Statement of Steven E. Bochner

I am a partner in the law firm of Wilson Sonsini Goodrich & Rosati and a member of our firm's Executive Management Committee. A few years ago, I had the honor to serve as a member of the SEC's Advisory Committee on Smaller Public Companies. I hope you are enjoying your experience on this committee as much as I enjoyed mine.

As you may know, one of the thirty three recommendations our Advisory Committee delivered to the SEC in April 2006 dealt with the subject of materiality. Specifically, we recommended that the SEC consider additional guidance with respect to materiality and restatement assessments in the context of previously issued financial statements. I am pleased to see that your committee is moving forward in addressing this important topic.

Our Advisory Committee also received data concerning the significant increase in restatements. We expressed concern that restatements were occurring where the impact of the error may not be material to a reasonable investor. We noted the subjective nature of materiality assessments, and the hindsight with which these decisions are often judged. In recommending the SEC provide additional guidance on this topic generally, we suggested two specific areas to consider. The first was a situation where an undetected error, not material to any previous annual or quarterly period, and not expected to be material on a cumulative basis to the current annual period, would be material to the current quarterly period. We encouraged the SEC to clarify that issuers would be permitted to correct such errors in the current financial statements, with no restatement, but with full disclosure. The second scenario we described in our report involved a situation where the hypothetical error would be material to one or more quarters in a prior year, and correcting the cumulative error in the current quarter would be material to the current quarter, but not to the current annual period. We suggested that the SEC consider allowing issuers to correct such errors, short of a restatement, but again with full disclosure.

Both of these examples suggest a conceptual approach consistent with the proposal outlined in your Progress Report, and one that I strongly support. Like you, I believe we should separate materiality assessments for disclosure purposes from the restatement determination. As you have noted, determining whether an error is material and should be disclosed is different from determining the best method of correcting such error. For example, if an issuer discovers an error that was material seven quarters ago, disclosure and correction of that error serves investors and our markets well. However, incurring the time, expense and potential exposure and market disruption a restatement entails may not serve these constituencies well. This line of thinking is consistent with the view expressed in your Progress Report that material errors with no relevance to a current investor's assessment of a company's financial situation need not be restated, but should be disclosed.

I would like to further illustrate the problem with restatement determinations in the context of applying the reasonable investor test embodied in Staff Accounting Bulletin 99. The reasonable investor test has a storied history under our federal case law and works well with respect to disclosure decisions. Because the reasonable investor test is subjective, and as materiality will be judged with hindsight (and often greatly influenced by whether the stock actually moved), decisions like closing the trading window and whether to disclose are made conservatively by well counseled companies. The maxim "when in doubt disclose," is good policy. "When in doubt restate," is not. Yet because of the liability involved and the fact that the same subjective standard is applied, it is not surprising that both of our advisory bodies have noted that issuers may be compelled to restate where materiality is questionable. Again the solution is to separate the disclosure requirement from the mode of correction. If an error is material, disclosure should be required and even enhanced. For example, one could imagine an extension of the current Form 8-K rules to require the filing of an Form 8-K upon a determination that there was material error in any quarterly or annual period within the prior three years, or upon any correction of a previously filed report. A restatement, however, would only be required in the event that such a correction impacted the company's current financial results on an annual basis. Under this type of approach, stealth restatements would be a thing of the past.

While on the topic of SAB 99, I support the position outlined in your Progress Report that SAB 99 should be interpreted to cut both ways: quantitatively large numbers may be immaterial when applying qualitative factors. I know from experience that there is considerable uncertainty on this topic both at the Staff, and among private practitioners. Your sliding scale suggestion when evaluating quantitative and qualitative factors is a sensible approach.

Finally, I believe the "going dark" phenomenon, often caused by an inability to file periodic reports due to a restatement in process, does not serve investors or our markets well. I agree with your observations that issuers should be allowed and encouraged to provide information to the market, even if it involves a partial filing. Some information is better than no information. Liability concerns could be addressed by using the current or a modified safe harbor for forward-looking information.

Your committee was asked by the SEC to find ways to increase the usefulness of financial statements, while reducing complexity. The area of restatement determinations is unnecessarily complex and uncertain, and I believe you are on the right track with your Developed Proposals in this area. Thank-you for giving me the opportunity to speak with you today, and good luck with the rest of your important work.