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ON SMALL BUSINESS CAPITAL FORMATION

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C O N T E N T S

P R O C E E D I N G S

CALL TO ORDER

MR. LAPORTE: Good morning, everybody. My name is Gerry Laporte. I'm the Chief of the Office of Small Business Policy in the SEC's Division of Corporation Finance.

I am here this morning to call to order the 26th Annual Government-Business Forum on Small Business Capital Formation on behalf of the Securities and Exchange Commission.

This event is being conducted under the mandate of Section 503 of the Omnibus Small Business Capital Formation Act of 1980.

To start things off, I'd like to call upon John White, Director of the SEC's Division of Corporation Finance. John's biography is contained in the program materials that have been distributed to you.

John?

INTRODUCTORY REMARKS

MR. WHITE: Thank you, Gerry. I'd first like to say how pleased we are for all of you to be here at the SEC's Annual Government-Business Forum on Small Business Capital Formation.

We at the SEC, and particularly in the Division of Corporation Finance, learn a great deal from the discussions at these forums, and we look forward to hearing the

recommendations that come out of today's roundtables.

Thank you all for taking the time to be here today and for sharing your insights and experiences with us, as well as with the public.

I anticipate that we will have a very interesting and informative day.

In a moment, I will have the pleasure of introducing Chairman Chris Cox, who will be providing his own introduction to today's discussions, but first I would like to take just a moment to acknowledge the important work done by Gerry and his office, the Office of Small Business Policy, in the Division of Corporation Finance.

As many of you know, that office is the face of the SEC every day to smaller companies. They have phone lines and e-mail, mailbox available, and they coordinate all of the Agency's efforts directed towards smaller companies.

In addition to organizing events such as today's forum, the office has spear headed a number of other important initiatives impacting smaller public companies in the past couple of years.

Chief among those are its tremendous efforts in coordinating the Advisory Committee on Smaller Public Companies, and its key role in the Commission's package of rule proposals this past Summer concerning smaller company capital raising and private offerings.

Under Gerry's leadership, the Office of Small Business Policy has done really a terrific job both through projects such as these and through its day to day work of reaching out to and working with smaller companies.

With efforts like these, the Commission's rulemaking and other initiatives are better able to take into account and to address the special needs of smaller companies.

Gerry, thank you very much for all that you do and your office does.

(Applause.)

MR. WHITE: With that, I will turn back to our event at hand for today, today's forum, and for Chairman Cox to start off with an introduction to the topics that we will be addressing here today.

As we all know, in his time at the Commission, Chairman Cox has taken on a number of important and challenging projects affecting smaller companies. The priority that he places on events such as today's forum show that the Chairman is not only a true friend of small business but also someone who understands the special needs of these companies.

Allow me to turn the podium over to Chairman Chris Cox, and you will hear his commitment in his very own words.

Chairman Cox?

(Applause.)

OPENING REMARKS

CHAIRMAN COX: Thank you very much, John, for that introduction. Welcome to everybody once again to the SEC's Annual Forum on Small Business Capital Formation. We welcome first all of you who are here with us at the SEC's auditorium in Washington and next, all who are participating via the web at SEC.gov.

This is an outstanding opportunity for entrepreneurs and for all the many professionals who help small business to help the SEC to fulfill our statutory mission of capital formation, promoting capital formation.

In addition to significant participation from the public, we have benefitted from representation from the Government Accountability Office, the Federal Reserve, state securities regulators, and very importantly, the Small Business Administration.

Thanks to the good work that is being done on behalf of small business at the SBA, we have a good idea of just how important today's topics are to our nation's economy.

For starters, small business is where all the job creation is. Small firms represent -- I love this figure -- 99.7 percent of all the employer firms in the United States. They employ half of the entire labor force in the private

sector. Of all the net new jobs created in our country, small business generated between 60 percent and 80 percent in every year during the last decade.

That's not all. It may seem that globalization is being driven mostly by multi-national global companies, but in fact, small business is leading the way when it comes to America's export economy as well.

According to the SBA's most recent figures, small business makes up 97 percent of all identified exporters. It produces over 28 percent of the nation's entire export value.

Small business is also responsible for the lion's share of America's technology leadership. Innovative firms and smaller companies produce 13 times more patents per employee than large firms. When it comes to inventions, it isn't just the quantity, but also the quality that characterizes small business. Small firms' patents are twice as likely as larger firms' patents to be among the top one percent most cited.

We should not be surprised that small business employs over 40 percent of all the high tech workers in the United States and seems always to get more bang for the buck.

Despite all of this exciting news about the contributions that small businesses are making to the world's greatest economy and to America's global business leadership, there is another less encouraging side to the story.

That is that Government, which as a matter of policy, is dedicated to supporting small business, and all of the job creation and innovation for which it is responsible is often getting in the way when it comes to regulation.

That is because the cost of regulation falls heaviest on smaller companies, and not surprisingly, the smallest companies, which are often the most innovative, are always the hardest hit.

Here is a telling statistic that provides good reason for all of us to be meeting here today. The very smallest firms, those with less than 20 employees, spend 45 percent more per employee than larger firms to comply with Federal regulations. It is not just capital raising that imposes regulatory burdens. It is all the rules and paperwork and legal costs that every Federal department and agency imposes.

Even though we at the SEC are not responsible for all of those costs, we have to be cognizant that every incremental regulation that we impose is added to the vast maze of Federal rules and regulations that every entrepreneur has to navigate.

Since our statutory charter is not to minimize the damage our rules inflict but rather to affirmatively promote and encourage capital formation, we have our work cut out for us.

We will have to be so good here at the SEC that we not only make a positive difference for small business, but we also make up for all the red tape that all those other Federal agencies inflict.

I know that everyone here today is enthusiastic about that mission. All of us are committed to scrubbing the SEC's rules to avail ourselves of every opportunity to nurture smaller offerings and give life to the dreams of enterprising American entrepreneurs.

As we do that, every one of us at the Commission will do well to heed the advice of the famous 19th Century French economist, Frederick Bastiot, the advice that every small business person intuitively understands, if you wish to prosper, let your customer prosper.

For us, that means that if we wish our nation to prosper and to benefit from lower cost of capital, we have to let small business prosper.

The last quarter of the century has been a golden era for small business. With our help, that success will spread even further, extending medical breakthroughs, technological innovations, and a higher standard of living to ever greater numbers of the world's people.

Let's get to work right away on lowering the cost of capital. This morning's agenda will feature two roundtable discussions aimed at just that topic.

The first will focus on recent SEC rule proposals relating to private companies, including recent initiatives to make Reg D and Form D more user friendly for small business, and to help private companies with stock option plans from unintentionally becoming public companies.

The second roundtable will consider the Commission's suite of recent proposals concerning smaller public companies. This will include a discussion of our recent initiatives on Rule 144, Form S-3, and merging Reg S-B into Reg S-K.

John White and impresario's of Corporation Finance have assembled a stellar cast for today's production. The Forum luncheon is going to feature remarks by SEC Commission Paul Atkins, of whom there is no greater champion of small business.

Our panelists for these roundtables will include Steven Bochner, who is a partner at Wilson Sonsini Goodrich & Rosati in Palo Alto; Lance Lange, who is a director of Robert W. Baird & Co. in Milwaukee; Gerry Laporte, the Chief of the Office of Small Business Policy here at the SEC, whom John White has already introduced, and who will serve as one of our co-moderators.

Marc Morgenstern, managing partner of Blue Mesa Partners in San Francisco, who will also be a co-moderator. Gregory Yadley, who is a partner at Shumaker Loop & Kendrick

in Tampa. Phil Clough, managing general partner of ABS Capital Partners in Baltimore.

Cromwell Coulson, who is chairman and CEO of Pink Sheets LLC in New York. Gerard O'Connor, a partner at Foley Hoag in Boston. Anna Pinedo, a partner at Morrison & Foerster in New York, and of course, John White, the SEC's Director of the Division of Corporation Finance at the Washington Headquarters, who will be our third co-moderator.

The afternoon program is going to include some very exciting break out sessions, including one devoted to the role of broker-dealers and finders in private placements.

These break out groups are going to be particularly important because they are going to help formulate specific regulations for the SEC to consider as we work to meet our obligation to encourage small business capital formation.

This is going to be a great program. We have an outstanding group of experts and absolutely a vitally important mission.

To all of you who are dedicated to this mission, thank you for being here and most of all, thank you for what you do every day, to help create jobs, to nurture innovation, and to make life better for every person on this planet. All of us at the SEC are very proud to be your partners.

Now, John and Gerry, over to you.

(Applause.)

MR. LAPORTE: Thank you, Chairman Cox, for those very inspiring remarks.

Before we get into the actual roundtable program, I'd like to talk about a few logistical matters that the Chairman did not have time to talk about during his remarks.

I'd like to remind those physically present here in Washington that this program is being webcast so that means a couple of things. Number one, I think every panelist has a microphone, but it is important they use the microphones or else the people out in webcast land will not be able to hear what they are saying.

Also, when I say "webcast," I mean video webcast. Just because you are not speaking does not mean you are not on the camera. Every once in a while, we have some embarrassing moment for people who do not realize they are on the camera. By the way, these people in the front row down here are facing the camera, so the focus is on you, too.

Secondly, I was a little embarrassed when John was talking about me as if I make up the Office of Small Business Policy. I actually could not hope to do what I do without the people on the staff of the Office of Small Business Policy, whom I'd like to recognize at this time.

First of all, I wanted to recognize Tony Barone, who is a special counsel. Tony is in the back. A lot of you know Tony already. He actually has pretty much a year round

job putting this forum together. It is not a full time year round job. At this time of the year, it is certainly more than a full time job putting this forum together.

I also wanted to introduce Corry Jennings. Corry is in the back. Johanna Losearch. Johanna is in the back. Kevin O'Neill and Tawanna Young. Tawanna was out at the registration table. Clement Smadja, our intern, and Netta Williams, who was also at the registration table, and last but not least, Mauri Osheroff, the Associate Director, who oversees the work of our office.

All these people play a great role in the work that we do. I could not do what I do and we would not be able get the work done that we do without the contribution of all these people.

So that you can follow the proceedings better, we have distributed program booklets to all the attendees in Washington. The program booklets contain an agenda of the proceedings and the names of all the panelists and brief biographies. Since the biographies are in the program, we are not going to spend a whole lot of time introducing you to the backgrounds of the panelists.

For those of you who are listening over the web, the agenda is available through a link on the webcast page that allowed you to tune into this webcast.

The Federal law under which the SEC conducts this

event envisions that the Forum will result in recommendations to improve small business capital formation.

Historically, most of the recommendations have been addressed to the SEC. This year's recommendations will be developed starting at 2:15 this afternoon in break out groups, as the Chairman mentioned.

We are asking all registered Forum participants who want to participate in the break out groups to reassemble here in this room, in the auditorium, after lunch at 2:15, and we will discuss at that time how the break out groups will work. You will need an SEC staff member to initially accompany you up to the conference rooms where the break out groups will be held.

After the break out groups, we are going to reassemble again on this floor. I think the program says we will reassemble in this room. It will actually be in the multi-purpose room, which is L006, I think, back in that corner of the building. You will see where the people are when you come down here.

At 4:45, we will have a session that Greg Yadley, who is sitting here, will moderate to actually aggregate the recommendations of the group and figure out how the group is going to submit the recommendations to the SEC.

In various years, depending on what the recommendations were, we sometimes have to appoint a

committee of people to put them together before they are actually submitted.

The break out group sessions will not be webcast, so those not here in Washington will not be able to participate directly. Anyone can make a written submission to the Forum record until October 15. You can do so by sending us an e-mail at smallbusiness@sec.gov.

All submissions received will be considered by the private sector drafting committee that Greg, I believe, is going to head again this year, although we did not talk about that. I assume he is willing to take on that role again this year. He did such a fine job of it last year.

Registered participants who participated in the break out groups or people who submit recommendations to us at smallbusiness@sec.gov, will be given an opportunity to vote on the final recommendations drafted by the committee some time after October 15.

One final note on submitting questions for discussion by the panelists in this morning's roundtable. We have made available in the back these manila colored cards, where the people in the audience can submit questions for discussion by the panelists.

