Whitney Holding Corporation
228 St. Charles Avenue, Suite 626, New Orleans, LA 70130
(504) 586-3596 Fax: (504) 619-4155

Joseph S. Schwertz, Jr.
Corporate Secretary

April 11, 2006

Via Email

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-9303

Re: 33-8655 Jan. 27, 2006 Executive Compensation and Related Party Disclosure
Release Nos.: 34-53185; IC-27218
File No.: S7-03-06

Dear Ms. Morris:

Whitney Holding Corporation ("Whitney") is pleased to submit the following comments to the Securities and Exchange Commission on the proposed changes to Regulation S-K 404's related parties provisions. Whitney is a registered bank holding company, whose principal asset is Whitney National Bank (the "Bank"). Whitney's sole class of common stock is listed on The Nasdaq Stock Market, Inc. The Bank considers itself a large community bank, with approximately 140 branches located primarily in coastal markets in the five Gulf Coast states.

The proposed rule's expansion of disclosure of related party transactions will cripple the longstanding corporate governance model used by Whitney and hundreds of publicly traded bank holding companies ("BHCs") in the United States. Like most community banks, the directors serving on Whitney's and the Bank's boards (generally the two boards are identical in composition) typically have personal banking relationships with the Bank, as do their family members. Often these directors and their family members are also executive officers and shareholders of significant commercial customers of the Bank. Federal and state banking laws reinforce this dual role of director and customer, generally requiring that a majority or other

substantial number of directors live in the markets served by their banks.[1] Banking regulators are well equipped and empowered to examine banks to detect abuse by insiders who are also customers of banks, but also recognize that "transactions between a bank and its insiders can address legitimate banking needs and serve the interests of both parties."[2]

The proposed rule will result in a significant reduction of the number of directors and candidates willing to serve as directors of publicly traded bank holding companies, for the following reasons:

- The rule greatly expands the number of customers whose borrowing relationships are subject to public disclosure in proxy statements and other SEC filings.
- The rule for the first time subjects ordinary course depositary and similar relationships of all insiders and others to public disclosure in proxy statements and other SEC filings.
- Due to the interaction of the rule and Nasdaq listing rules, Nasdaq rules will require far more frequent Audit Committee approvals of ordinary course banking relationships.
- If a board of directors weighs the scope of a director's relationship with the bank (and that of his family and their entities) in determining director independence, the BHC may have to disclose these confidential banking relationships (even if they are otherwise not required to be disclosed directly).
- Interaction of the proposed rule and Nasdaq listing rules will result in the disqualification as independent directors of many (if not most) outside directors of publicly traded BHCs.

The following discussion addresses each of these consequences of the proposed rule.

Expansion of disclosure of borrowing relationships:

The proposed rule would greatly expand BHCs' proxy statement reporting obligations to include loans they make to business, nonprofit, trust and estate entities ***associated with family members*** of directors and executive officers. Currently, Regulation S-K 404(c) regulates the disclosure of loans made by a public company (or its subsidiaries) to insider related persons. The current rule generally requires disclosure of indebtedness to the public company or its subsidiaries by (i) directors or executive officers, (ii) director nominees and (iii) immediate family members of the foregoing. The current rule also requires disclosure of indebtedness of

---

[1] 12 USC 72 (requires at least a majority of national bank directors to reside in the specified proximity of the bank); La. R.S. 6:282.A. (requires at least a majority of the directors of a Louisiana state bank to be domiciled in Louisiana).

[2] OCC publication "Insider Activities," revised and published March 2006, page 1. http://www.occ.treas.gov/handbook/insider.pdf

entities (including trusts) associated with directors, director nominees and executive officers. It does **not** – at present – require disclosure of indebtedness of entities associated **with family members**.

Here's what the rule currently states:

"(c) Indebtedness of management. If any of the following persons has been indebted to the registrant or its subsidiaries at any time since the beginning of the registrant's last fiscal year in an amount in excess of $60,000, indicate the name of such person, the nature of the person's relationship by reason of which such person's indebtedness is required to be described, the largest aggregate amount of indebtedness outstanding at any time during such period, the nature of the indebtedness and of the transaction in which it was incurred, the amount thereof outstanding as of the latest practicable date and the rate of interest paid or charged thereon:

1. Any director or executive officer of the registrant;

2. Any nominee for election as a director;

3. Any member of the immediate family of any of the persons specified in paragraph (c)(1) or (2);

4. Any corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which any of the persons specified in paragraph (c)(1) or (2) is an executive officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities; and

5. Any trust or other estate in which any of the persons specified in paragraph (c)(1) or (2) has a substantial beneficial interest or as to which such person serves as a trustee or in a similar capacity."

