April 3, 2006

Nancy M. Morris
Federal Advisory Committee Management Officer
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Exposure Draft of Final Report of Advisory Committee on Smaller Public Companies to the U.S. Securities Exchange Commission
File Number 265-23

Dear Ms. Morris and Advisory Committee Members:

America's Community Bankers ("ACB")[1] is pleased to comment on the Exposure Draft of the Advisory Committee Final Report on Smaller Public Companies ("Final Report"). We commend the Advisory Committee for its long and hard work to provide recommendations to the Securities and Exchange Commission ("SEC") to relieve the burden of the federal securities laws and improve the securities regulatory system for smaller public companies.

ACB Position

The Advisory Committee's Final Report offers many good recommendations for smaller public companies, particularly with respect to relief from Section 404 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") for microcap and smallcap companies that we support. The Final Report, however, does not recognize the extent to which the requirements of the federal securities laws and Section 404 of Sarbanes-Oxley are particularly onerous for publicly held community banks.

As a first step, we are supportive of Recommendation IV.S.3 that would establish a task force made up of SEC officials and representatives from the federal bank regulatory agencies that would "discuss ways to reduce inefficiencies associated with SEC and other governmental filings." This task force would consider finding ways to synchronize filing

[1] America's Community Bankers is the member driven national trade association representing community banks, public, private and mutual associations, that pursue progressive, entrepreneurial and service-oriented strategies to benefit their customers and communities. To learn more about ACB, visit *www.AmericasCommunityBankers.com.*

requirements of substantially similar information and study the feasibility of incorporation by reference of agency filings of equivalent information. However, we believe that more regulatory relief for community banks is warranted. Unlike other public companies, banks and savings associations are already subject to extensive regulation and safety and soundness examinations by more than one federal bank regulator[1] and, often, a state bank regulator. In particular, depository institutions over $1 billion in assets are subject to internal control assessments as required by Section 36 of the Federal Deposit Insurance Act.

ACB requests the Advisory Committee recommend that the SEC grant relief from the Section 404 requirements of Sarbanes-Oxley to community banks of $1 billion or less in total assets. In addition, ACB supports the Advisory Committee's recommendations that would exempt microcap and smallcap companies from section 404 of Sarbanes-Oxley. This recommendation if adopted by the SEC would include community banks, but only those with less than $125 million in annual revenue. Community banks also support the Advisory Committee's recommendations for scaled regulation of smaller public companies and the recommended amendment to Rule 12g5-1.

Background on Regulatory Burden and Community Banks

Complying with the federal securities laws has always been more difficult for smaller public companies. It is vital, however, for these companies to have access to the equity markets to grow. However, the costs of compliance often outweigh the benefit of access to the equity markets. As the Advisory Committee's Final Report illustrates, the provisions of Sarbanes-Oxley and the auditing standards issued by the Public Company Accounting Oversight Board are particularly burdensome for smaller public companies. Smaller public companies lack the staff resources to ensure compliance resulting in additional costs either in personnel or outside firms.

Public community banks in particular are overburdened by recent changes to securities and corporate governance laws and regulations. Because of increased regulatory requirements, many community banks have deregistered their stock or have sought mergers with larger institutions. Privately held community banks and mutual organizations, however, are also feeling the effects of Sarbanes-Oxley. In fact, the 2005 Grant Thornton survey of community bank executives found for the first time that not one mutual or private bank in the survey indicated that it would be likely to go public in the next three years. Private banks and mutual institutions have found that in many cases external auditors are applying the same public accounting standards to these non-public banks.

Whether public or private, the regulatory burden associated with complying with federal banking laws and regulations as well as securities standards threatens the survival of

[1] Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Deposit Insurance Corporation and the Federal Reserve Board of Governors.

community banks. The cost of duplicative regulations may result in projects not being funded, new products not being offered and jobs not being created. Ultimately, the loss of a community bank negatively affects a community through less competition, fewer products and services, or higher prices.

Unlike most other public companies, banks must already comply with a complex regime of banking laws and regulations that are substantially similar to the requirements of section 404 of Sarbanes-Oxley. In fact, the language of section 404 was based on requirements imposed on all banks by Section 121 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), which amended Section 36 of the Federal Deposit Insurance Act.[2] FDICIA requires that banks and savings associations provide an annual management report on internal controls and obtain an attestation of management's assessment by the external auditor. Therefore, there is significant overlap between the requirements of FDICIA and Section 404 of Sarbanes-Oxley. In recognition of the burden associated with compliance for smaller banks, Federal Deposit Insurance Corporation regulations originally exempted banks under $500 million from these requirements.[3] In 2005, the FDICIA threshold of $500 million was increased to $1 billion in total assets. This change should reduce costs for privately held banks and savings associations. It is important that publicly held community banks obtain comparable regulatory relief from Section 404 of Sarbanes-Oxley.