If you want to submit a suggested topic, please fill out a card and bring it to Clement up here at the front.

If you are listening by webcast, you can send in a

suggested discussion topic to me at my e-mail address, which is LaporteG@sec.gov. I am going to try to monitor my Blackberry while I'm sitting here. We will fill out a slip for anybody who sends me an e-mail with suggested topics for discussion.

We will see how many topics the panelists have time to discuss in the roundtables. I want you to remember that this is not supposed to be a question and answer session. What we are looking for are questions for discussion that may lead to recommendations to improve small business capital formation, including suggested changes to the SEC rules.

With that, I think we will go ahead and start the panel. Marc and I are going to be co-moderators. I am going to consider Marc the primary co-moderator here, and sort of defer to him on how we are going to do this panel.

ROUNDTABLE ON SECURITIES OFFERINGS BY PRIVATE COMPANIES

MR. MORGENSTERN: How many of you have been here before?

(Show of hands.)

MR. MORGENSTERN: That is a pretty healthy gathering. That must explain why you are all in the back.

First, I will make the plea if panelists, if you wouldn't mind, coming down. The closer you are to us, the more this is going to feel like an interactive forum. We would appreciate it. We think it would be good for you. I

will give you 30 seconds while I keep talking to consider moving down.

There we go. Show real leadership here. We do not want to be a bunch of talking heads. Everybody in the audience is smarter than we are, so we would like to take advantage of it. For those of you who are still coming, I thank you.

Before we start, I am going to let the panelists just very quickly introduce themselves so you can get a sense of, among other things, what bias everybody brings to the discussion.

As I think most of you know or many of you know, as near as we can tell, I have been on the executive committee of this Forum every year except the first year. I think this is my 25th year on the executive committee.

Part of what I bring to the party is I have been almost every person in the audience. I am a lawyer. I have been a real estate broker-dealer. I have been a general partner and a partner in a venture high tech fund. I have been a promoter. I have operated hotels, shopping centers, 221(d)(4)s and almost anything you can name.

There is almost no set of eyes at this table that I have not looked through, and I have represented issuers and underwriters and portfolio companies.

I have a lot of sympathy for every side of this

discussion, even Gerry's side. I was on the NASD Business Conduct Committee. I don't even know if you know that. I have even sat on the regulator side. And I do a lot of writing and teaching, most if it coming out of these kinds of topics.

Let me just stop there for a second. By the way, for those of you who have no idea who this is, last year, he had a beard.

(Laughter.)

MR. BOCHNER: I'm different from Marc, as I have had the same job for 26 years. I have been a partner at Wilson Sonsini Goodrich & Rosati in Palo Alto and I practice venture capital, IPO, and public company law. A lot of my clients have been small start up's that have been funded through venture funds and individuals using many of the exemptions we are going to talk about today.

I also had the pleasure of being on the SEC Advisory Committee for Smaller Public Companies, which spawned some of the proposals we are going to talk about today. I teach a class at UC Berkeley's School of Law called venture capital and IPO law in my spare time.

MR. MORGENSTERN: And the NASDAQ.

MR. BOCHNER: For the last ten years, I have been on the NASDAQ Listing Council, which I have chaired for the last couple of years. That is a body of NASDAQ which advises

the NASDAQ Board on governance standards and other listing requirements.

MR. LANGE: My name is Lance Lange. I am a director with Robert W. Baird & Co. I head Baird's private placement practice. In that role, I'm responsible for raising growth stage equity capital for companies, PIPE transactions and registered direct transactions.

Baird is a pretty classic middle market investment bank. Our capital markets business is comprised of institutional sales, research and investment banking. We cover over 500 stocks from a research standpoint. The median market cap is below $1 billion. In our regular M&A business, the middle market, as we define it, is really 50 to $500 million enterprise valued companies.

We are keenly interested in anything that can help small companies raise capital.

MR. YADLEY: I'm Greg Yadley. I practice law in Tampa with the firm of Shumaker Loop & Kendrick. I'm very active in the ABA and also teach a course at the University of Florida Law School.

I have been involved with the Forum for the last three years and was an attendee in some of the early years.

My practice is a mix of securities and M&A and general corporate. In the securities area, everything from helping companies get organized through an IPO or another

exit strategy, and just about everything.

I enjoy helping people. That is why I became a lawyer and that is what I like to do. I like to have clients who appreciate the right way of doing things. What that means is sometimes it is hard to help them raise money because the regulations are sort of a web of obstacles.

The SEC over time has made things better. They have done some tinkering. With the advisory committee and what the current team at the SEC, starting with Chairman Cox, have done, I think is just terrific. They have embarked on, as we all know, a very aggressive series of rule proposals, kept us busy all Summer.

I think it is a great time for us to effect change and really bring securities regulation of smaller public companies and exempt offerings in sync with what has happened in the market, particularly in technology.

It's a great day and we are going to talk about some interesting things.

MR. MORGENSTERN: We try usually not to be so overloaded with lawyers. If you look at the materials you have this year, you have almost 500 pages of proposed rules. It is very hard not to overload the panels with lawyers. I sort of apologize on behalf of everyone.

The second observation I would make is that in many ways, this particular forum is a return to the very early

forum, and the reason is the comment period on the Regulation D proposals does not end until October 9th.

My goal is for this afternoon to return to sort of the packwood sessions we had in the early 1980s, and a packwood session was when you sort of started and said we know we only have two or three hours but we will try to really emerge from here with crafted legislative proposals and responses because we can still have an impact on the final rules.

With that, let me just ask a question. Have any of you read the rules?

(Show of hands.)

MR. MORGENSTERN: Real gluttons for punishment. Liked them overall? Hated them overall? Just plowed through them overall?

Here is what we are going to try to do. We are going to try to let Steve get through the 12(g) stuff relatively quickly. It is pretty dry and antiseptic. I do not think it is real controversial.

(Laughter.)

MR. MORGENSTERN: We will take a pause when he is done to see if that is a correct hypothesis. In any event, if anybody is angry, you can direct it at him.

Then we are going to spend a long time on the Reg D proposals. I do not want the 12(g) stuff to get lost in the

Reg D stuff. Steven?

MR. BOCHNER: Thank you. It is hard to go after and talk about something when somebody has already told you it's dry and boring.

(Laughter.)

MR. MORGENSTERN: I said "antiseptic," too.

MR. BOCHNER: Okay. I think the 12(g) proposal is sort of a classic cost/benefit sort of question. I think it comes about because it takes longer to get public, which means it costs more money, which means you have to hire more employees, until you are able to get to the point of being public.

The question is we have an exemption under the 1933 Act for options issued in a compensatory context, but yet for those smaller companies that happen to hire so many people that they have more than 500 optionees, and if they meet the net asset test, $10 million, then they are forced into 1934 Act registration.

On the one hand, there is an 1933 Act exemption that says because its options in the compensatory context, you don't need the protections under the 1933 Act, and yet if you have enough of these people, you have to register under the 1934 Act.

I am a fan of this proposal.

MR. MORGENSTERN: Steve, let me just back up for

one second. Most of the time when you think of somebody going public, you think of them going public under Section 12(b). They voluntarily decide to go public. They register with the SEC. It is a conscious action.

12(g) has frequently been called the "creeping public offer." It is when you have a private placement and you have a private placement and you have a private placement, and then sort of without even intending to, you have more than 500 shareholders and more than $10 million in assets, and the SEC says you can't keep telling me you're a private company because you have 500 shareholders. You have more shareholders than IBM, so that is a 12(g) company.

That is just background for what Steve is talking about.

MR. BOCHNER: I think in a way, conceptually, it kind of syncs up the policy rationale that I see behind the compensatory plan exemptions under the 1933 Act with a parallel 1934 Act exemption, on the theory that these optionees probably don't need the protection under the 1934 Act either if they are truly options granted in a compensatory context.

That is kind of the concept here. As I said, I am a fan of the proposal.

The proposal does have with it maybe a couple of things that perhaps some of the other panelists or somebody

in the audience would like to respond to, a few restrictions that I think will impair the effectiveness of this exemption from 1934 Act registration.

These are provisions which go beyond the restrictions under 701 itself. These are restrictions on transferability. Most options are non-transferrable. It also makes the underlying shares non-transferrable. In effect, it takes 144(k) transferability away from the recipients of these types of securities.

Secondly, informational requirements, which are more onerous than those under 701, because you have to start, if I understand the proposal correctly, start providing information much more quickly.

I think one question perhaps for the panels this afternoon and maybe for the rest of us up here, are those restrictions really necessary, or will they get in the way of the purpose of this exemption, to really just equate the 1933 Act exemption, 701, with a parallel 1934 Act exemption, and just say in the compensatory benefit plan context, we don't need the regulation, and we don't need these additional encumbrances.

MR. MORGENSTERN: If you took the business context, it tends to be almost always, there may be other things, a very fast growing technology company that is using options as a major way of attracting their employees. You are not going

to find it -- I have lived in both Cleveland and San Francisco. You are not going to find any Cleveland Midwest manufacturing companies running into this problem.

If you are in Silicon Valley or you are on Route 128 where you have companies exploding from $1 million to $200 million in three years and giving options away like crazy, it is a real problem.

That is the sort of factual background for it.

MR. BOCHNER: I guess to be specific about these restrictions, I would love to see this kind of an exemption but with no additional transferability restrictions beyond that provided under Rule 144, and then informational requirements which parallel those that exist under 701, and don't make it more onerous than under 701. That would be the kind of proposal.

I don't know whether the ABA comment letter has been submitted yet. I think this echoes those concerns. That would be a good place to look for the details of those suggestions, the ABA comment letter to the 12(g) exemption for compensatory option benefit plans.

MR. MORGENSTERN: Steve has referenced 701 any number of times. Does anybody in the audience need reference points to that? Okay.

Steven, anything else you want to add?

MR. BOCHNER: No.

MR. MORGENSTERN: Great.

MR. LAPORTE: While we are at it, we have a suggestion for discussion from the audience. The suggestion is that we discuss the absence from the recent SEC proposals of proposed revisions to Rule 701.

The reason I bring this up is we are sort of in the compensatory security concept context right now. The person says why not increase the threshold for required disclosure from $5 million to $20 million?

I may be the person that is best able to talk about this.

MR. MORGENSTERN: We can all vote "yes" quickly. Is everybody in favor of that? Yes, we are cool.

MR. LAPORTE: I acknowledge it was one of the recommendations of the Advisory Committee. It was not picked up by the Commission and included in the recent rulemaking proposals.

I really can't comment on why that is the case. It is what it is. We recognize that.

By the way, Marc mentioned that Steve was on the Advisory Committee. He was the member of the Advisory Committee who, I guess, sort of sponsored the 12(g) recommendation that resulted in this Commission proposal.

The Commission hasn't picked up on this. I supposed as part of some future rulemaking, increasing the

701 ceiling from $5 million to $20 million, I know that is there, and if we have a 701 rulemaking, I guess that will be something that we will talk about.

I don't know if anyone else wants to comment on that.

MR. MORGENSTERN: Let me just do one legislative observation because the group up here has talked enough among ourselves that we know the following.

We as a group have a problem when there is a statute, a rule, a regulation, that we are 99 percent convinced is ignored in reality because no one thinks they can comply with it.

When you find rules like that, we just think they are bad rules and you ought to focus on them and fix them. They just have to be fixed. If people can't or won't comply with them, you create an era of lawlessness, that is what it sort of boils down to. That is a very bad thing to do.

We just give you that as a background, not particularly in response to 701, although a little bit in response to 701, but more as we go through other things.

You all may feel differently, by the way. Your answer may be no, bring the hammer down. If it's the rule, it should be the rule.

This whole area of private placements and exempt transactions and exempt securities is rife with either a

selective enforcement or intermittent reinforcement and enforcement. It is a problem that has been going on for 40 or 50 years at least.

MR. LAPORTE: Marc, could you expand upon what you mean by 701 in that context? I didn't get the connection, frankly. Maybe I should.

MR. MORGENSTERN: Let's just take dollar amounts. You have a fast growing company. Almost no matter what you do, you are going to exceed the $5 million, or you are going to have to tell the people hired in the last year, sorry, you are completely different than everybody who came before you, and your compensation incentives have to be totally different.

