

ASSOCIATION YEAR 2007-2008

CHAIR

Charles E. McCallum
900 Fifth Third Center
111 Lyon Street, NW
Grand Rapids, MI 49503-2487

CHAIR-ELECT

Karl J. Ege
909 A Street
Tacoma, WA 98402-5111

VICE-CHAIR

Nathaniel L. Doliner
4221 West Boy Scout Boulevard
Suite 1000
Tampa, FL 33607-5780

SECRETARY

Lynne B. Barr
Exchange Place
53 State Street
Boston, MA 02109-2803

BUDGET OFFICER

Renie Yoshida Grohl
8300 Fox Hound Run NE
Warren, OH 44484-1774

IMMEDIATE PAST CHAIR

Linda Hayman
4 Times Square
New York, NY 10036-6518

**SECTION DELEGATES TO
THE ABA HOUSE OF DELEGATES**

Amelia H. Boss
Philadelphia, PA

Myles V. Lynk
Tempe, AZ

Maury B. Poscover
St. Louis, MO

Hon. Elizabeth S. Stong
Brooklyn, NY

COUNCIL

Stanley Keller
Boston, MA

Linda J. Rusch
Spokane, WA

Karol K. Sparks
Chicago, IL

Heidi M. Staudenmaier
Phoenix, AZ

Willard K. Tom
Washington, DC

Arthur N. Field
New York, NY

Kathleen J. Hopkins
Seattle, WA

Mary Ann Jorgenson
Cleveland, OH

Martin E. Lybecker
Washington, DC

Vincent I. Polley
Bloomfield Hills, MI

William H. Clark, Jr.
Philadelphia, PA

Donald W. Glazer
Newton, MA

Stephanie A. Heller
New York, NY

Dixie L. Johnson
Washington, DC

William B. Rosenberg
Montreal, QC

Mitchell L. Bach
Philadelphia, PA

Conrad G. Goodkind
Milwaukee, WI

Paul (Chip) L. Lion III
Palo Alto, CA

Timothy M. Lupinacci
Birmingham, AL

Jacqueline Parker
Seattle, WA

BOARD OF GOVERNORS LIAISONS

Don S. DeAmicis
Boston, MA

Karen J. Mathis
Denver, CO

SECTION DIRECTOR

Susan Daly
Chicago, IL
(312) 988-6244
suedaly@staff.abanet.org

AMERICAN BAR ASSOCIATION

Section of Business Law

321 N. Clark Street
Chicago, Illinois 60610
(312) 988-5588
FAX: (312) 988-5578
e-mail: businesslaw@abanet.org
website: www.ababusinesslaw.or

October 5, 2007

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

Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. S7-15-07
Release Nos. 33-8819; 34-56013; 39-2447
Smaller Reporting Company Regulatory Relief and Simplification

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association in response to the request of the Securities and Exchange Commission (the "Commission") for comments in its July 5, 2007 release referenced above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the American Bar Association (the "ABA"). In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

I. PROPOSED RULE REVISIONS

As an initial matter, the Committee supports the Commission in continuing to recognize the significant economic role that small business plays in the United States and, particularly, for its continued efforts to reduce the regulatory compliance burdens of smaller public companies in light of the disproportionate resources that they must commit to that effort.

Overall, the Committee strongly supports the proposals set forth in the Proposing Release ("Proposals"). Although we do have some suggestions and recommendations,

October 5, 2007

Page 2

we believe the Proposals strike an appropriate balance between reducing the regulatory burdens associated with the disclosure and reporting requirements of smaller public companies, while preserving investor protection. We believe that the availability of the scaled disclosure and reporting regime to a greater number of smaller public companies will provide investors with an appropriate level of disclosure, yet allow management of these companies to dedicate more of its time to managing the operations of the business and creating shareholder value. In this regard, we note that, while the disclosure and reporting requirements are scaled, we do not believe such scaled disclosure will negatively affect investors because the disclosure required is still significant and is designed to elicit information that is material to investors. Accordingly, we strongly support the Proposals and, as requested, we provide our further observations and suggestions below.