Recommended Relief from Section 404 of Sarbanes Oxley

ACB asks that the Advisory Committee recommend that the SEC recognize the substantial level of regulation and independent oversight by bank regulatory agencies of community banks and grant appropriate relief from Section 404. If the FDIC has determined that non-public institutions with less than $1 billion can be exempt from FDICIA requirements without safety and soundness concerns, it is consistent that similar relief from Section 404 could be granted to community banks. These smaller institutions would still be subject to the full scope of banking laws and regulations and required to have adequate internal controls in place. Most importantly, they would be subject to regular safety and soundness examinations by bank regulators. In addition, financial information from bank regulatory reports is publicly available 30 days, in preliminary form, and 60 days, in final form, after the report date. Therefore, the Advisory Committee should not be concerned that investors are not adequately protected.

In addition to the above recommendation, ACB strongly supports the Advisory Committee's Recommendation III. P.1 regarding microcap and smallcap companies and urges the SEC to adopt this recommendation. Although the Advisory Committee makes other recommendations in the Final Report, we agree with the Advisory Committee that this is the preferred recommendation because it offers immediate relief while maintaining investor protections without the burdens of Section 404.

---

[2] 12 U.S.C. § 1831m.
[3] 12 C.F.R. Part 363.

This recommendation exempts microcap companies, including community banks, with less than $125 million in annual revenue from the Section 404 requirements of Sarbanes-Oxley. It would also exempt smallcap companies with less than $10 million in annual product revenue. To take advantage of this exemption, these companies would be required to have or expand their corporate governance controls.

We, however, do not believe that revenues are the best measure for determining the availability of this exemption. Revenues can fluctuate for a variety of reasons depending upon the industry of an issuer and are not often comparable. In the banking industry, the bank regulators have found that an asset test is a better gauge of size for exemptions. We recommend for the banking industry that the threshold be based on total assets. Another approach would be to combine assets with equity market capitalization.

Scaled Regulation for Smaller Companies

We support the Advisory Committee's Recommendation II.P.1 providing for a scaled or proportional securities regulation model for smaller public companies. Included in this model is the Advisory Committee's recommended definition of a "smaller public company." The current $25 million threshold for "small business issuers" eligible to use Regulation S-B is outdated. That threshold has not been revised since 1992 even though the average size of companies has increased significantly.

The Advisory Committee's definition of "microcap companies," i.e., those with equity capitalizations below $128 million, and "smallcap companies" with equity capitalizations between $128 million and $787 million are appropriate. Microcap and smallcap companies would combine under the definition of "smaller public companies" for a new scaled regulatory system. We agree with the Advisory Committee that equity market capitalization is a superior measurement over public float for determining eligibility for smaller public company treatment. Equity market capitalization includes both affiliate and non-affiliate shares outstanding whereas public float only considers non-affiliate shares. We also agree that the SEC should promulgate regulations for determining smaller public company status and transitions from one category to another and reverse. We would recommend an average of market capitalization over an extended period of time.

We support the Advisory Committees' Recommendation IV.P.2 that Regulation S-B, with its abbreviated disclosure and financial statement requirements and other accommodations, be made available to smaller public companies as that term is defined by the Advisory Committee. We agree with the Advisory Committee that to reduce costs and simplify disclosure, smaller public companies should be permitted to provide two years of audited income statements. Adding one year of audited balance sheets for a total of two years to annual reports and registration statements is appropriate and provides a better financial picture of a company without adding additional burden. If the SEC adopts a new system of scaled regulation, then the scaled financial accommodations

currently available to small business issuers should be made available to smaller public companies as recommended by the Advisory Committee.

SEC Rule 12g5-1

The threshold number of shareholders that requires registration with the SEC needs to be modernized to reflect the significant growth of companies in recent years. This threshold has become increasingly important to small companies as they consider entering or exiting the Securities Exchange Act of 1934 reporting system due to increasing costs and burdens of complying with reporting requirements. Currently shareholders of record are counted to establish registration and deregistration requirements. This allows securities held in street name not to be counted and companies can circumvent the SEC's rules for entering and exiting the disclosure system.

ACB supports the Advisory Committee's Recommendation IV.S.1 that the SEC amend Rule 12g5-1 so that that all beneficial owners are counted for calculating the number of shareholders for purposes of Section 12(g) of the Securities Exchange Act of 1934. The Advisory Committee recommends in the Final Report that the Office of Economic Analysis or some other professional organization conduct a study. At a minimum, we believe that the threshold for registration should require at least 1,250 beneficial shareholders, with an appropriate corresponding threshold for withdrawals that is not less than 1,000 beneficial shareholders.

Conclusion

ACB appreciates the opportunity to provide these comments on the Final Report of the Advisory Committee on Smaller Public Companies. If you have any questions please contact the undersigned at, 202 857-3186 or via e-mail at slachman@acbankers.org.

Sincerely,

Sharon H. Lachman
Regulatory Counsel
Regulatory Affairs