You will really have to give a ton of cash because we can't give you enough equity. That kind of choice happens a lot in this area.

If everybody just keeps doing what they are doing, I had a plan under 701, it was a good plan, but as an example, I was planning on going public in 2001, and I was still in compliance with the rule, but in 2001, my registration statement got withdrawn, and I had to stay private for four more years.

My whole approach to the 701 got screwed up. I intended to comply with it all along. I never thought it was going to be private for ten years.

There are a fair number of things in the private realm where it is not a perfect world. You don't get to choose when you get to go public. You don't get to choose when you get to sell the company.

You make rational decisions and good five year plans, and they get messed up by the marketplace.

MR. LAPORTE: You are not talking about the $5 million ceiling specifically, because the answer to that is to provide more disclosure. Some companies do not like to provide the disclosure, and they think it is almost the equivalent of going public, and they don't really want to go public.

MR. MORGENSTERN: And they don't want to lose the competitive edge, which is part of the question. Again, the smaller the company, the more words like "material disclosure" become a problem for them. Their larger competitor signs the same $1 million contract, and it is not material.

No fooling around, they feel that the disclosure really hurts their company, and they would rather take the risk of being wrong with the securities law than hurting their company. Those are two bad choices they have to face.

MR. BOCHNER: Marc, perhaps the panels this afternoon could look at both the trigger for the information requirement, which Gerry is alluding to, and also the type of

information required, whether it is time to take a look at whether you need that much information, or whether there is maybe a condensed way to comply, a more cost effective way to comply with the information requirements of 701.

MR. MORGENSTERN: Again, it's not as if there is a secondary trading market. The more there is a secondary trading market, the more at least I understand why you have an information requirement, because people who aren't as close are going to be buying the security, but the more frozen and illiquid the marketplace is, the harder it is to say the information is really necessary to protect anybody, because there is nobody to protect them from.

MR. LAPORTE: There are very few people making investment decisions is what you are saying, so what is the information for.

MR. MORGENSTERN: Yes. Before we go too far from this, when I suggested that I didn't think the 12(g) proposals were going to be all that controversial, somebody sort of snorted out in the audience like I was smoking dope.

I was just curious. Has that person changed their mind or do they still --

AUDIENCE SPEAKER: (Inaudible.)

MR. MORGENSTERN: Did anybody else have anything specific on 12(g) before we move on to Reg D?

AUDIENCE SPEAKER: The annual report delivery.

(Inaudible.)

MR. MORGENSTERN: Could you repeat the question for the webcast?

MR. LAPORTE: Stand up and identify yourself and repeat the question.

AUDIENCE SPEAKER: What we have seen with non-reporting companies (Inaudible.)

MR. YADLEY: The gentleman has raised the question that since these smaller companies have to compete with larger companies for accounting firm resources and time and attention, that maybe the 90 days could be extended to 120 days without any loss of protection, and it would give these companies better access to their accountants.

MR. MORGENSTERN: That is exactly the sort of question we can take up this afternoon in the roundtables. That is a good question, not to be discussed here, but move it into that forum.

Anyone else?

(No response.)

MR. MORGENSTERN: We will move into Regulation D.

Greg, do you want to start? Do you want Steve to start? Me to start?

MR. YADLEY: Steve can start.

MR. BOCHNER: I think this proposal has -- the genesis goes way back, I think, to Linda Quinn and perhaps

further back than that.

The question of whether regulating offers is really the way to go, particularly in this information age when even if you get a limited offer with certain information, most of us are automatically going to click and go to the web site and get a whole lot of different kinds of information.

There is a blurring between the public and private here. The suggestion has been made throughout the last maybe 30 years or so that perhaps it is time to move away in the private offering realm from any kind of general solicitation prohibition.

I think that is the key point behind proposed Rule 507. It has enhanced accreditation standards for a group of investors called large accredited investors, but the really profound thing, I think, from a securities lawyer's point of view is that you could effect a private placement and have limited general solicitation.

Hopefully, what this does, if we get it right, will improve capital formation, improve efficiency, allow investors, the right kind of investors and companies, to more effectively get in contact with one another, without impairing investor protection because we are dealing with sophisticated investors that can protect themselves.

I think that is the basic philosophy behind this set of proposals.

MR. MORGENSTERN: If you said what are the two overwhelming issues that have persisted since Walston Purina in 1953 and before then, what makes a good private placement, and remembering that the words "private placement" don't appear in the 1933 Act. The words are "non-public distribution" that appear.

The general approach is how is the offering conducted and who is the offering conducted to?

Those questions have not changed much.

The general solicitation that Steve is talking to is what's the predicate approach to the manner of offering, and it has always been pretty clear that you couldn't do -- not for right or wrong -- you could not do a general solicitation or advertising, and have that be a private placement. That has sort of been out here. There is no move in that territory.

The second question is who is an appropriate person to be the subject of a private placement, and that was going back to 1953 when the Supreme Court said well, people who are sophisticated, we don't quite know where they came up with the word "sophisticated," and capable of fending for themselves, and we definitely don't know where those words came from, but those kinds of people are appropriate investors in a private placement.

That got sort of blurred into, for those of you who

are old enough to remember, Rule 146 and 147 when they were companion pieces. 146 was a statutory attempt at private placements under 4(2). I never personally knew anyone who did a 146 deal who thought they complied with it, because it was impossible to comply with.

And then 146 morphed into Reg D in 1982. I can't remember if it was in conjunction with the establishment of this forum or if that was just an accident.

MR. LAPORTE: It was part of the same milieu, let's say. Reg D did not result from this forum. The first forum was held in 1982, I think after Reg D was adopted.

MR. MORGENSTERN: With the broad concept of accredited investors came a fairly sharp line that said there is one group of investors that we are going to treat very differently than any other group, and we are going to say that accredited investors in general are people who are either sophisticated or they can fend for themselves, or they have enough money that they can buy the ability to be sophisticated and to fend for themselves.

Transactions with all accredited investors are treated differently than transactions with a single non-accredited investor.

When Steve said there is one overwhelming aspect in the proposed rules and for the first time there is a suggestion that you could have a private placement that also

has elements of general solicitation and advertising, I think that is accurate.

I think it is equally accurate to say that there are many, many, many changes in here to an accredited investor that need to be looked at quite carefully, both starting with where the original definitions of "accredited investor" is sensible, because many of the definitions that are in here are simply updating them.

They are adjusting things for inflation. If it was $1 million in 1982, inflation adjusted, it is 2 to $2.5 million. If an income test was $200,000, by now, it should be $300,000.

Those are all mathematically accurate, but the question is are they relevant. They sort of assume that the original number had a magic to it and a logic to it, and there was a reason for it.

As you go through these rules, I think you are looking at the part that intrigues Steve the most, and I understand why, is the general solicitation. This, by the way, does go back to a shared concern that it is very, very hard for people to comply with general solicitation and advertising, if they aren't already very well established companies.

If you are talking about first time issuers, it is quite difficult to comply with. Again, to have large numbers

of people unable to comply in good faith with rules is a rule you ought to look at closely.

The second is what are we really using "accredited investor" for. What do we really mean by it and what the regulatory folks mean by it. What behavior should and should not be shielded by it.

MR. YADLEY: On the one hand, I think that proposed Rule 507 is a wonderful thing because it does not have a monetary ceiling. You can have as many investors as you want, and it focuses on purchasers. To me, that is the key. That is what Steve is saying.

MR. MORGENSTERN: Purchasers as opposed to offerees.

MR. YADLEY: As opposed to offerees. It is the people who buy the securities that need to be given full disclosure. I think that is the answer. That is what is behind the key that opens the door.

Today, almost everybody has access to information. It is still not true that everyone has a facility with a computer and there are people who use computers for e-mail and don't surf the Web. When my mother starts using her computer, which she has done over the last year, it's scary.

MR. MORGENSTERN: By the way, all she does is search engine Greg's name, just so we are clear here.

(Laughter.)

MR. YADLEY: People have access to information. Many of the proposals, including the S-3 proposal, recognize that there is good information out there, and there is information about all kinds of companies, not just public companies, and people can access it.

The real concern of a small company is not having confidence, not being unwilling to share the story and open their hearts. It is to whom. For them, finding these sophisticated investors is hard at an early stage company.

The new rule proposal would make it easy to find those people, but one of the things that will be problematic, I think, and the Commission recognized it in its request for comments, is what if you use this limited advertising, because you really believe you justify very wealthy people putting money in your company, and you are unsuccessful.

"Unsuccessful" means that you could not raise the money in about 30 to 45 days because you burned through a lot of cash during that time period. Can you go back to the humdrum accredited investor, the millionaire? Maybe not. Probably not.

I think that is a huge problem that we need to deal with.

MR. MORGENSTERN: If I could go slightly off point for a second, but it is related. Steve and I wrote two

articles. His name doesn't appear on either one of them. One of them is called Sarbanes-Oxley Subtle Disclosure Costs. I kept begging him to put his name on it because all the intelligent stuff in it is his, and he refused.

We have another article coming out in November at the Annual Institute of Securities Regulations on due diligence and how you take minutes in a post-Sarbanes-Oxley world. Again, I would tell you that Steve is the co-author, but again, his name isn't on it. I thought I would mention it.

In both of those articles, and the reason I raise them, as you listen to these discussions, one of the things that we said is defined terms, whether defined terms in Board minutes, defined terms in contracts, defined terms in the regulatory scheme, they should be intuitive. Someone should read the defined term and almost immediately know what it means.

If you start to have an accredited investor, a big accredited investor, a Godzilla accredited investor, you are not going to know what it means.

People tend to read what they expect something to read. To start introducing into legislation terms that are very similar sounding either in the same rule or in related rules that have different meanings, I think, will have very mischievous consequences, and people will be reading too

quickly and doing something too quickly, and thinking this applies to accredited investors, when it really only applies to super accredited investors.

Language is important. Statutes that are intuitive, statutes that have short sentences, statutes that have examples, get complied with a lot more than statutes that are really written by lawyers to lawyers.

I don't know if I told you that we did this. We went back and one of the things we said for Board minutes was where might you look for guidance on how to write Board minutes. We said how about the SEC? In 1998, they promulgated the plain English rules.

If you remember, when they promulgated those rules, the Securities Bar went crazy. The Securities Bar just said we can't write this stuff in plain English, this is very technical, very sophisticated, very complex stuff.

It is ten years later. If you read most prospectuses, they are pretty legible, and definitely in plain English.

One of my concerns is this statute is getting away from plain English. I think the SEC is straying from its own mission, and I think its own mission was a good mission and a good statement.

Did you know we said that, Steve?

MR. BOCHNER: Did I know we said that? No. Marc

did all the work, and that's why name doesn't appear in those articles. He really did the work.

The corner of the world I come from is one of technology and perhaps more access to capital than might occur in other parts of the country because we know where the venture capitalists are. We know how to get a hold of them. Angels, a little less so. Some angels are organized; some aren't.

Then there is a group of investors that maybe also fall into the angel camp that are very hard to contact. It is sort of word of mouth and who you know.

I think the issues with the private placement exemption are do we hit the levels right. In other words, do we need to tinker with accreditation. Are we balancing investor protection and access to capital.

I suspect we are pretty close to right. Is it a million? Is it $2.5 million? Is it $1.5 million? Who knows. I think we have private offering exemptions which seem to work pretty well.

I think the definition of "accredited investor" should be looked at to try to dial it in and change over time, and perhaps change for inflation, and change as the market changes.

That is why I started out saying I thought the real innovation was -- we referred to it last night as dipping

your toe in the water general solicitation. I would say 507 to me is sort of the first modest step of acknowledging, okay, maybe we ought to look at easing up on regulating offers and let more general solicitation.

When we were discussing this at the Advisory Committee level, we were fans of doing this, obviously. It is in the Advisory Committee recommendations.

I think the concern we had was making sure that this didn't spawn sort of those late night t.v. investor ad's. That is the thing that I think was scary to us.

How do you allow general solicitation in a way that is going to ensure investor protection, I think, is a relevant question. I think proposed Rule 507, from my perspective, is a pretty good first step.

I applaud those efforts. I think it is a big change.