The banking industry has long fought to protect the financial privacy of directors and executive officers, their entities and their family members and has been successful in convincing the SEC to insert an instruction to this rule that protects this privacy expectation – to some degree. Instruction 3 to the existing Regulation S-K 404(c) states the following:

"Instructions to Paragraph (c), of Item 404:

3. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T [12 CFR part 220] and the loans are not disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C. 1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies), disclosure may consist of a statement, if such is the

> case, that the loans to such persons were made in the ordinary course of business, were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and did not involve more than the normal risk of collectibility or present other unfavorable features."

The proposed rule makes a number of changes to the requirements for disclosure of indebtedness. Here are the key expansions that will cause trouble for BHCs and their directors and executive officers (page references are to the SEC's release).

- The proposed rule potentially requires disclosure of "material indirect interests" of *family members* of directors, director nominees and executive officers. In other words, a BHC will have to identify, monitor and possibly publicly disclose the loans it or its subsidiaries make to corporations, organizations, trusts and estates in which <u>immediate family members</u> of its insiders own at least 10% equity interests or serve as executive officers or partners. This is the biggest change affecting loan disclosures proposed in the new rule (pages 121-122, and pages 132-133).
- The term "immediate family members" of a related person expands to cover stepchildren, stepparents and persons sharing the household of a related person (page 125).
- The proposed rule requires disclosure of indebtedness even if the event triggering the disclosure arose when the person involved was not an insider (or a family member of an insider) at the time of the event. Thus, a director desiring to protect the privacy of his family member's disclosable transaction with his BHC's bank could not do so by resigning as a director (page 124-125).

Community based BHCs will find it very difficult to comply with the proposed rule, for several reasons. First, it is very difficult to identify the reportable entities controlled by family members of directors and executive officers. How many individuals know enough about their extended family members - including relatives by marriage – to identify each relative's 10% or greater investments? This knowledge is even more questionable when family members are estranged. Second, many community based BHCs have larger boards than the average public company – as part of a long-standing corporate governance model of attracting a wide cross-section of community business and civic leaders. This dramatically increases the number of potential banking relationships that the typical BHC must track and potentially disclose publicly. Third, how does a BHC provided reasonable notice (and warning) to its business customers of the risk that the BHC might have to disclose the business' most sensitive of financial information – namely, that the entity's loan is troubled? In summary, the proposed rule creates a situation in which an individual's decision to serve as a director or executive officer of BHC operates not only to waive his or her personal right to a confidential relationship with his bank, but also waive the similar rights of his family members and of the entities (whose identities will often be unknown at the time to the insider) in which his family members have made even minor investments.

<u>Expansion of disclosure of depositary and similar banking relationships</u>:

The proposed rule's elimination of S-K 404's current exclusion from disclosure of bank depositary and similar services will have profoundly negative consequences for the banking industry. Banks are by definition in the *payments* business. The proposed rule would make ordinary course *payments* to insiders and their family members and entities disclosable to the public. Whether prompted by general concerns of financial privacy – or even fears that public disclosure of significant financial assets could mark them as kidnapping targets – directors and executive officers will likely resign rather than subject themselves (and unknowing family members) to unexpected public disclosure of their ordinary course financial transactions and relationships.

Currently, SEC Regulation S-K 404(a) regulates the disclosures that a publicly traded BHC must make about transactions between the public company (and its subsidiaries) and directors, director nominees, executive officers, the immediate family members of the foregoing and entities in which the foregoing have a material indirect interest. Here is the current text of 404(a):

> **"a. Transactions with management and others.** Describe briefly any transaction, or series of similar transactions, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, or series of similar transactions, to which the registrant or any of its subsidiaries was or is to be a party, in which the amount involved exceeds $60,000 and in which any of the following persons had, or will have, a direct or indirect material interest, naming such person and indicating the person's relationship to the registrant, the nature of such person's interest in the transaction(s), the amount of such transaction(s) and, where practicable, the amount of such person's interest in the transaction(s):
>
> 1. Any director or executive officer of the registrant;
> 2. Any nominee for election as a director;
> 3. Any security holder who is known to the registrant to own of record or beneficially more than five percent of any class of the registrant's voting securities; and
> 4. Any member of the immediate family of any of the foregoing persons."

Of critical importance to BHCs, is instruction 7 to this rule, which states the following:

> "7. No information need be given in answer to paragraph (a) as to any transactions where:

……

B. The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;"

The proposed rule explicitly proposes **to delete this instruction**, stating the following: "We propose to eliminate current Instruction 7 to Item 404(a), which establishes certain presumptions regarding materiality and may operate to exclude some transactions from disclosure that might otherwise require disclosure under the principles enunciated by the Item" (page 118). Thus, the new rule requires disclosure of (i) any transaction (and that term includes a series of transactions) occurring since the beginning of a BHC's last fiscal year in which the BHC or a subsidiary was a "participant" that exceeds $120,000, and which any related person (director, nominee, executive officer, family member or entity and in which the foregoing have a >10% stake, or serve as a partner or executive officer) has a direct or indirect material interest.