Definition of Smaller Reporting Company

The Committee agrees that, for purposes of determining whether an existing public company satisfies the new proposed definition of “smaller reporting company,” the appropriate test should be the issuer’s public float. To the extent that the public float cannot be computed for such issuer, we also support as an alternative test the use of annual revenues of the issuer for the most recently completed fiscal year for which audited financial statements are available. However, as described more fully in the *Recommendations* section of this letter, we do not believe that public float is the appropriate test in the case of an initial public offering registration statement, nor do we believe that threshold levels of \$75 million in public float and \$50 million in annual revenue set forth in the proposed definition of “smaller reporting company” are appropriate given the Commission’s objectives as set forth in the Proposing Release. Rather, we would urge the Commission to consider adopting an annual revenue test in the context of an initial public offering and expanding the availability of the scaled disclosures to “smallcap” companies, as that term was defined in the Final Report of the Advisory Committee on Smaller Public Companies (the “Advisory Committee”) to the Commission, dated April 23, 2006 (the “Advisory Committee Report”).

The Committee also supports the extension of the smaller reporting company disclosure requirements, as proposed, to non-U.S. companies that qualify for smaller reporting company status. Furthermore, to the extent that the Commission may later permit non-U.S. companies to use International Financial Reporting Standards without reconciliation to U.S. GAAP, we would recommend extending this to smaller reporting non-U.S. companies.

Integrating Regulation S-B into Regulation S-K

We support the integration of Regulation S-B into Regulation S-K proposed in the Proposing Release. We believe that these changes will benefit both smaller reporting companies and

investors. While we do not believe that the integration of Regulation S-B into Regulation S-K as proposed will necessarily simplify the disclosure obligations for those smaller reporting companies that already are eligible to use the Regulation S-B Forms (because the provisions as integrated are substantially the same as are currently set forth in Regulation S-B), we do believe that integration is beneficial because the scaled disclosure and the corresponding reduction in regulatory burdens will now be available to a greater number of public companies without negatively impacting investors.

A la Carte Approach

We believe that expressly sanctioning an “a la carte” approach to disclosure by smaller reporting companies will be beneficial to such issuers, permitting them some flexibility in addressing the various disclosure requirements without sacrificing investor protection. To the extent that smaller reporting companies determine that compliance with the mainstream requirements of a particular Item of Regulation S-K imposes costs and burdens on them that are simply not justified by the benefits of the incrementally more rigorous disclosure required by the “regular” provisions of that Item, they can choose to take advantage of the less onerous requirements applicable to smaller reporting companies. However, to the extent that they believe that they can satisfy the more rigorous requirements of the mainstream version of a particular Regulation S-K Item without undue burdens or costs, they can do so. This creates a “win-win” situation where investors will be able to reap the benefits of more detailed disclosure in areas where the cost is not disproportionate to the perceived benefits, while issuers will be permitted the flexibility to determine which areas of disclosure justify the additional costs necessary to provide a higher level of disclosure and which do not. In this manner, smaller reporting companies may intelligently allocate resources to the preparation of disclosure in areas where it makes sense to do so, but avoid unnecessary expenses in areas where it is not cost-effective and money is better spent on the issuer’s core business endeavors.

We believe that this “a la carte” approach is, in fact, already sanctioned by disclosure rules generally. Moreover, as specifically proposed to be implemented by the Commission, the approach will not create extra work for the Staff members who are reviewing documents filed with the Commission. Two of the most fundamental and important tenets of line-item disclosure requirements are: (1) it is always permissible to disclose more than is required by the line item and (2) issuers are required to disclose all material facts that are necessary to make the statements included in the document not misleading. See Sections 11 and 12(a)(2) of the Securities Act of 1933, as amended (the “Securities Act”) and Rule 408 promulgated under the Securities Act, and Rules 10b-5 and 12b-20 promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). In this regard, it would not technically be necessary for the Commission to “bless” the a la carte approach to disclosure for smaller reporting companies, because it is already inherent in the existing system. Nonetheless, we believe that it is very helpful for the Commission to permit it expressly so that it is clear to all smaller reporting companies that they may properly use that approach.