The other question one might ask, and we discussed it last night over dinner, is should 507 and 506 be collapsed. In other words, if accredited investors are truly, under 506, if these are investors who companies can issue stock to because we have decided that they are investors who can fend for themselves, either because of the amount of the investment or the amount of money they make, why should we regulate offerors in that context, too?

You could argue that 507 and 506 ought to be

collapsed. I realize there is some regulatory issues with how the two separate exemptions are being proposed, the statute under which they are being proposed.

In the interest of simplicity, Marc, you could make a case for the ultimate evolution of the private placement exemption being let's have a list of investors who we think can take care of themselves and with respect to those investors, if they are purchasers, we are not going to regulate offerors.

MR. YADLEY: That would certainly take care of the conflict I referred to earlier. By the way, for those of you who didn't raise your hands when asked if you had read the rule, the infomercial that Steve made, the way the SEC has addressed that in its proposal is that the limited solicitation has to be in writing. That could be a newspaper ad. It could be an e-mail. It cannot be a television or other broadcast spot.

I think the other aspect that the SEC has it right on is that for this to really work, the Commission has to take advantage of the ability to have Federal preemption of state laws. That is tricky because the state regulators by and large sometimes feel that they are in a process of cleaning up the mess, they are the feet on the street, and when the frauds happen, it is in their backyards, not in Washington.

They come at this from a real enforcement perspective. Nevertheless, for this to have any merit, it really does no good to be able to take out an ad in the Wall Street Journal and not be able to sell in various states.

I think the Commission is right to apply Federal preemption to this rule.

MR. MORGENSTERN: I'm just curious. There are a couple of things. One is the proposed change from the integration safe harbor from six months to three months, and whether or not you think that has an effect.

Secondly, in terms of your distribution of private placement memorandum's, are they mostly paper? Are they mostly on line? How do you guys monitor what is happening with them?

MR. YADLEY: First of all, reducing the safe harbor is great. The proposal doesn't go as far as the Advisory Committee recommended. That was a 30 day period, but 90 days certainly will be beneficial.

Obviously, it is beneficial because companies, particularly at the early stage, yes, they need $10 million, but nobody is going to give them $10 million until they can get from point A to point B. They tend to move forward in smaller tranches. Three months can be a life time for them, so this is a good move.

MR. MORGENSTERN: I'm trying to get the

underwriters' perspective to that.

MR. LANGE: I would agree. Just a couple of practical items. You had mentioned manufacturing companies in Cleveland, manufacturing companies in Milwaukee. It is a little bit more difficult to access the type of investor that you probably would in some of the technology driven areas of the country.

From our standpoint, 507 has some real appeal, but we do see some practical issues. I guess it would be our decided preference that it wasn't mutually exclusive, to be able to access one pool of investors and then perhaps to be able to utilize others, I think, would certainly be helpful.

From the standpoint of just going back to the integration rules, from our standpoint, reducing that from six months to three months is really an important benefit, especially given the way investors invest these days.

So many things are driven off of milestones, evolution of the business in the near term. Many times, there are specific contracts or awards or partnerships that are in the near future.

From our standpoint, we have worked pretty diligently to manage the six month integration rules, and now actually it would be decidedly an improvement to have it at 90 days.

MR. MORGENSTERN: Once you make a single decision,

investment decision, that says I'll give you more money when you hit this milestone? Is that a separate investment decision or is that just investment decision number one, and then your funding when it occurs?

MR. LANGE: Often times, it is a commitment, basically, contingent upon certain items happening. From their standpoint, so much of the marketing effort is driven by where the company is going to go, what items are going to happen between now and the evolution of that business.

You will have investors who are investing based upon the potential, and they are aware of certain items that could evolve for the company. However, you really don't need a full amount of capital to get you through those milestones, and there is also a valuation component associated with reaching each of those milestones.

From the standpoint of the agent who has identified someone who is keenly interested in putting a significant amount of money in the company but is wholly aware that there are items that if they don't happen, they will have less interest.

From our standpoint, you could argue that it is part of one financing. It does improve things such that if you can shrink the integration risk, that is going to be appealing to both the buyers and the company, the issuer.

MR. MORGENSTERN: We were talking last night and

weren't sure from an underwriter's standpoint, but people on both Coasts tend to have a high percentage of their net worth in their houses. People in the Midwest have much less of a net worth in their houses.

Did you guys have a reaction to the proposals of real estates in and real estates out?

MR. LANGE: We tend to be pretty conservative with private placements. The risk profile is typically far higher than we would see with a lot of our companies. Our preference really would be to be more strict with regard to the investor.

From our standpoint, the real estate component probably isn't a great thing to be included in that net worth calculation. We would actually prefer to see it out. We are really trying to drive the sophistication. We would be far more interested in people who are used to something that has a significant amount of risk and be able to demonstrate a certain amount of ability to understand that.

That is our preference.

MR. MORGENSTERN: How about the difference between net worth and income test for an individual compared to a household?

MR. LANGE: I guess I haven't really thought that much about it. From the standpoint of the net income test, it does seem to make sense -- I think the term is

"aggregated." It seems like that is a more appropriate measure.

Getting to your question about the memorandum, typically, we are utilizing technology more so than we ever had in the past. I would say probably in the last two years, circulating a written text where we are actually FedEx'ing a package to someone is probably ten percent of what we do.

Most people want to receive it electronically. What used to be a tome is now becoming more and more just a very thorough executive summary, and augmenting that essentially with a lot of management presentation type material.

I think that is becoming far more efficient. I would expect you are going to see less and less of the full memorandum that we used to write.

MR. MORGENSTERN: By the way, that's my experience, too. It wasn't the experience of others, which is sort of why we were curious to know.

MR. YADLEY: In the discussion last night, and there is a lot more traditional paper delivery with the little number pinned in at the top, just for control purposes.

I think one point that Lance made is a good one. The accredited investor --

MR. MORGENSTERN: Is that one and only one or just

one of many?

MR. YADLEY: No, he made lots of good points. He's the guy with the money, so we have to be nice to him.

The accredited investor test, that is a legal test. That is how we advise our clients that it is okay to do it this way. We also advise them that they should know their investor. I think Lance is correct that we counsel clients and they are interested in making sure they understand does this person have the sophistication and the knowledge, and can they afford to lose this, is all their net worth in their house, they don't have any money.

That would become more of a difficult task, I grant, if we loosen upon on general solicitation and you don't have that more firsthand knowledge of your investors.

Nevertheless, I think that is a burden that issuers would gladly take on for the ability to be able to contact more people.

I guess another thing on the general solicitation, going back to Marc's opening comment about you want to have rules that people will comply with. Otherwise, you are creating an environment where people can bend the rules and feel they can do so with impunity.

Even if you try as an issuer to only talk to people with whom you have a preexisting business relationship, because you have no broker and you can't use a finder, the

problem is the friend of the friend.

Lots of artifice is created in order to make sure that you are not contacting somebody that has heard about your deal.

I think the reality is that people hear about deals from their neighbor or their brother-in-law or their colleague down the hall, and there needs to be a way to make sure that you are not blowing your private placement exemption or limited offering exemption by dealing with these people.

Again, I think the focus is on the purchaser and the disclosure that is made.

MR. MORGENSTERN: Do we have questions from the audience that people want to get on the table now? Is everybody still awake out there? Is anybody still awake out there? Can everybody still stand up and say "rubber buggy?"

Is everybody still happy to just have us prattling away up here? Okay. The best prattler I know is Steve. Would you like to prattle?

MR. BOCHNER: I guess a couple of other items that Gerry kind of kicked around with us for discussion is Form D. I guess at a high level, is Form D needed. Can we do away with Form D. Do we simplify it.

After all, these are investors who can take care of themselves. They are private offerings. Sometimes you can

do them under 4(2). Plenty of venture capital, one or two venture funds. You may never file a Form D.

I would be interested in all of your reactions as to whether Form D is necessary at all, and whether it should be much more significantly streamlined on the theory of perhaps confidentiality concerns, it's not that expensive to do, but it would be another way to reduce regulation.

Maybe Gerry, does the Commission find a lot of value in the forms? Is your sense that all of the information in these forms is really useful and something that the Commission needs?

MR. LAPORTE: Let me just back up a step. One of the primary reasons we have Form D is because it was a joint Federal and state form. It was originally just an SEC form, then it was redeveloped as a joint Federal and state form.

I think the Commission several years ago put out a rule proposal proposing to eliminate Form D, and the states didn't take kindly to that proposal. They said we need it, and even if you delete it from your requirements, people are still going to have to file it on the state level.

I think that we sort of re-thought, and what we are trying to do is sort of actually use it as a way to make uniform state/Federal regulations, to have sort of an one stop filing process where if we can get this done, it would really reduce regulatory burdens as opposed to increasing

them.

To get back to your question, Steve, do we use this information. I'm constantly being asked for information on how many small companies use this regulation, Rule 506, Rule 504, and right now, we don't really do much with Form Ds. They are filed. Some private sector companies do take the information and sort of aggregate it and produce some information. We don't do any of that.

If somebody asked me how many Rule 504 offerings were reported on Form D last year, I wouldn't know. I'd have to ask Clement here to pull out the 25,000 Form Ds we got last year and go through them manually in order to get that information.

By making it electronic, I think we are hoping that the information that we do get will become more valuable.

I'm talking about information that we get for rulemaking purposes, to analyze who is using the rule and what are they using it for, what are the patterns in different parts of the country.

We do use it for enforcement purposes quite a bit, as do the states. I think that is really the reason why it exists more so than the role it plays in producing data for rulemaking purposes. It is really for enforcement purposes.

MR. MORGENSTERN: I would think the recidivist rules would be one of the things that really shows up, where

the bad boys are using them.

MR. LAPORTE: Yes. Marc was saying he would think the recidivist -- why don't you go ahead and state it?

MR. MORGENSTERN: One of the proposals, which again I think there is very little opposition to, is that you can't use these rules if you have been disqualified for doing bad things under the securities rules.

One of the places that shows up is on Form Ds. It says have you done a bad thing before. Yes, I have. Then you can't use this form.

MR. LAPORTE: One of the things that the NASD comment letter on Form D pointed out is that our disqualification proposals and our related person in the Reg D release, and the Form D don't exactly match up. We are going to have to work on that, which is a good suggestion.

Our disqualification proposals and related person proposals in these two different releases need to match.

That is one of the purposes of the disqualification proposal, is to make sure that recidivists don't get too much of a break on exemptions.

MR. MORGENSTERN: One of the things that Steve really did want to talk about, which relates to 507, is the words that you are allowed to use, how many of them you are allowed to use, what the purpose of them is. I don't think we have talked about that at all.

Why don't we at least get that on the table? Again, I think that is something that in the break out sessions this afternoon is worth talking about.

MR. BOCHNER: You mean in the general solicitation context?

MR. MORGENSTERN: Yes.

MR. BOCHNER: Greg, I know you had some thoughts on should it be limited to 25 words. I guess the one comment I will throw you and then let you chime in is it gets to this problem of confining information generally.

The genie is out of the bottle, if I get a limited tombstone advertisement under 507, I am going to read the 14 words, and the next thing I'm going to do is do a web search and look at their web page and get a whole lot of other information.

There is going to be a lot more than 25 words. You would really have to confine -- I suppose it gets you into the discussion of is there anything on the web page that could constitute an offer, and do you need to cleanse your web page when you are conducting a 507 offering.

A lot of issuers will put product and sales and marketing and other kinds of literature on. We are used to doing that in the public offering context, to look at web pages and make sure that we eliminate anything that might be construed as an offer.

I guess the question is does the 25 word limit make sense.

MR. YADLEY: I think it is way too small. I think it could be 50 or 100 words, and it would probably still be not enough, but it would be better.

Just some background on this. I am very sympathetic to the Commission and what it is trying to do with Form D. Gerry was pretty candid that it is of limited use perhaps or has been until there will be electronic filing. For the states, it really is important.

In fact, there are only two states who don't use Form D. One is Florida, where I am from. Florida has a really easy private placement exemption. There is no filing. There is not even a requirement for a written disclosure document. You can make disclosure by access.

Of course, New York has its own Form 99.

I think the SEC is showing leadership here in trying to come up with a form that really works.

