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November 12, 2008

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Re: Updating the Shareholder Threshold for Registration

Gentlemen:

I am writing to you, on behalf of the American Bankers Association[1] ("ABA"), to follow up on our prior discussions and correspondence regarding the outdated shareholder threshold for SEC registration. In particular, today's letter is provided to you in connection with Mr. David Bochnowski's participation in the November 20th SEC small business forum where he will raise the issues of: (i) updating the shareholder threshold under Section 12(g) of the Exchange Act of 1934 ("Exchange Act") from 500 security holders to between 1,500 and 3,000 security holders; and (ii) amending the threshold under Section 15(d) and 12(g)(4) of the Exchange Act permitting de-registration from 300 to between 900 and 1,800 security holders to relieve the regulatory burden placed upon smaller public companies, in particular, community banks and savings associations (hereinafter collectively referred to as "banks"). While we hope that you both will be available to hear first-hand from Mr. Bochnowski about the impact of the 500 shareholder issue on community banks, we wanted to remind you of this issue prior to the forum and provide you with ABA's current thoughts.

The current credit crisis and the events of the last year make this issue one of vital importance to our community banks. Bank regulators are asking banks to raise capital—a difficult task during this market turmoil. Retaining an outdated shareholder threshold level adds to these current difficulties by interfering with community banks' ability to raise capital in their local communities for fear that they will trip the 500 shareholder threshold, and is, we believe, bad public policy.

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ more than two million men and women.

The Shareholder Threshold for Registration Should be Updated

The ABA first raised this important matter in March 2005 with then-SEC Chairman William Donaldson.[2] More than three years later, this issue continues to be of importance to small public companies, in particular community banks. Moreover, we understand, through our numerous meetings with Commission staff, and communications with members of Congress that there may now be consensus that the existing registration rules are outdated and that the Commission should explore whether the current shareholder threshold numbers for registration and de-registration are acceptable criteria for determining when an issuer must register as a public company.

Specifically we note that, Chairman Cox addressed this issue over one year ago, in a response to Senator Olympia Snowe's follow-up questions from a Small Business Committee Hearing. At that time, Chairman Cox informed Senator Snowe that SEC staff has been directed to determine whether the SEC has sufficient authority to amend the Commission's rules relating to the shareholder threshold that triggers registration and that the SEC's Office of Economic Analysis was directed to undertake a review of the Section 12(g) registration standards to determine whether they continue to be the most appropriate means of accomplishing the objectives of Section 12(g). We are concerned that the SEC's efforts in this regard have stalled.

Outdated Shareholder Thresholds Do Not Accomplish Section 12(g)'s Objectives

The ABA strongly believes that the current shareholder thresholds for registration and de-registration are terribly outdated and do not represent appropriate means to accomplish the objectives of Section 12(g). By simply updating the shareholder threshold for registration, the SEC could provide much needed regulatory relief to small businesses of all kinds.

Section 12(g) dictates the circumstances under which an issuer must register as a public company with the SEC and subsequently comply with the Commission's periodic reporting and other requirements. This section requires registration if a company has more than $10 million in assets and more than 500 shareholders of record. In 1964, when Section 12(g) was enacted to expand the registration and reporting requirements beyond companies traded on a national exchange, Congress understood the need for the regulation to be scaled and thus limited the reach of the provisions to ensure that "the flow of proxy reports and proxy statements [would] be manageable from a regulatory standpoint and not disproportionately burdensome on issuers in relation to the national public interest served."[3] Companies are not considered to have a large

[2] *See* Letter of Mar. 2005, from Wayne A. Abernathy, American Bankers Association, to William Donaldson, Securities and Exchange Commission. Please also note, that in making this recommendation, the ABA specifically did not recommend that the current interpretation of "held of record" in Sections 12(g) and 15(d) be revised to mean "beneficial holder" rather than "record holder." Any such revision could in practice increase the regulatory burden, forcing into the periodic reporting system banks that currently are not in the system. See Letter of Dec. 13, 2005, from Sarah A. Miller, American Bankers Association, to Gerald LaPorte, Securities and Exchange Commission; and Letter of April 3, 2006, from Sarah A. Miller and Donna J. Fisher, American Bankers Association, to Nancy M. Morris, Securities and Exchange Commission.