From the perspective of the Staff reviewing filed disclosure documents, the Proposing Release provides that smaller reporting companies must identify themselves by “checking the box” on the front cover of the relevant disclosure document, whether it is a registration statement under the Securities Act or a periodic report under the Exchange Act. This will enable the Staff reviewer to know immediately whether he or she should be applying the mainstream disclosure requirements or the smaller reporting company disclosure requirements. In all cases except Item 404 of Regulation S-K, the smaller reporting company requirements are less rigorous than the mainstream requirements and would *a fortiori* be satisfied by a smaller reporting company that chooses to provide the more detailed disclosure required by the mainstream requirements. Thus, it would in no way be necessary for the Staff reviewer to determine on an item-by-item basis which set of requirements has been followed. If reviewing a document filed by a smaller reporting company, the Staff reviewer would simply be able to check for compliance with the lesser standards of the smaller reporting company requirements for all items other than Item 404 (regardless of whether the smaller reporting company has followed the mainstream requirements or the smaller reporting company requirements for any particular item). With respect to the Item 404 disclosures, the reviewer would be checking against the smaller reporting company requirements, which are more rigorous in that they potentially pick up disclosure of related person transactions that would fall below the \$120,000 threshold.

Finally, we note that the market itself also will determine the level of disclosure appropriate for smaller reporting companies. If the investing public believes that the streamlined disclosures are adequate and will permit more resources to be focused on the business, they will invest in such companies. On the other hand, if the potential investors believe that an issuer’s level of disclosure is too low and is not justified by the cost savings, they will not invest in such companies. The market provides a check and balance on the appropriate level of disclosure by smaller reporting companies.

Eliminating S-B Forms and Transitional Small Business Issuer Format

We also support the Commission’s proposed elimination of forms associated with Regulation S-B and the small business issuer transitional disclosure format. We believe the elimination of the Regulation S-B forms will eliminate unnecessary redundancies and confusion that exist with the current parallel disclosure regulatory scheme, eliminate the perceived stigma on companies using Regulation S-B forms, and provide both time and cost savings to smaller reporting issuers who will be able to incorporate information from their previously filed Exchange Act periodic reports into a Form S-1 registration statement. We believe that time and money saved in the preparation of disclosure and compliance with the reporting obligations permits management to focus on company operations and building shareholder value. In addition, due to the infrequent use of the small business issuer transitional disclosure format, we support the Commission’s elimination of this disclosure option as proposed.

Transition to and From Smaller Reporting Company Status

We believe the transition rules as set forth in the Proposing Release could create a situation where companies are frequently transitioning in and out of smaller reporting company status. Our recommendations regarding modifications to the proposed transition rules to address these issues are set forth in the *Recommendations – Transition to and from Smaller Reporting Company Status* section below.

II. RECOMMENDATIONS

Increase Thresholds for Purposes of Smaller Reporting Company Definition

We understand the Commission's desire to integrate the thresholds set forth in the new proposed definition of "smaller reporting company" with the existing thresholds of \$75 million of public float and \$50 million in annual revenue that trigger entry into and exit from "accelerated filer" status under Rule 12b-2 under the Exchange Act. However, we believe to do so does not adequately promote the Commission's objective of expanding the availability of scaled disclosure to those smaller public companies that can benefit from the proposed expansion without negatively affecting investors. Specifically, while the proposed thresholds (less than \$75 million of public float or less than \$50 million in annual revenues in the case that public float is zero or cannot be computed) set forth in the definition of "smaller reporting company" cover substantially all of the "microcap companies," which are defined in the Advisory Report as companies with equity market capitalization in the lowest 1% of total U.S. equity market capitalization, they do not include all of the "smallcap companies," which are defined in the Advisory Report as those companies in the next lowest 1% to 5% of total U.S. equity market capitalization. We agree with the Advisory Committee's conclusions that the regulatory burdens faced by the smallcap companies are substantially the same as those faced by the microcap companies and we see no reason not to extend to them the benefits of the proposed rule changes. We would strongly suggest that the public float and annual revenues thresholds as proposed be increased to those levels that would result in the inclusion of smallcap companies (as defined in the Advisory Report) within the definition of a smaller reporting company. The proposed change would only extend the benefits of scaled disclosure and reporting relief to public companies that together account for the bottom 6% of total market capitalization. There are various ways of accomplishing this, including using the methodology recommended by the Advisory Committee to cover smallcap companies or setting the dollar thresholds at levels that achieve a similar result. We believe that the inclusion of smallcap companies within this proposed framework strikes the appropriate balance between the protection of investors and the disproportionate regulatory burdens on smallcap companies, who have similar cost constraints to those of microcap companies.