To put this fundamental change in perspective, consider its impact on a BHC's ability to recruit – or retain - directors once they realize that their BHC must disclose their names (or family members' names or entity names) and detailed transaction information about the following ordinary course banking and brokerage transactions:

- A BHC's subsidiary makes a payment of the proceeds (principal and accrued interest) from a maturing $130,000 CD to a director's parent. Or, for that matter, suppose the bank meets the $120,000 threshold through debits and credits posted during the year as the customer rolls in and out of 90 day CDs.
- The BHC's brokerage subsidiary executes a director's son's orders to sell $60,000 in IBM stock and $70,000 of Intel stock during a calendar year and makes payments of the proceeds to the son.
- A director's mother-in-law presents $130,000 in Series E savings bonds for payment at the BHC's banking subsidiary.
- An executive officer's brother-in-law living on the Gulf Coast deposits insurance settlement checks in excess of $120,000 into his checking account.
- A director's corporation has a cash management sweep arrangement, in which the corporation's excess cash deposits are swept overnight into repurchase agreements. These arrangements are very common and provide corporate customers an opportunity to earn overnight returns on cash balances and enhanced protection (beyond the $100,000 FDIC insurance coverage) against bank insolvency. Each morning, the BHC's bank re-credits – makes a payment into – the corporation's bank account in the amount of the sweep (plus interest). The aggregate amount of these overnight debits and morning credits to the corporation's account will easily exceed $120,000 – often on a weekly or even daily basis.

<u>Expansion of Audit Committee approvals required of ordinary course banking transactions</u>:

Nasdaq has a rule requiring any transaction disclosable under S-K 404 must be approved by the BHC's audit committee or other independent committee of the Board. BHCs will face huge difficulties in detecting and monitoring ordinary course transactions of the type discussed in the preceding section and will waste valuable audit committee time in approving these transactions. (Nasdaq Marketplace rule 4350(h)).

<u>Expansion of disclosure of other relationships not otherwise requiring board disclosure</u>:

The proposed rule will require the BHC to disclose – for each independent director – a "description of any transactions, relationships or arrangements not disclosed pursuant to paragraph (a) of Item 404 that were considered by the board of directors of the company in determining that the applicable independence standards were met." Page 140-142. So...a BHC that presents a director-by-director analysis of ordinary course banking and borrowing transactions to its board so that the board will have a complete picture of each director's (and family members', etc) relationship to the BHC risks making those transactions disclosable – even if S-K 404(a) does not independently require such disclosures.

<u>Loss of independence of most outside directors:</u>

The proposed rule's expansion of transactions reportable under S-K 404 will also deprive many outside directors of their independent status under Nasdaq listing rules. This will create huge issues for BHCs as they struggle to maintain committees comprised entirely of independent directors, including the audit, nominating and compensation committees. The problem is that the Nasdaq listing rules consider lending and depositary transactions reportable per S-K 404 as events that disqualify a director from holding independent status. Here's the explanation:

> Nasdaq listing rule 4200:
>
> (15) "Independent director" means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgement in carrying out the responsibilities of a director. The following persons shall not be considered independent:
>
> ......
> (B) a director who accepted or who has a Family Member who accepted any ***<u>payments</u>*** from the company or any parent or subsidiary of the company in excess of $60,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:
> .....

(v) loans from a financial institution provided that the loans (1) were made in the ordinary course of business, (2) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with the general public, (3) did not involve more than a normal degree of risk or other unfavorable factors, and (4) ***were not otherwise subject to the specific disclosure requirements of SEC Regulation S-K, Item 404;***

(vi) payments from a financial institution in connection with the deposit of funds or the financial institution acting in an agency capacity, provided such payments were (1) made in the ordinary course of business; (2) made on substantially the same terms as those prevailing at the time for comparable transactions with the general public; and (3) ***not otherwise subject to the disclosure requirements of SEC Regulation S-K, Item 404;*** or

(vii) loans permitted under Section 13(k) of the Act.

Conclusions:

Whitney urges the SEC to preserve the existing exclusions from disclosure available to publicly traded bank holding companies and their insiders. There are very strong public policy reasons justifying the continued privacy expectations of insiders, their family members, and entities controlled by both insiders and their relatives, which arise when those individuals and business deal with federally supervised financial institutions. America's community banking organizations are best served by directors and executive officers drawn from the communities served by these organizations, who actually do business with their entities and can identify with the needs and wants of their customers (many of our shareholders are also our customers). Finally, inasmuch as banks are *in the payments business*, the weakening or elimination of the exclusions that protect this ordinary course activity from disclosure by bank holding companies will destroy a model for corporate governance that has served this nation well since its founding. It would be a great loss to our nation and economy if larger community banking organizations lost their experienced directors (and found far fewer qualified replacements) while smaller community banking organizations elected to "go private" and deregister as SEC reporting companies to retain their traditional corporate governance models.

Sincerely,

Joseph S. Schwertz, Jr.

51926