[3] Securities Acts Amendments of 1964, Pub. L. No. 88–467, 78 Stat. 565 (adding Section 12(g), among other provisions, to the Exchange Act); .S. Rep. No. 88-379, at 19 (1963).

enough public market presence to be subject to significant reporting under the Exchange Act unless both the asset and shareholder thresholds are met.

For the banking industry, the shareholder number is the only meaningful Section 12(g) measure (as 99 percent of all banks have assets in excess of $10 million). Banks have large dollar assets due to the fact that loans are considered assets, which, in turn, are leveraged liabilities of the bank, *i.e.*, deposits. To give you some perspective, the bank regulators define a small bank for purposes of the Community Reinvestment act as an institution with less than $1 billion in assets,[4] so virtually all community banks that are considered small, in at least one context, will exceed the asset size parameter of the Section 12(g) test.

Over time, the asset measurement standard set by Congress in 1964 has been adjusted "to assure that the burdens placed on issuers and the Commission were justified by the numbers of investors protected, the size of the companies affected, and other factors bearing on the public interest, as originally intended by Congress."[5] Nonetheless, while the asset size parameter has been increased ten-fold from the $1 million level initially required in 1964 to $10 million in 1996, to reflect the exponential growth in the securities market, the 500-shareholder threshold has never been adjusted, although the Commission noted in 1996 its intention to consider updating it.

Even the Department of Treasury has recognized that smaller financial institutions that are publicly traded by virtue of having 500 or more shareholders should be treated more akin to privately-held firms when applying to participate in the Capital Purchase Program. We are hopeful that the Commission will view this matter similarly and elect to increase the shareholder threshold. In the more than 40 years since Section 12(g) was adopted, the size of the investing market has grown substantially, as has the number of corporations and the number of investing shareholders. A small corporation today with a small investor footprint is significantly different from what it was 40 years ago. While the shareholder threshold of 500 at one time may have been an accurate reflection of a public market, it no longer is.

ABA Has Provided Information to the SEC to Illustrate the Outdated Nature of the Shareholder Threshold

Earlier this year, ABA began providing informal assistance to the SEC's Office of Economic Analysis (OEA) to assist them with their efforts to determine whether the current shareholder threshold numbers are outdated. Specifically, we provided OEA with data relating to the household location of several community banks' shareholders to help explain the local nature of the banks' shareholder base, under the theory that these shareholders have sufficient ability to monitor their investment in their local community bank and thus do not need the protections provided by the Exchange Act's periodic reporting requirements. The information we provided to the SEC reflects that between 70% and 95% of the surveyed banks' shareholders are in-state. Often they are bank customers and have the ability to make first hand observations regarding the health of the institution and its value to the shareholders and the community. It

[4] *See e.g.,* 12 C.F. R. §228.12 (u).
[5] Exposure Draft of Final Report of Advisory Committee on Smaller Public Companies, SEC Release No. 33-8666 (March 3, 2006) [71 FR 11090, 11097].

also helps illustrate that the investment decisions of these investors are not necessarily made in reliance on information and expensive reports filed by the banks under the Exchange Act.

A closer look at the nature of the community banks we sampled also reveals other factors that are inconsistent with a characterization of these banks as public companies that need to be subject to the full panoply of Exchange Act registration and reporting. Banks with less than 3,000 total shareholders rarely have liquid trading markets that allow them to truly benefit from being public. The banks surveyed by ABA had a total number of shareholders that ranged from 410 to 6,500. The average daily volume over a three month period for the surveyed banks was only 10,202. None of the banks with less than 1,500 shareholders had an average daily trading volume over the three month period that was greater than 850 shares. In addition, the average market capitalization of these banks is less than $144 million, and the banks with fewer than 1,500 shareholders had market capitalizations between $16.9 and $76.6 million.

The Disproportionate Burden to Community Banks

As these low market capitalization and thin trading markets statistics from our sample illustrate, community banks with less than 1,500 shareholders typically do not receive the traditional benefits of being public. The banks are local businesses with local shareholders. On average, they have revenue of $14.8 million and only 118 full-time employees. It is common for these banks to receive little or no analyst coverage, have a limited trading market, provide little liquidity for their shareholders, and attract little institutional investment. Any benefit that these companies receive from being public is significantly undermined by the disproportionately high costs of regulatory compliance placed on these smaller companies. In the post SOX era, it is well documented that the costs of being a public company are disproportionately borne by smaller public companies.[6]

The negative impact of the low shareholder threshold is felt acutely by community banks because unlike other small businesses, community banks are broadly held by shareholders in their communities. Even without intention to offer shares publicly, many community banks have seen their shareholder base grow as successive generations distributed their stock holdings among their descendents.