Personally, I liked the old name of the form, which was Report of Sale. I think there is some merit to having it actually be a final sales report, but it's not. I think primarily because the states want to know when people are starting an offering.

Again, I keep coming back to general solicitation, because I really think that is the big issue. The Commission

has recognized in several ways when they talked about the changes that are being proposed for the Form D area.

First, there is a safe harbor. Whatever you have said in your Form D, that is not a general solicitation. They have taken out sort of the other information so that people can't free ride in it, but the Commission in its release also said, you know, this is a source of disclosure. People actually look at these things. The Commission cautions people to look out for themselves.

They should look and see if an issuer has filed a Form D, but remember, for the most part, these are private filers. Ninety-five percent of Form Ds are filed by companies that are private companies.

I think the SEC again recognized this. One of the pieces of information taken out, and I think this is what Gerry was alluding to, is the existing Form D has information about owners of a certain percentage of stock, affiliates, and that is not in the new rule.

In a sense, electronic filing of Form D is going to be an invitation for a prospective investor who, as Steve says, sees the 25 words or however many words it is, checks out the company on the web site, sees on Form D what states the securities are being offered in, and if there is a broker-dealer, and who is that broker-dealer, and then they call them up.

I guess that is not general solicitation, because the company didn't do it.

MR. LAPORTE: Maybe I could introduce a bit of controversy here, Greg.

When you understand what the purpose of Form D is, it is supposed to be a notice to regulators. I don't understand really why any business can't describe its business in 25 words or less. This is not a disclosure document. This is a telegraph of what business are we in, and why isn't 25 words even enough for General Motors to say what business they are in. You can say you are a conglomerate, if nothing else. That is only one word.

MR. YADLEY: I viewed the form maybe differently as it is a notice of an offering. What is the offering. You are right. I guess it depends on where you start.

MR. MORGENSTERN: One of the things which is very different about this release, again, you have to really look at it and take it as seriously as the SEC did, and I'm looking on page 21 right now, which is what we are sort of talking about, the 25 word limit.

Ordinarily, the SEC says this is what we think. If you read this page, it says "We propose the following." Then it says should we require or permit any other information? What additional information would be appropriate? Should any of the optional information be required? Should we eliminate

or expand the 25 word limit?

I mean there is question after question after question, or to put it differently, they are really saying folks, we really would like your input. If you have a thought, please share it with us because we would like to take it into account as we make final rules here.

To the best of my knowledge, this is the most open solicitous release I can ever remember, Gerry. Maybe I'm forgetting something. There are an awful lot of questions in here.

MR. LAPORTE: I appreciate that. Marc, one of the reasons why some people have said our releases -- now instead of proposing releases, they are all concept releases. I think people who understand -- I think that is true.

One of the reasons we do this is because we lost some cases in the courts. If you want to change the proposal upon adoption, you have to make sure you have asked the question at the proposing stage, or you might get a court shooting you down.

We have to be much more thorough in the types of not proposals, the questions we ask, to make sure that we have enough leeway at the adopting stage to do what we think is appropriate.

MR. MORGENSTERN: It is very refreshing. This is the right forum to ask those types of questions.

MR. LANGE: Just to comment on the 25 words. It probably does not need to be 100. You could probably expand it to maybe 50 words. Anybody who has ever been involved in a drafting session for a public offering knows how much time and attention and effort is really placed on the very first paragraph in the box.

You can do a very succinct description of the business, but often times, you are going to need probably practically more than 25 words. Again, I don't think it needs to be 100. Maybe the answer is 50. I do think you need a little bit more leeway.

MR. MORGENSTERN: Another theme -- I'm going to keep contrasting 146 and 147, just because I would love to see 147 changed at some point.

If you go to page 23 of the release, there are a couple of places where it says how does the issuer or the agent form a reasonable belief that something is true. If you remember, one of the biggest changes in Regulation D which made it a rule that someone could comply with, was that under 146, you had to simply make an absolute statement that something was true. You knew that Gerry was an accredited investor.

The big change that was made in Reg D in any number of places is it said you had to have a reasonable basis to believe. Not that you were right. You had done enough and

had a reasonable basis to believe something, even if you were wrong, you weren't going to get your hands slapped and lose the exemption.

That concept of reasonable basis continues to exist in the new releases, and remains a very important concept.

To me, it is the biggest flaw in old 147, the entrusted exemption is there is no margin for error, that it deals with offerees, not purchasers. So, 147 is supposed to be everybody has to live in California. You make one offer to somebody who technically lives in Nevada, you thought they lived in California, you have blown the entire exemption.

The incredible push forward Reg D did is it emphasized purchasers. If somebody didn't purchase something, why do we care? No bad thing happened. Why would we punish anybody?

The second layer of the defense was did you have a reasonable basis for believing. It might even have been wrong. You were a good citizen. You tried to comply. If you tried to comply and still made a mistake, nobody is going to put you in jail.

Those are two very important things which haven't happened to Rule 147 and need to happen, but what you do see consistently applied in these rules, and at this point you may just take them for granted, but you really shouldn't take them for granted because they are important concepts.

We have three minutes. If there is anything else that any of the three of you want desperately to say, or anyone in the audience desperately -- two desperates. I'll go left to right. I'll take both of them.

AUDIENCE PARTICIPANT: Just one question on Form D. (Inaudible.)

MR. LAPORTE: Do you want to repeat the question, Marc? Greg?

MR. YADLEY: The question was for public companies, what about Form D. I think behind the question was should it also be a current filing as it is for private companies, or perhaps a reporting obligation quarterly.

Is that your question?

AUDIENCE PARTICIPANT: (Inaudible.)

MR. LAPORTE: We really try to handle that in the 8-K as opposed to Form D. Form D, at least in its current form, isn't intended to --

AUDIENCE PARTICIPANT: (Inaudible.)

MR. LAPORTE: I see, for a non-reporting. The Form D doesn't perform that function very well now. It may for some non-reporting public companies, if there is somebody that is watching for Form Ds that come from those companies, but maybe Pink Sheets watches for them. I don't know.

MR. YADLEY: I don't know. That is a really good question.

MR. LAPORTE: That is a good question.

AUDIENCE PARTICIPANT: (Inaudible.)

MR. LAPORTE: The question is is there a good policy reason for excluding venture capital funds from 507 or private pool investment vehicles in general?

AUDIENCE PARTICIPANT: Maybe both.

MR. LAPORTE: The Commission didn't address that in the release. I know some of the comment letters have addressed it. We have gotten comments on that. People have said why doesn't 507 cover private pool investment vehicles. That has already been made in some comment letters.

Now the Commission will be looking at that issue when it looks at the comments on Reg D. Presumably, there will be some response. If there is an adopting release here on Reg D, they will be addressing that question.

MR. BOCHNER: Most venture funds don't respond well to general solicitation anyway, even the limited tombstones. That is just not the way they are contacted. When they are, at least the funds I work with, they don't like to be engaged on that basis, at least today.

Having said that, I certainly can't think of a reason why these most sophisticated of all investors shouldn't be included within 507.

AUDIENCE PARTICIPANT: (Inaudible.)

MR. BOCHNER: When they are raising funds

themselves; got it.

MR. MORGENSTERN: It is a good question. I would hope the SEC would come out and say they could. Again, maybe that is a perfect question for the break out this afternoon, and if it is a specific suggestion, it is exactly the sort of thing that ought to be going in now while it is still during the comment period.

AUDIENCE PARTICIPANT: (Inaudible.)

MR. MORGENSTERN: I get it and I agree with it. I'm just saying let's try to turn it into a real proposal this afternoon as part of what we are doing.

If it is okay with everybody, we are done with our allotted time. I'm sorry.

AUDIENCE PARTICIPANT: (Inaudible.)

MR. MORGENSTERN: I think we should hold that for this afternoon, but I think that is a very good question.

I think with that, we will thank all of you for your patience and attention, which has been fabulous, and get off the stage so they can get it ready for the next group.

MR. LAPORTE: If anybody wants coffee, the signs say on the outside you are not supposed to bring coffee in the room, but if you want to get a quick cup of coffee, we do have a Dunkin Donuts in the building. I guess we are on the lower level. It is on the first level. You can get up there on the elevator and the stairs.

MR. MORGENSTERN: If we can, a round of applause on our first panel.

(Applause.)

ROUNDTABLE ON SECURITIES REGULATION OF SMALLER PUBLIC COMPANIES

MR. BOCHNER: Good morning. Why don't we start the same way that we started the last panel, with some introductions, starting with you.

MR. CLOUGH: Thanks, Steve. I'm Phil Clough. I am a managing general partner at ABS Capital Partners. We are growth company investors investing in private companies with 20 to $60 million in revenues typically. We do have a good number of those businesses that we ultimately exit through the public markets.

We have had seven IPOs since 2001. The typical market caps as they enter the public markets are around 200 to $400 million, with a 75 to $100 million float.

I am on the Board of one public company currently and five private companies. One of the private companies is actually in registration now for a public offering by the end of the year, we hope.

Two of those other private companies also have aspirations for the public markets and are making preparations for that.

I have also served on the Boards of a couple of

other public companies in my career, and actually both of those were pre Sarbanes-Oxley.

Throughout the 1990s, I was an investment banker at Alex Brown & Sons and involved in a lot of initial public offerings for smaller cap businesses.

I'm looking forward to the discussion today. If there is time, I also hope to raise a few topics around Rule 404 and the new compensation disclosure requirements, as well as hopefully some comments about trends in accounting rules that I think are troublesome for investors.

MR. COULSON: Hi. I'm Cromwell Coulson, CEO of Pink Sheets LLC. We are in the over the counter market, the largest quotation system for trading of registered and unregistered securities.

Last month, we traded about $11.4 billion worth of securities, traded across our facilities by broker-dealers. We also trade about one-third of the OTC Bulletin Board transactions across our services in the inter-dealer transactions.

We very much made the trading more efficient for smaller companies and more electronic, and in the last two years, we have started to focus on issuer disclosure.

In March, we launched OTCQX, which is a process to separate credible issuers that have reached the operating company level out from the rest of the over the counter

market, and using a sponsorship model much like the AIM market, and we have four growth U.S. investment banks signed up to sponsor issuers, and a few more law firms.

Also, for companies, because the OTC market has different levels of companies in their states of disclosure, we have gone to categorize the whole Pink Sheets, which we implemented in August.

Since then, about 100 companies have gone from providing no information to the market to providing current information to the market with a letter from their attorneys stating so. Last month, 75 percent of our dollar volume took place in companies with current information, while less than five percent took place with companies with no information.

Thank you.

MR. O'CONNOR: I'm Gerry O'Connor. I'm a lawyer with Foley Hoag in Boston. Foley Hoag is a firm in Boston that does a lot of work with emerging technology companies. We work with companies in the software and information technology space, life sciences, and renewable energy technology.

We are quite active in smaller to mid-sized public companies. We have done lots and lots of PIPE deals and major acquisition work with smaller public companies, anywhere from market caps of under $10 million to over $1 billion, and listed or quoted from the Pink Sheets up through

the New York Stock Exchange and other national markets.

I am looking forward to the discussion this morning. My general take on the three proposals that will be discussed are they are a great set of ideas, a couple of improvements that could be made, which I hope we will get to, so I'm looking forward to getting started.

MS. PINEDO: I'm Anna Pinedo. I'm a partner in Morrison & Foerster's Capital Markets group. Morrison & Foerster is a global firm. We represent both issuers and financial intermediaries, and my practice is focused principally on representing financial intermediaries in financing derivatives transactions.

MR. BOCHNER: I am pleased to welcome back to the podium John White, who is going to be my co-moderator for this session.

MR. WHITE: I was jotting down notes when everybody was talking about their experiences in the earlier panel. I actually spent 30 years on one job and at one law firm, actually spending most of my time with larger companies, I would have to say.

I have now been one and a half years on this job. I have to say it is exciting and exhilarating. I highly recommend to any of you who have started at the first stage. The second stage here is very exciting and well worth it. I'm looking over at you, Steve, among other things, as you

said you had spent 25 years in one place.

In any event, it has been a very exciting experience for me.

Alan Beller called me even before I started, and actually my first exposure, I guess, in my new job, was to come down last February to one of the meetings of the Advisory Committee, in terms of introduction.

