taking a risk-based approach to

[3] For a complete description of ICBA's Section 404 Survey of Community Banks, see ICBA's comment letter to the SEC dated March 31, 2005 concerning the formation and goals of the Advisory Committee.
[4] *An Audit of Internal Control Over Financial Reporting in Conjunction with an Audit of Financial Statements* issued by the Public Company Accounting Oversight Board in March, 2004.

the AS2 audit, the evidence from publicly held community banks appears to be that the implementation of AS2 has resulted in very rigid, prescriptive audits with auditors utilizing a "bottom–up" rather than a "top-down" approach. The accounting profession and in particular the increasingly dominant Big Four accounting firms have adopted this approach without exception resulting in skyrocketing audit fees and internal costs for smaller public companies.

While a separate accounting standard for smaller public companies would probably reduce some of the high costs of SOX Section 404, ICBA believes that micro-cap companies must be exempted from Section 404 and small-cap companies should be exempted from the external audit requirements of that section in order to be competitive with larger companies and foreign competition. Even with a separate accounting standard, we believe that smaller public companies would still be subject to extensive auditing of detailed control processes under Section 404 by auditors excessively concerned about their liability and being second guessed by the PCAOB.

We also believe that the enhanced corporate governance controls proposed by the Advisory Committee will ensure that there are sufficient investor protections in place if smaller public companies become fully or partially exempted from SOX Section 404. These include (1) adherence to standards relating to audit committees in conformity with Rule 10A-3 under the Securities Exchange Act of 1934 (the "Exchange Act")[5] and (2) the adoption of a code of ethics for all directors, officers and employees. It is also important to note that smaller public companies will still be subject to other SOX requirements even if they are fully or partially exempted from SOX Section 404 including the CEO and CFO certification requirements and the requirements to disclose all material weaknesses known to management, including those uncovered by the external auditor and reported to the audit committee. Furthermore, if the SEC fully or partially exempted micro-cap and small-cap companies, only 6% of all public companies in the U.S. in terms of market capitalization would be affected.

As for the other primary recommendations made by the Advisory Committee, we strongly support (1) incorporating the scaled disclosure accommodations currently available to small business issuers under Regulation S-B into Regulation S-K and making them available to micro-cap companies, and (2) incorporating the scaled financial statement accommodations currently available to small business issuers under Regulation S-B into Regulation S-K or Regulation S-X and making them available to all micro-cap and small-cap companies. We are particularly pleased that the Advisory Committee has recommended that smaller public companies be required to file only two years of audited income statements. Eliminating the third year of audited income statements will reduce costs and simplify disclosure while not adversely impacting investor protection in any significant way.

The Advisory Committee's Secondary Recommendations

ICBA also endorses all of the Advisory Committee's secondary recommendations. However, we do have serious concerns about amending SEC Rule 12g5-1 to mean held by actual beneficial holders in lieu of "held of record." If Rule 12g5-1 were amended, small public companies would be forced to make extensive inquiries of broker-dealers and banks that

[5] 15 U.S.C. 78a *et seq.*

hold their stock in nominee name just to verify that they are still over the 500-shareholder threshold under Section 12 of the Exchange Act. Furthermore, in order to verify beneficial ownership, they would need to determine who has investment control and voting control in each instance where a stock holding is held by a trust, a family corporation or by an affiliated stockholder. Since it is much easier for smaller public companies to count the number of stockholders on their stockholder ledger than to determine and count beneficial owners, ICBA believes that amending Rule 12g5-1 is unnecessary and will just increase the regulatory burden on smaller public companies.

However, we do agree with the Advisory Committee's recommendations that the SEC's Office of Economic Analysis conduct a study to consider whether the 500-shareholder threshold under Section 12 of the Exchange Act should be modified or raised. This standard has not changed since 1964 and should be updated for inflation**. ICBA recommends that the 500-shareholder requirement under Section 12 of the Exchange Act be increased to reflect the increased size of companies and the increased value of the dollar. ICBA also recommends that Sections 12(g)(4) and 15(d) of the Exchange Act also be updated so that the threshold for de-registration is increased from 300 shareholders to a higher number that reflects the size of small companies and the value of the dollar.**

ICBA also strongly supports the Advisory Committee's recommendation to form a task force of SEC and banking regulators to consider ways to reduce duplicative regulatory reporting. Publicly held banks and holding companies file extensive call report information with the banking regulators including balance sheet and income statement information with very detailed schedules about each of their significant assets, liabilities and capital items. Call report information is often due at the same time that publicly held banks or holding companies are required to file their SEC Form10-K and 10-Q information resulting in a major burden for them particularly at yearend. **The task force should study how bank regulatory call reports can be synchronized with the SEC reports to eliminate duplicative reporting as well as the feasibility of the SEC extending incorporation by reference privileges to call report information filed by banks and bank holding companies.**

Conclusion

The Final Report of the Advisory Committee provides an excellent roadmap for the Securities and Exchange Commission to adopt a system of scaled or proportional securities regulation for micro-cap and small-cap companies. ICBA supports all of the recommendations in the Final Report except for the recommendation to amend SEC Rule 12g5-1. Among the Advisory Committee's primary recommendations, we strongly support the recommendation to exempt micro-cap companies from Section 404 of SOX and to exempt small-cap companies from the external audit requirements of Section 404 of SOX. As for the Advisory Committee's secondary recommendations, we strongly endorse (1) a study to determine whether the 500-shareholder requirement under the Exchange Act should be updated and raised and (2) a task force of SEC and bank regulatory representatives to consider ways to reduce duplicative reporting by banks and bank holding companies.

ICBA appreciates the opportunity to offer comments on the Final Report of the Advisory Committee. If you have any questions about our letter, please do not hesitate to contact me at 202-659-8111 or Chris.Cole@icba.org.

Sincerely,

Christopher Cole

Christopher Cole

Regulatory Counsel