Revenue Test for Initial Public Offerings

Although the Committee understands the rationale for the public float test to determine whether an already public company is a “smaller reporting company,” we would suggest a different approach for initial public offerings. Under the Proposing Release, an issuer filing a registration statement for an initial public offering is required to compute public float by multiplying the aggregate worldwide number of shares held by non-affiliates before the offering plus the number of shares included in the registration statement by the estimated public offering price of the shares. To the extent that the estimated public offering price and/or the number of shares being offered increases during the time between the initial filing of the registration statement and the final prospectus, which is often the case, use of this methodology could result in an issuer being required to switch midway through the process from using smaller reporting company disclosure standards to using more extensive regular disclosure standards. Conversely, if the price range and/or number of shares being offered decreases, the issuer will have satisfied a more extensive disclosure standard than it turns out it was required to satisfy. In addition, the estimated initial public offering price, which is heavily dependent on market conditions, is often not determined until a significant time after the registration statement is initially filed, yet decisions about what disclosure to include must be made long before that time.

Moreover, a potentially incorrect classification would be carried over to the first Form 10-K filed after going public. Thus, the issuer that has just completed a disappointing initial public offering and is clearly a smaller reporting company in fact may be subject to more extensive disclosure and reporting requirements until it satisfies the applicable transition rule requirements.

Instead, we believe that the use of the annual revenue test with a threshold of \$100 million, as proposed below in connection with the transition rules, is a more appropriate method for determining whether a company should be considered a “smaller reporting company” in the initial public offering context. Annual revenue is a financial measure that would provide certainty, can easily be computed from an issuer’s financial statements and is not subject to the volatility that stock prices can reflect. It is also a better measure of whether the issuer has sufficient personnel and infrastructure to deal with the more extensive disclosure requirements applicable to issuers that do not qualify as smaller reporting companies. Further, the use of such methodology does not subject the issuer to potential issuer status misclassification, as would be the case in the event the public float test in the Proposed Release is adopted.

Adjustment for Inflation

We agree with the Commission that the thresholds that the Commission ultimately adopts with respect to the definition of “smaller reporting company” as well as the transition rules should be

adjusted for inflation and the Committee has no objection to the use of the PCECTP Index as proposed in the Proposing Release.

Transition to and from Smaller Reporting Company Status

Although the Committee believes that the test for transitioning out of smaller reporting company status would result in less fluctuation in and out of smaller reporting company status if it provided for a two-year test period (as does the current “small business issuer” transition test), we understand the desire of the Commission to maintain a simple one-time test that is performed at the same time that the test for large accelerated, accelerated and non-accelerated filers is performed, *i.e.*, at the end of the second fiscal quarter. However, the Committee believes that it would be very useful and logical to apply both a public float threshold and a revenue threshold when determining whether a smaller reporting company should have to switch to the more rigorous disclosure requirements of Regulation S-K.

For smaller companies in many industries, stock prices are often extremely volatile. It is possible that a smaller reporting company’s public float, which is tested at a single point in time, might exceed the threshold on the last trading day of the second fiscal quarter due to an unusual upswing in the market or an unfounded rumor of positive news, even though its normal trading price level is considerably lower. However, it is much less likely that a company’s revenues, which are measured over an entire fiscal year rather than a single point in time, would fluctuate significantly from year to year.