Since I have been here, the exposure to the whole topic of the needs of smaller businesses has really been quite extraordinary. We had the Advisory Committee. We had this forum has year. I spent an enormous amount of time on what I'll call the 404 adventure, including taking on management guidance, which was very much aimed at helping smaller public companies. I hope that we find that it does.

Of course, this past Summer, we had the six proposals that are the topics of the panels today.

I thought just to take a minute to tell you how we go to where we are today. Last February, we were having a planning session with Chairman Cox. We were going through a variety of things. Basically, he said look, you know, the end is in sight for 404. We can see a timetable that we will get our rulemaking in AS 5 done and so on by Summer, but we still have the capital raising part of the Advisory Committee report.

He said John, it's time for you to shift onto the

next thing. We talked about it a little while. The real focus and the direction from him was to figure out what we can actually get done, don't shoot too high that you can't get to the finish line.

Of course, just about that time, the ABA sends in the letter that basically says we think and we look at the whole topic -- they sent it in in April. There were drafts of it floating around before then.

I sat down with the team in Corp Fin and we looked at the ABA letter, but primarily at the Advisory Committee report and other things that had been accumulating in the Division over the years.

We just came up with the six proposals that you see in front of you as what we thought was something that we could realistically get done in a reasonable time frame. That's not to say we won't look beyond that at other things.

If we try to do everything, that was biting off more than we could chew. We really focused on what we thought we could get done.

I know I keep praising Gerry and his group. The idea that we went from -- I think we kind of got this figured out by late March -- we went from late March to a Commission meeting on May 23rd to put out -- it was actually 623 pages of proposals.

I have only been here for a year and a half. I

don't think there are many times 623 pages of proposals were drafted by any division in a comparable time period. Of course, I guess in fairness, they may have been drafted for the meeting on May 23rd. It then took us another two months, as you know, to notice to get them all out.

That is how we got to where we were in May. I have always been told by Chairman Cox that we should under promise and over deliver. I say this with some trepidation. This at least is my ambition and it is good to have goals and ambitions.

I am certainly focused on getting to the finish line on all of this this year. Whether that is doable -- that is just my ambition and goal here. We are very focused on these six proposals and very focused on getting them completed.

Having said that, I don't know whether we are supposed to give a disclaimer or not when we are sitting here at the SEC table, but I'm only expressing my own personal views. I'm not speaking for the Commission or any members of the staff.

That is kind of where we are and what we are trying to do. I am very excited to be here today to primarily listen as we evaluate the comments and the thoughts that are coming in.

MR. BOCHNER: Terrific. Why don't we get started.

My Advisory Committee is no more. I do have to say that we sunset it after we delivered our report in March of 2006.

I have to say I am impressed and grateful that such a large percentage of the 33 recommendations have seen some sort of action, ranging from 404 to capital formation to in the private company context, public company context.

I think there are more proposals out there, recommendations out there, that are yet to be addressed perhaps, but I think when we started in March of 2005, if you would have told me then that we would have a whole new auditing standard, we would be proposing general solicitation on a limited basis and for private companies, we would make S-3 eligibility broadly available, and some of these other things, I don't think I would have believed you that it could have happened in basically a little over two years.

I think it has actually been an extraordinary time of rulemaking. I think this will be one of those junctures, I think, in the history of the securities laws that people look back at as a pretty critical moment when things changed hopefully for the better for smaller company capital raising generally, private and public.

With that, why don't we launch in and let's start with S-3 changes. Anna, I'd love you to kick us off. Give us your thoughts about the proposal. What do you think about making S-3 more broadly available to all public companies and

eliminating that public float requirement?

MS. PINEDO: Sure. Just to echo, Steven, what you have already said, I think that the combination of the releases make significant progress in terms of facilitating capital formation, and will really help smaller and mid cap public companies.

I think uniformly, the market would agree that there is sufficient information that is publicly available, both through the combination of technological advances and the functioning of the integrated disclosure system, to be able to make S-3 available to smaller public companies.

I think it will make a difference, a very real difference to smaller public companies in terms of giving those companies an opportunity to have other capital raising alternatives. They won't necessarily have to choose between PIPE transactions and equity lines of credit. They will have the opportunity to do a shell take down. They will have the benefit that comes with the economy of keeping a shell current.

I think that from all of those perspectives, the S-3 proposal is really excellent and will help.

I think the one aspect of it that bears closer examination is the 20 percent standard. Over a period of 12 months in the proposed release, companies would be limited, smaller public companies that are not S-3 eligible on a

primary basis pre-reform will be limited in their use of S-3.

I think there are a couple of basic issues with the 20 percent threshold that are worth discussing and worth considering.

I think first off, there sort of seems to be a misalignment between the regulatory imperatives. If one concludes that the 1933 Act has always been a disclosure statute and one concludes that the logical premise for making S-3 available to more companies is that there is adequate information for investors and that information is current and well maintained, and that the Commission has opportunity to review the information and comment on it, as it does through its comments on 1934 Act documents, then I have difficulty getting to the assumption that it is appropriate to include a 20 percent limitation and to suggest that 20 percent limitation is reasonable or even necessary from a public policy perspective based on liquidity concerns.

I think there is an issue there. While I understand that liquidity concerns are valid concerns, they may not be appropriate in a disclosure statute.

I think if one were to kind of jump beyond that and get to whether 20 percent is a right number, again, I have difficulty having the Commission make that normative judgment as opposed to letting companies and their boards and their advisors make the judgment about what is appropriate.

And more importantly, letting the market make the judgment about the number that would be appropriate.

Then some sort of fuzziness in the last year. There have been a number of Commission comments, really no formal guidance, although I think certain members of the Commission staff, Corp Fin staff, have come forward and clarified their comments on PIPE transactions and transactions that are purportedly secondary offerings but in reality ought to be reconsidered or recharacterized as indirect primary offerings because if you look at the number of shares of stock that have been raised in the private placement transaction, by comparison, relative to the company's total shares outstanding prior to the private financing, it is a disproportionately large number.

I think appropriately there was SEC concern about whether some smaller public companies and broker-dealers that advised them were taking advantage of that and using that means of financing inappropriately to get stock to market.

I think those are valid concerns. I don't know that the way to address it is by imposing this limitation, or by having the staff sort of super impose its views about whether one means of financing is more appropriate for a company than another.

I think that has always been a decision that has been left to the market and to investors to react on. It

should probably be best left to boards.

I think if the SEC is truly focused on availability of information, and we all conclude, I think, and I haven't seen any comment letter that would disagree that there is adequate public information about these smaller reporting companies, then why the 20 percent test.

If we are going to go with the test, why 20 percent for this, why 33 percent for questionable PIPEs. I think it all becomes a little fuzzy.

To conclude just on a positive note, I also think that it is appropriate that the new eligibility criteria apply to foreign private issuers. Again, going back to the basic premise, is there enough financial information, is there enough information on a timely basis for investors.

I think we would have to conclude that there is for foreign private issuers, and there is probably no rationale that would justify separating our regulatory scheme, particularly at a time when there is such focus on the competitiveness of the U.S. markets and our friendliness for foreign investors and foreign public companies, I think it is appropriate that the benefits be extended to foreign private issuers.

One last note, I also would be interested in discussing with the group their thoughts on at the market offerings. There are a number of questions raised in the

SEC's proposal about whether a different standard ought to apply to at the market offerings.

Interestingly, in securities offering reform, which I think these reforms really dovetail very nicely with, the SEC relaxed the at the market offering restrictions that used to be in 415(a)(4), and now there is some question in this release that perhaps there should be different standards.

That just seems again sort of illogical in the sense that an at the market offering as opposed to a fixed price offering is less subject to market manipulation.

It just seems a little bit as if maybe there is some logical leap that maybe we are all missing.

MR. BOCHNER: John, you can chime in here, too. Gerry, the 20 percent -- Anna, it sounds like you are a fan of this proposal. I think the rationale behind it is public information is widely available and you can on EDGAR and go on the Internet and get SEC filings, allow the cost efficiencies of incorporation by reference to be achieved by the smallest of companies. That is the basic premise behind this S-3 proposal.

I guess the question is there is this provision that limits the amount raised to 20 percent of the public float in a year.

What is the rationale behind this and is this the right level I think are two good next discussion topics. Is

this meant to be a speed bump, Gerry?

In other words, these are smaller companies or maybe there is a little more concern, and is this a speed bump or is it something else. If we need a speed bump, is this the right bump, I suppose, is a good question.

MR. O'CONNOR: I agree wholeheartedly with just about everything Anna said. I think this is a good idea in essence. I'm not sure what the intention of the 20 percent was, whether it was a speed bump or some sort of test, under which or over which rather we would catch people using this inappropriately.

I can't vouch for the logic of the 20 percent public float threshold either, especially when you are talking about the public float. That introduces a whole new level of variability based on what affiliates, not just management, but other affiliates hold. I don't think it is the right way for the Commission to look at who should be eligible to use the S-3 on a primary basis.

Frequently, growing technology companies of the type that make up most of our client base, speaking of my practice and my colleagues' practices, need more than 20 percent of the public float to really execute their business plan.

If the public capital markets wish to support that and the disclosure is out there, I don't get the 20 percent.

I don't like it. If there needs to be some sort of speed bump, I think it should be significantly higher. Thirty-three percent does sound like something that is harder to argue with. It is a pretty significant percentage.

I still don't get the logic. If you do buy into the logic there should be some sort of speed bump or some sort of threshold, then I think it should be much higher than 20 percent of the public float.

I am happy to stop there. I have some other thoughts on S-3 that I could throw out now.

PARTICIPANT: Cromwell, I know you had some thoughts about this. Gerry, then we will come back to your other S-3 thoughts.

MR. COULSON: I pretty much agree with everything. Disclosure should be rather than merit review, and disclosure has been winning luckily in securities market regulation.

From the market side, we really do see a point where the investment decision is not made based on the company. The investment decision is made on the public trading liquidity. There is a fair amount of funds out there who don't care what a company makes, don't care what a company does, don't care what assets it has or business it has. It looks at how it is trading and what liquidity they can get into the market.

I do understand the Commission wanting to put in a

speed bump because the investors and financiers are very smart, and there is a lot of small companies who get excited about capital. The existing shareholders get substantially diluted.

I would think you would want to normalize it to where the PIPEs' number is. Twenty percent does seem low, and many smart people have commented that it is low.

MS. PINEDO: Cromwell, just to ask you a question. I think it's true that investors will be guided -- most investors, not just financial sector investors or financial buyers, are going to be guided by volume, trading volume.

Why not let the market decide? If there is thin volume, they are not going to buy. In other words, financing decisions, when a company and their financial advisor go out to make a financing decision, shouldn't the market decide on trading volume, just as the market decides on price or liquidity discount in connection with the availability of 144?

MR. COULSON: You are talking about the buyer of the offering of the securities versus the buyer in the public market.

MS. PINEDO: Buyer in the public market is still going to affect the trading price. We are talking about companies that are already public.

MR. COULSON: If you could get diluted by one-

third, tomorrow, what does that do to public valuations of companies? That is a real issue from a secondary market position.

Since the private placement business is institutions, the public participates in the public market. They don't get to invest in these companies through private placements. Their only route in is through the public market. The limit to the dilution that could happen from this, I think, is something to protect that person.

It should be a higher number than 20 percent. I think they should look at the total market cap of the company, not just the public float. How much is it safe that someone can get diluted in a year. That is really one of the issues we hear from investors constantly, having gotten diluted. That is the real problem in the market.

We have seen many companies also not understanding the transaction they are engaging in, the dilution it is going to lead to.

MS. PINEDO: That's interesting. Do you think, for example, the only sort of analogy that exists out there for something like the 20 percent rule is the 20 percent rule that some of the stock exchanges have?

The NYSE has its version of the 20 percent rule. AMEX has its version. NASDAQ has its version.

I think that most market participants would tell

you that practical experience with those rules has proven that they are not particularly effective in curbing the behavior that is problematic.

We routinely advise both companies and investment banks that are acting as placement agents in transactions as to all those rules. You can structure an at the market deal with one. You can fiddle with it so that you have a deal that is compliant with those restrictions, yet you are not addressing the very valid concern about dilution.