These factors exert significant pressure on banking organizations and other affected companies to reduce the number of shareholders in order either to avoid registration requirements or to de-register. Due to the increasing costs of being a registered public company, a number of small businesses, including some of our member community banks, have determined that de-registration is in the best interests of their shareholders. However, companies that wish to de-register must either have less than $10 million in assets or less than 300 record shareholders, and for banks who wish to de-register, this means somehow reducing their shareholder base below 300 record shareholders.

[6] *See Generally*, Foley & Lardner, The Cost of Being Public in the Era of Sarbanes-Oxley (August 2, 2007) *available at* http:/www.foley.com/publications/pub_detail.aspx?pubid=4487; Exposure Draft of Final Report of Advisory Committee on Smaller Public Companies, SEC Release No. 33-8666 (March 3, 2006) [71 FR 11090].

Reducing the number of record shareholders can be costly. Stock buybacks, reverse stock splits and the attendant legal costs are particularly expensive for small businesses. In addition, these transactions can have negative consequences for local communities. As much as community banks would like to get out from under the heavy weight of SEC registration, they often have no desire to reduce the number of shareholders, especially if that means disenfranchising the localized ownership that makes these banks members of the community. As Daniel Blanton, President and CEO of Georgia Bank Financial Corporation testified before the SEC Advisory Committee on Smaller Public Companies:

> We are reluctant to [de-register] because the Bank was founded on the belief that the Augusta [Georgia] area needed a locally owned and operated, relationship-based bank. Most of our shareholders live within our market and all but a few do some business with the bank. This localized ownership is quite common at community banks across the U.S. Often times, investing in the local bank is the only remaining investment members of a community can still make.

For those community banks that cannot reasonably go private due to a large shareholder base, many could be forced to merge with a larger partner in order to spread out the cost of compliance. Such regulatory-induced mergers or disenfranchisement cannot be wise public policy.

Investors Will Continue to be Adequately Protected

The banking industry is not seeking this change in order to "go dark," and stop providing investors with disclosures. Community banks are part of a highly regulated industry governed by numerous statutes and regulations affecting almost every aspect of banking activity. Each banking institution is regulated by two agencies: the agency that issued the bank's charter and the Federal Deposit Insurance Corporation ("FDIC"). Significant financial and other information regarding every bank and savings association can be publicly viewed on the website maintained by the FDIC. All banks are required to make annual reports available to both their customers and investors. Most provide financial and other information to investors through their company websites.

Indeed, many community banks that elected to de-register under the current regulatory requirements pledged to make public disclosures on their website of information previously required to be filed with the Commission. As Mr. Bochnowski will explain at the upcoming SEC small business forum, keeping shareholders and the public fully informed about the bank's performance is essential to its presence as a community bank. The advantage to the small community banks that would come with de-registration is not a lack of transparency; rather it is a reduction of regulatory burdens and reporting requirements that pose a disproportionate burden on small community banks.

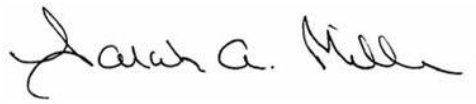
Conclusion

Understandably, our members are disappointed that this issue remains stalled despite having attracted the attention of members of Congress and SEC Chairman Cox. We strongly

believe that it is time for the 500-shareholder threshold to be increased to a level that is an accurate indication of a public company. Making this overdue change will help restore the principals of proportionality and balance to our securities laws so that the benefits to the investing public outweigh the regulatory costs to our nations' small businesses. Increasing the shareholder threshold number will significantly reduce the unwarranted regulatory hardship suffered by these small community banks and allow them to continue to be job incubators on main street America.

We are encouraged that Mr. Bochnowski will have the opportunity to present the concerns of our community banks at the upcoming SEC small business forum. We would be happy to continue to work with your offices to provide additional information on these issues from our member banks. Should you have any questions, please do not hesitate to contact me or my colleague, Carolyn Walsh, at 202-663-5253 or cwalsh@aba.com.

Sincerely yours,



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