Moreover, companies with revenues of less than \$100 million typically are unprepared for the staffing and infrastructure requirements necessary to comply with the more difficult regular disclosure requirements. To guard against forcing a small company that is really not prepared to deal with more onerous disclosure requirements out of smaller reporting company status, we suggest that there also be a revenue test applied. Specifically, we recommend that, if a company that has previously qualified as a smaller reporting company exceeds the public float threshold (proposed by the Commission to be \$75 million) at the end of the second calendar quarter, but has annual revenues for the last fiscal year of less than \$100 million, it should be permitted to remain a smaller reporting company.

Similarly, we believe that, once a smaller reporting company has transitioned out of that status, the test for transitioning back into smaller reporting company status should only require a public float that is less than the basic threshold (proposed by the Commission to be \$75 million) if its revenue is less than \$100 million. We see no reason to penalize smaller companies by forcing them to keep reporting under the more stringent rules until their public float dips below \$50 million. If a company has downsized significantly during the year, it is very possible that, although their public float was above the threshold at the end of the second fiscal quarter, it is significantly below the threshold at the end of the fiscal year. However, the proposed test doesn’t permit “re-testing” of the public float at fiscal year end. If there were a secondary test

October 5, 2007

Page 8

for revenues applied at fiscal year end, such a test would provide a measure that (1) reflects the whole year and (2) more accurately reflects the company's ability to comply with more comprehensive disclosure requirements.

We also believe that requiring the company to be below both the public float threshold and our proposed revenue threshold in order to transition into smaller reporting company status (after having been a reporting company subject to the more comprehensive disclosure obligations imposed by Regulation S-K) also eliminates the risk present in the Proposed Release that a company that has strong revenues (and presumably adequate resources to meet the larger public company disclosure and reporting obligations) could nonetheless claim smaller reporting company status if its stock price has been temporarily negatively affected, causing its public float to fall below the public float threshold at the end of the second fiscal quarter. In short, we believe these recommendations would appropriately narrow the group of larger public companies that should be able to avail themselves of the scaled disclosure and reporting relief by transitioning to smaller reporting company status to those companies that presumably have fewer resources available due to a substantial reduction in revenues.

Effective Date of Adopted Rules and Pending Registration Statements

We urge the Commission, in determining when smaller reporting companies may use the rules as adopted by the Commission, to extend the benefits of the rules as adopted to qualifying issuers with pending registration statements at the time of adoption. We believe that some smaller issuers who may be "on the bubble" with respect to the proposed "smaller reporting company" designation (i.e., above the current \$25 million threshold but below the proposed \$75 million threshold proposed) would consider postponing filing a registration statement under the existing rules, pending the Commission's adoption of the proposed rules discussed under the Proposing Release. Accordingly, we would urge the Commission to provide that the rules, as ultimately adopted, would be applicable to registration statements of "smaller reporting companies" (i) filed on or after the effective date of the rules, and (ii) filed prior to the effective date of the rules, but not yet declared effective by the Commission on the date the proposed rules are effective, provided such issuer meets the definition of "smaller reporting company" on the date such registration statement is ultimately declared effective. We believe this would greatly benefit potential "smaller reporting company" issuers considering an offering during the pendency of these proposed rule changes, in that such potential "smaller reporting company" issuers would not delay their registration offering process further while awaiting the effective date, while at the same time providing potential "smaller reporting companies" in registration with the ability to contain its risk profile given the benefit of the financial statement requirements under current Item 310 of Regulation S-B (as compared to financial statement requirements under Regulation S-X).

October 5, 2007
Page 9

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. Members of the Committee are available to discuss them should the Commission or its staff so desire.

Respectfully submitted,

/s/ Keith F. Higgins

Keith F. Higgins,
Chair, Committee on Federal Regulation of Securities

Drafting Committee:
Richard A. Denmon
James R. Griffin
Sharon P. Nixon
Brian S. North
Ann Yvonne Walker

With a copy to: Hon. Christopher Cox, Chairman
Hon. Paul S. Atkins, Commissioner
Hon. Kathleen L. Casey, Commissioner
Hon. Annette L. Nazareth, Commissioner
John W. White, Director, Division of Corporation Finance
Gerald Laporte, Chief, Office of Small Business Policy