MR. BOCHNER: Let me just chime in, and then I want to go back to your additional comments. We did get a question from the audience that I think this is a relevant juncture to relay here.

Does the SEC have any influence over NASDAQ and AMEX to increase the 20 percent shareholder requirement for share issuances?

We can come back to that. It is sort of the other side of the same issue.

MR. COULSON: The S-3 -- the point is there are other ways to do offerings. The S-3 is the very fast one that can come into the market. You have speed.

If you can do a very fast offering that substantially dilutes the public holders, maybe that should be done, and if you are going to do more, you can still do a different type of offering.

If you need quick cash, you can do an S-3. If you need more, file a different type of registration.

MS. PINEDO: Right, but that doesn't address the regulatory concern. If the regulatory concern -- if we are moving away from this being a disclosure statute on information availability to the SEC suddenly dealing with market reg issues in the 1933 Act, then you have to look at whether the 20 percent or the 33 percent or any percent makes sense.

The way that the rule is calculated right now in the proposal, it would mean that the 20 percent is based on just what is publicly offered.

You could circumvent that, go up to your 19.9 on a short form. You can do an additional amount on a private deal. It's not aggregated. You have not dealt with dilution. You have not dealt with market liquidity issues because in six months, that is all freely available and up for grabs, so you have accomplished nothing.

In the meantime, you have introduced -- I think there is a tremendous amount of practical complexity associated with how the 20 percent and whatever percentage limitation would work from a practice perspective.

I think bankers and issuers would have a really hard time figuring out how to track what has been issued, what form it has been issued under. I think the complexity

doesn't make it friendly.

MR. COULSON: Don't you think instead it should be a number of just total outstanding as an easier way, of total market cap?

MS. PINEDO: If you are trying to align, market cap and liquidity at least have more to do with one another.

MR. COULSON: Then you are saying as a public investor, whether it is 20 percent or 10 percent or 30 percent, that's my risk of dilution from this, and the market can price it.

I think that is really what is the value here, how much dilution can be used through this process. Since it's an ownership stake, it is not your amount to trade in the market, it should really be how much your ownership stake can be diluted by this process.

MR. BOCHNER: I suppose another way to handle this speed bump issue could be if that is truly the concern, and I suspect there may be others, but one could eliminate the 20 percent threshold and simply have a policy within the Division that for companies below this level, their S-3s may tend to get reviewed more. Maybe there is a review sort of profile that in effect creates the same speed bump without forcing these issuers who need to raise 32 or 33 --

MR. COULSON: Sadly, that is merit review, and merit review is hopefully something we are moving away from.

MR. BOCHNER: It wouldn't be merit review. It would be just the same review -- the beauty of an S-3 is less disclosure and presumably quicker time to market. You would not change in the nature of the review, you would just simply -- I'm just reacting to the speed bump question, if that is a legitimate regulatory concern. Maybe there are more effective ways to deal with that than making somebody flop over into S-1 land.

AUDIENCE PARTICIPANT: If I may, I come down very strongly -- I was on the Advisory Committee with Steve. I come down very strongly on Cromwell's position here. He may not point it out, but I'd certainly like to point it out, his background is as an over the counter trader. My background for many years was as a securities broker as well.

For the smaller public companies, the liquidity test is very (Inaudible.) PIPEs are in fact the new IPOs. Micro cap and small cap companies don't get to do IPOs. They get to attract PIPE investors.

A PIPE investor is someone who is making a decision to buy a discounted security to hold for almost always a short period of time. The entire process of this rulemaking and the issues that came forward from our Advisory Committee was to attempt to allow the small cap investment community to expand, so that in fact they have somebody to sell to who will have some confidence that it is not in fact overly

diluted, more visible disclosures available.

(Inaudible.) That liquidity issue and the dilution issue which in fact is a very major issue in the over the counter market, I think argues for a pretty strong speed bump, in my view.

MR. BOCHNER: Why don't we spend another five minutes or so on S-3, and then move to Rule 144.

MR. O'CONNOR: Let me back it up a second. Let me add one comment on dilution. I think dilution is a fact of any offering period, to over simplify it, or perhaps at the risk of over simplification, if that risk of dilution is adequately disclosed, I don't think it is the job of the 1933 Act to bar some offerings and permit others.

That is where I'm at on dilution. I think it is essentially a misplaced concern, although there are some tangential points and it is worthwhile considering dilution as part of the overall mix of issues. It is not one that I think really is inherently the business of a 1933 Act.

Just taking a little bit of a broader perspective, I think which of our clients are going to be helped by this. I'm not necessarily sure that a primary S-3 is a quicker in and out of the market money raising tool than a follow on S-1, particularly if you are going into the market extracting capital and concluding your offering.

I think usually you will write the S-3 prospectus

as if it were an S-1 anyway, as a marketing document. Furthermore, with the incorporation by reference that many issuers will be able to use in an S-1, I'm not sure there is a ton of difference.

What we are talking about really is putting up a shell in an S-3 and allowing companies with lower than $75 million public float to have that shell be effective and take down from the shell. I'm not sure companies in that market cap range are going to have the needs for instant liquidity and a take down as the larger companies do with acquisition opportunities that may be less material to larger issuers.

I am a little bit of a skeptic in terms of how revolutionary what we are proposing here is going to be for that company.

A build up to my proposal that we reconsider making S-3 eligibility -- making S-3 available for resale registration statements for public companies with market caps under $75 million.

I'm not sure of the logic for continuing to impose a $75 million market cap for resale registration statements, as going back a little bit to the 1982 release of integrated disclosure in the first place. I believe that public float requirement for resale registration statements was considered and rejected in the final release.

I think that logic was sound then, and I think it

remains sound, particularly with the interpretation that allows NASDAQ issuers to use S-3 resale registration statements, but does not permit Pink Sheets or OTC Bulletin Board companies to use S-3 for resales.

You can be as fundamentally financially healthy on the Bulletin Board, having been de-listed from the small cap market, but not having made it back up to the re-listing standard. In fact, your market cap and price per share could be greater than a company that has managed to hang on to its NASDAQ small cap, but that company would be able to use a resale registration statement on S-3 and your company would be prohibited.

That is a very significant disadvantage. For some companies that I work with, it is a potentially fatal disadvantage.

That is a real problem. I strongly urge reconsideration of that position. I could go on and on. I would like to throw it open for a little feedback and discussion.

MR. BOCHNER: John, would you like to comment?

MR. WHITE: I guess you are ready to move to the next topic, but let me at least give a couple of random thoughts.

I'm not used to talking in the middle of a rulemaking. I'm kind of reluctant to say very much. First

of all, there is clearly a disclaimer here, and second, I won't say much.

Random thoughts. Doing this in small steps, when we talk about the 20 percent, is certainly an idea that was intriguing to us, to not do everything all at once. That may have been evident from the release. Incrementalism is not a bad way to regulate.

Second, the 33 percent, I'll call it informal staff policy that you are alluding to, that obviously is a policy that triggers a second look at primary offerings. I could even argue that it's really in a different context and with a different purpose. I can see how you relate the two. That is an informal staff policy to trigger when we look further.

The remarks about market cap versus public float, that comes out of the Advisory Committee report as well, because the Advisory Committee report used market cap as opposed to public float.

Certainly, the potential variation in those two numbers is much more dramatic in smaller companies often.

Finally, the idea of maybe thinking about this from the review perspective is an intriguing thought. We do have, I guess you could say, a different review standard or one that is at least almost biased in one direction on the 1934 Act side, which actually comes out of some of the statutory language in SOX that says we have to review everybody every

three years at a minimum, but we are supposed to look at companies' list of characteristics, and actually size is one of the characteristics.

In fact, at the moment, and we actually review companies more often when they are larger, so there is clearly a bias in our review program to date towards focusing on larger companies, the 1934 Act review program.

I tried actually not to say anything substantive about any of these issues.

MR. BOCHNER: Maybe as we are heading out to 144, Phil, in talking to you earlier, you had some concerns, before we get to 144, about the impact of some of the new and existing regulation on smaller public companies and capital formation.

Did you want to comment on things you are seeing out there?

MR. CLOUGH: Sure. I appreciate the opportunity. The first comment around 404 compliance, the great sense out there is that the SEC is trying hard to introduce some common sense and some materiality standards to the application of the rule. I think AS 5 is the one example of that.

Really, at the point of attack in the companies, it is not having the desired impact. I just throw this out for the regulators to consider, how do you actually change behavior.

I think you have an accounting profession that is scared. I think you also have an accounting profession that has economic interest in the regime the way it is currently.

A typical private company's expense for a high end audit with a major firm would be around $150,000. The annual cost around audit plus 404, when you include the consultants you need involved, is 1.2 to $1.3 million.

It is a very sizeable cost. When you go to the auditors and you start talking about how do these hours build up. One of our companies has a very simple business, very few cash transactions, one bank account, and yet the auditors are spending 50 hours on cash controls. I think they acknowledged to you that is a crazy number, but they point to if anything goes wrong, you know, it is a major, major problem for our firm.

I think if you sort of ask Board members and management teams what is the major issue out there, I've heard the young private companies, the small private companies, say it is still the 404 rules and the costs.

The other topic that is just now arising, I'm on two compensation committees, is the new compensation and disclosure requirements. I think there are two issues around this.

One is costs, and that is not a dramatic number, but I do see comp committees now feeling the need to engage

consultants to work with them because of these new disclosure requirements. That number, at least the companies I am involved with, looks like a $30,000 to $50,000 a year cost, and not tremendous, but when you add it on top of the other costs, it continues to add up.

I think the thing that is interesting to me, and this is real time, so I don't really know where the SEC ends up coming down in terms of what has to be disclosed, but I know we are being asked to disclose the actual MBOs the named executive officers had to achieve. We have been asked to also disclose the actual targets.

Those goals and targets typically emit from the strategic plan of the company, which is sort of the most confidential sort of information, and also often relate to areas that the company is weak in.

To the extent that we are talking about areas where the company is weak, we are giving our competitors some information that they might find useful.

The thought I just wanted to lay out was whether in fact you actually end up having to disclose all this information or even just the questioning for it, it has the potential for some unintended consequences in terms of comp committees thinking about maybe we are better off with subjective comp plans in the first place if in fact we are going to do best practice and have the plans tied directly to

the objective measures of are we hitting our targets, which is what I think investors want.

We have already had discussions at both of these comp committees about if this is a disclosure requirement, do we really keep heading down this path.

I don't know if I'm a bit like Don Quichotte here sort of going on.

MR. BOCHNER: Why don't we transition --

MR. WHITE: I could probably make a comment or so. You have hit a couple of things that I guess I would like for everyone to hear on this.

On the 404 compliance point, first of all, we obviously hope that what we have done is going to result in significant improvements.

One of the things that I thought it was worth commenting on is the continued focus on whether there are going to be further extensions on 404. I am just repeating what has already been said. Since I know there are strongly felt views around here, I think I should repeat them.

We have no plans or expectations to extend the 404(a) management guidance requirement that comes into effect at the end of 2007. Obviously, there have been some legislative suggestions out there, but at least from the SEC's perspective, we have no expectation of doing that.

With respect to the audit requirement at the end of

2008, if you listened at the open meeting on the AS 5 approval back in July, there were two Commissioners who said they thought the audit requirement should be extended.

Chairman Cox said at the time that he wanted the staff to conduct a cost study with respect to the impact -- a cost study with respect to AS 5.

Obviously, that can't occur until people have used AS 5, which gets you to the end of March of next year.

The question of what we might or might not do with respect to the 404(b), the second part of the extension, and whether we might consider that, a further extension of that, obviously it needs to wait until that cost study is completed, at least in the view of the Chairman.

We have had a number of contacts with both the larger accounting firms and with a variety of companies that suggest that many companies are still going slowly on deciding -- moving forward on the management guidance part of this for the end of this year.

I guess I would just urge all of you who are advising smaller companies that at least from this building, we are not anticipating any extensions. If you want to do this in an efficient and effective way, you should be getting to work on the task that is at hand for the end of the year.

I guess I can't help on your executive comp remark. First of all, as I think you all know, we are expecting to

have a report out soon that is going to talk about our review process and what we are expecting.

