April 11, 2006

Sent via e-mail to rule-comments@sec.gov

Advisory Committee on Smaller Public Companies
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-3628
Attn: James C. Thyen, Co-Chair
Herbert S. Wander, Co-Chair

Re: File No. 265-23
Recommendations for Reducing Unnecessary Regulatory Burdens on Smaller Public Companies

Ladies and Gentlemen:

This letter is submitted by the undersigned attorneys, who represent smaller public companies and are active members of the Committee on Federal Regulation of Securities and the Small Business Committee of the American Bar Association's Section of Business Law. We are writing to express our support for the recommendations included in the exposure draft of the United States Securities and Exchange Commission Advisory Committee on Smaller Public Companies (the "Committee"), as published in Release Nos. 33-8666 and 34-53385 in response to the Committee's request for input on ways to improve the current regulatory system for smaller companies under the securities laws of the United States, including the Sarbanes-Oxley Act of 2002 ("SOX"). We previously delivered written testimony to the Committee on September 12, 2005, urging the Committee to recommend six specific actions (the "Prior Comments") and appreciate the Committee's consideration of our views.

The comments expressed in this letter represent the views of the individuals listed below and have not been approved by the House of Delegates or Board of Governors of the American Bar Association ("ABA") and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law or any of its Committees. This letter also does not represent the views of any other ABA Section.

I. GENERAL COMMENT

We applaud the end product of the Committee's deliberations, which represents a major step forward in dealing with the many obstacles that smaller companies face. The Committee's recommendations have substantial merit and address many facets of the difficult issues facing smaller companies. We are particularly pleased that the Committee determined to "be bold" in considering whether the original purpose of existing rules was still being served and in formulating its recommendations to the Securities and Exchange Commission ("SEC").

We support all of the Committee's recommendations. In the following section, we identify the specific recommendations that we believe should receive the highest priority in implementation. Please refer to our Prior Comments for a discussion of our reasons for supporting these recommendations. We urge the SEC to carefully consider the Committee's recommendations and engage in rulemaking in accordance therewith as soon as possible.

II. HIGHEST PRIORITY RECOMMENDATIONS

Although we support all of the Committee's recommendations, we feel that the following recommendations are particularly important and therefore deserve the highest priority.

A. SOX Section 404

We strongly support recommendations III.P.1 and III.P.2, which deal with how the provisions of SOX Section 404 should apply to smaller public companies. It is absolutely critical that these recommendations be implemented immediately in order to avoid damaging the financial viability of smaller public companies. We also concur with the Committee's recognition that smaller public companies should not be subject to the full panoply of SOX Section 404 requirements until there is a framework that takes into account a cost-benefit analysis and adjusts the requirements, as necessary, to reach the correct balance for smaller public companies. We believe, as the Committee has recommended, that deferral of the requirement to comply fully with SOX 404 should be implemented as proposed.

B. New and Expanded Exemptions from Registration

We believe that it is an opportune time for the SEC to consider the adoption of new, more useful exemptions for non-registered offerings of securities, whether conducted by public or private companies. The Securities Offering Reform rules that became effective December 1, 2005 (Rel. No. 33-8666) have vastly improved the landscape for registered offerings, particularly for the largest companies (*i.e.*, the WKSIs). What are sorely needed now are initiatives in the area of unregistered exempt offerings of securities by smaller companies.

In this regard, we endorse recommendations IV.P.5 (new private offering exemption permitting general solicitation and advertising and "testing the waters"), IV.S.7 (raising the disclosure threshold on Rule 701 from $5 million to $20 million), IV.S.9 (shortening the integration safe harbor from six months to 30 days) and IV.S.11 (defining the term "qualified investor" and making the NASDAQ Capital Market and OTCBB stocks "covered securities" under NSMIA). These changes are overdue and would go a long way toward easing capital formation for private and smaller public companies.

C. Availability of Form S-3

The ability to use Form S-3 for primary offerings under the Securities Act of 1933 should be made available to all public companies that meet certain filing requirements, regardless of

their public float. For this reason, we support the Committee's recommendation IV.P.3 (making Form S-3 available so long as the company has been reporting under the Securities Exchange Act of 1934 for at least one year and is current in its reporting at the time of filing). We believe that the expanded availability of the Form S-3 would provide an important saving in both time and costs without compromising the quality of public disclosure. We also believe such a change would recognize the substantial changes in the disclosure cycle over the past decade. In particular, we note: (i) the expansion of the items that require the filing of a Current Report on Form 8-K, which requirements apply to ALL public companies without regard to their market capitalization; and (ii) the ready availability of all filed (and all furnished) periodic reports and Form 8-K Reports on EDGAR assures that investors can easily obtain up-to-date information about the issuer .

D. Size Definitions and Scaling of Regulation

Although it may be implicit in our specific comments above, we underscore our strong support for the Committee's recommendation II.P.1 regarding the method for defining "smaller public companies" and "microcap companies" and the proposition that securities regulations in general need to be scaled to fit different sizes of companies. The "one size fits all" approach taken by SOX is fundamentally unfair to smaller public companies and is harming their competitive position due to the disproportionately high costs for smaller public companies to comply with the regulations under SOX. The SEC and the PCAOB have recognized this, as evidenced by their two postponements of the effectiveness of SOX Section 404 and the SEC's guidance with respect to how it should be applied. We sincerely hope that the SEC will follow the Committee's recommendation to revise the categories of issuers and to scale the regulations that apply to each category in such a way as to take into account the abilities of companies in a particular category to handle regulation and the cost-benefit equation of each regulation.

E. Section 12(g) Amendments by Rule and Interpretation

We support recommendation IV.S.1 (including beneficial holders, but excluding holders of compensatory employee stock options in determining the number of holders for purposes of Section 12(g) registration and deregistration). This change, together with the proposed amendments to Rule 701 mentioned above, will greatly assist private companies that are not yet ready to be public companies, but are forced under current interpretations of the rules to prematurely register securities under Section 12(g) and become a reporting company. We believe that these proposed rule amendments should be accompanied by a significant increase in the assets used in the Section 12(g) test. Companies with assets of less than $100 million generally lack the infrastructure and resources to comply fully with public company reporting requirements and other compliance obligations. The threshold has not been increased since 1996. Since that time, there have been numerous increases in the regulations applicable to public companies (*e.g.*, expanded Form 8-K requirements and SOX), as well as inflation. It is time to revise the assets number upward by a significant amount, for example $100 million. We urge the Committee to add this to its recommendation IV.S.1 in its final report to the SEC.

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We hope these comments are helpful to the Advisory Committee and look forward to working within our own firms and professional organizations to assist the SEC, the self-regulatory organizations and other market participants to implement the Committee's recommendations.

Respectfully submitted,

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