Certainly with respect to targets, there is a long established process in there for confidential treatment. If you conclude the targets are material and thus would meet the disclosure requirements as part of the principles based CD&A discussion, there is a confidential treatment procedure that has been around for a long time and we are applying the traditional standards to that.

I think you missed a piece of it when you were describing that. Anyway, I couldn't help but to respond to both.

MR. CLOUGH: Clearly, there is. I just think in the real world, when you are dealing with these requirements, a lot of times the legal advice you get and the costs you run up, I think there is a tendency for management teams to ultimately cave or just to feel like there is a pressure to disclose.

The unintended consequence could be that instead, you let that impact your actual compensation plans versus really having the extended discussion. By the way, the extended discussion is expensive, because there is a lot of legal time involved in that.

When you think about MBOs, to me, I would think that those almost by definition are confidential. Why push

on the companies and make them go through that exercise.

MR. BOCHNER: Anna, how about 144? What do you think of the proposals to shorten the holding periods?

MS. PINEDO: Again, I think it is extremely helpful. I think it will be a great improvement to the capital formation process. I think shortening the holding period to six months will change the dynamics of how, for example, private transactions/PIPEs are priced, and will change the landscape in terms of the relative discounts to market from a public deal/private deal.

I also think from a practical perspective, a number of the proposals are going to be very, very useful for just practicing lawyers, simplifying the forms, possible combination of forms. I think that is enormously helpful.

I think codifying the interpretations is great because I know as a practitioner, having to go through all of those no action letters is very, very frequently a painful process, and so having the codification of at least what we have all come to accept as the basics in the 144 area will be very helpful.

I think the biggest problem with the 144 release, and I hope it doesn't over shadow the very positive aspects of the proposal, is the re-introduction or proposed re-introduction of tolling.

I know in many ways, how the release was written,

it sort of puts it out there as we are shortening it to six months, at worse, you will be no worse because it will just be a year if you have hedged.

I think looking at it from that perspective is really a big shortsighted and doesn't take into account the enormous derivatives market that exists in the U.S., and doesn't take into account the complexity just from a procedural perspective policing what would be required, if tolling were to be re-introduced.

I guess several things to say on tolling. I think as many commentators have suggested, the SEC hasn't pointed to any harms or abuses that have resulted as yet, so is it warranted to re-introduce tolling. Is it warranted to re-introduce it given the effect that it is likely to have.

It will make the derivatives market in the United States uncompetitive. It will significantly affect the 144(a) market.

I think from a different perspective, the SEC has always been reluctant to make a determination, and I think this was considered in the 1995 and 1997 releases on 144, and all the comments, at that time, Securities Industry Association's comments, and now the letter which I participated in the drafting of.

I think what all those letters make clear is that there are a variety of products out in the market, a variety

of hedging techniques and trading strategies, and there is no reason necessarily for the SEC to step in and to make a determination about what an appropriate level of risk is in holding a security.

I think that the SEC has always sort of intelligently stayed away from making a determination about how much risk one has to have and what measure of risk would sort of constitute continuing to hold a security, and having a valid holding period.

I think the put equivalent position definition is really over broad, and is going to just take a number of transactions that really don't constitute a sale, that simply mitigate risk, and make those into a sale.

I also think it just mucks up the whole area. In many ways, what the release sort of shorthands is hedging equals a sale, and hedging doesn't equal a sale. I think there is lots of case law out there showing that courts agree, that a hedge is not necessarily a sale.

Just from a practical perspective, I think the other vantage point to consider is we are doing all of these very positive things to improve capital formation and make capital formation more streamlined and more effective and make our markets more efficient.

We are going to make a broader number of companies eligible to use S-3. That is a great thing. We are going to

shorten the holding period. That is a wonderful thing.

At the same time, if you make hedging more expensive, how is that going to affect the market. If you can't hedge a restricted position, which again is something that in principle the SEC has not had problems with, and the SEC has constantly reiterated that is both permissible and lawful. How is that going to affect the economics of the marketplace?

I think again it is another one of those situations where there are lots of other means available for the SEC to police the activity that is troublesome.

Without a doubt, there have been a number of very widely reported instances of sort of manipulative shorting activity, particularly affecting small cap companies. I think the SEC Enforcement Division has been very active on this front.

I think what began as the hedge fund investigation and morphed into the PIPE investigation and morphed into the insider trading investigation, I don't even know what investigation we should call it now, but the SEC's look into manipulative trading practices and the regulations on shorting and market regs' activities in the shorting area are sufficient and appropriate.

Finally, I think that if the SEC were to go with the re-introduction of tolling, there is a plethora of issues

that the release doesn't even begin to address.

Since many of our clients are investment banks and we advise them both on their third party activities as well as on their proprietary trading activities, I can tell you they are all very concerned about tolling, whether aggregation is going to be required for all proprietary interests in institution, how different countervailing trades are going to be considered, how the transactions in the trading around a 144(a) for the underlying, not the covered or subject security, are going to be treated.

It is going to introduce so much confusion in the marketplace that it may outweigh the clear benefit of just shortening the holding period to six months.

MR. BOCHNER: On that point, you are saying that if there is a private equity arm of an investment bank that happens to be in a restricted security, it may also be engaging in stabilizing transactions or hedging transactions, and you are saying it is going to be practically difficult to track?

MS. PINEDO: That is just one little piece of it. Converts are an active part of the market. I think many investment banks have very active convert desks. You wouldn't consider that the proprietary fund of a bank, because it's not. It's just that desk, as well as arbitrage trading desks and other desks.

They are clearly holding for investment. They are also making markets, and they are doing a number of different things. If you're going to -- just from a compliance perspective -- if you're going to aggregate all of that trading and attempt to figure that out, then I think that is going to be from a practice perspective very, very difficult to enforce.

MR. BOCHNER: I suppose, Gerry, from a regulatory perspective, I guess this all comes from Section 404 and the concern about 144 is an exemption for a safe harbor for not being an underwriter, and not being an underwriter means the securities come to rest and you take market risk.

In your perspective, is that a valid concern? Are we in a day and age when if you buy a restricted security, you may be hedging out there, but as a practical matter, six months is a long time. The economics may be a little different.

MR. O'CONNOR: I think essentially -- let me get to my conclusion first so you know where I'm going with this.

I would wait on tolling. I would urge that this regulation, like the others we have discussed, be done incrementally, put in the reduced holding periods, put in the different treatments for affiliates and non-affiliates, and observe the market to see if it appears that we then need to introduce or re-introduce tolling.

I would take it one step at a time. I'm not convinced we are going to have a problem.

You cannot use the restricted securities while they are legended in restricted to cover your short. Again, at the risk of over simplification, I think that is good enough.

You have those securities. They are not fungible. They are in your hands as legend restricted securities. Your broker is unable to sell them into the market through a DEWAC because your counsel will not give you an opinion.

If you do have a short position and if you need to cover that short position, you can't use your 144 securities until the holding period has expired.

I think at least for the time being, until it emerges that we do have a problem that was unanticipated with people misbehaving in some manner, I would let that aspect of it speak for itself and see where it goes.

MR. BOCHNER: Cromwell, any thoughts about this?

MR. COULSON: Sure. Just a quick one again. I do think the tolling approach may not be the best approach, but you really do want people if they are doing a private placement making an investment decision rather than what I can get out of the liquidity decision and how that is accomplished is better for the staff to figure out.

I think 144 is a great rule, except for where it really drops off at non-reporting companies.

If you look at the most successful growth market, the AIM, essentially on marketing, but very few of their companies have over 500 shareholders.

With the Rule 144 proposal, sadly, it is driven off Rule 15c2-11 for information requirements. That rule, for those who don't know it, is a rule of what a non-affiliated broker-dealer, the information they can publicly collect from an issuer who they don't have a relationship with, and review before they start a market in a security.

To use those disclosure requirements for what insiders should provide into the market is really driving the car backwards. The unaffiliated broker-dealer has less access to and less ability to produce the information that the market needs, and I would say the information required under 144 now and as proposed, because they didn't change it, really doesn't cover companies/insiders under 10b5. There is just not enough information for a rational investor to be protected.

On the other side, the Commission, they see reporting issuers when they file, and they see non-reporting issuers when they are suspended by Enforcement. There is this great cliff that drops off in to the unregistered world.

Fleshing out what disclosure should be out there and how it can be made available is really going to bring up to a level these smaller companies and provide a lot more

information for investors, number one, but number two, regulators.

I know from our disclosure service, as we start pushing our disclosure and Pink Sheets companies that are non-reporting, one of the most avid users has been the SEC's Division of Enforcement. That's a good thing.

The best merit review should slowly die off or quickly die off, and the best is consequences on the enforcement side, as Anna said. That is the other piece of 144 I find troublesome, the completely unequal treatment of non-reporting former shell companies, because they can't use 144. Most of us would agree that any technology start up is probably a shell company.

If you are in your garage, you have an idea. I'm going to go make computers. I'm going to make this software. I need to go get some money. You're a shell company pretty much.

There is this whole nefarious world out there of people who have business development companies, businesses in a box, and they are very problematic because there is a world of opinions of what is one, and it seems you can say you're not a shell company or you are, but truly, I think 144 should be available to non-reporting companies after they have had an audited financial report, which shows they are no longer a shell company.

You might even raise the standard a little higher, which is they are not a business development company, development stage company, because that is something the accountants will vouch on. It shouldn't be a former business that was a shell company because it is a legitimate transaction to bring companies into the public market, and is supported in other growth markets outside the United States by the regulatory systems.

I think we filed the longest comment letter on 144 by number of pages. You can hear more of our thoughts from that.

MR. WHITE: I actually read it last night on the exercise bike. It was very exciting and long.

PARTICIPANT: Gerry?

MR. O'CONNOR: I agree that the 15c211 piece for non-reporting companies is a little bit of a strange piece of 144. In my practice, I very, very seldom see companies doing 144 deals and relying on some market maker out there with 15c211, almost invariably, 144 -- we are the ones who have to get the legend off and the transfer agent is unlikely to facilitate the transaction without that opinion.

We are very weary of giving a 144 opinion on a non-reporting company. I think that is a little bit of a black hole of 144 which otherwise is a very sound rule and a very effective rule.

I would give some consideration. I would urge some consideration of Cromwell's proposal.

I think if a company wants to, and it is the company that decides to engage in a transaction that is meant to meet the requirements of 144, then it is not unfair to ask the company to get some information and be responsible for its own information.

One other comment on 144. I have always thought, and when I train junior lawyers about 144 practice, I say it is two rules in one really. It is a rule about a kind of securities and it's a rule about a kind of security holder.

That confusion is eliminated a little bit by the proposed release, but I would go a little bit further and say we are talking about restricted securities which are securities issued in a private placement to non-affiliates, and we are talking about controlled securities, which is every kind of securities an affiliate can hold.

Here are the rules for restricted securities, and here are the rules for controlled securities.

As a follow on to that, I think you can probably see the day coming pretty quickly where you can get rid of the form. If you're talking about a form that has to be filed only by Section 16 persons, which I think are pretty close if not directly overlapping, then I think you can revise Form 4, something like a statement that you are 144

compliant or what have you.

I think the Form 144 is a good way to screw up a good 144 resale because you won't get the opinion if you forget to file the form before you sell, so it exists only to screw up otherwise innocent and compliant trades, as far as I'm concerned. You could get the information out there in the electronic Form 4.

The other thing that happens with Form 144 is that the media and the people watching the stock misinterpret it, and they think well, he sold a bunch more stock, after all, he filed the Form 144, and then you see the Form 4s as well.

I think there is a lack of sophistication among a pretty large percentage of the people who track these smaller public companies as to what you are disclosing on the form.

There are a couple of issues for you.

MR. COULSON: I completely agree, but the one point that would be very nice is again for non-reporting issuers to be able to use the Form 4, and also bringing in the idea -- what we have seen quite often is companies that have gone dark so far because Sarbanes-Oxley hasn't kicked in, we are going to see a different group when it actually costs some money. A lot of them have used the chance to go dark to try to buy out their shareholders.

We think for non-reporting companies, there needs to be another side. It shouldn't just be selling. It should

be buying. That's a point. The Form 4 should really fit any company when the insiders are transacting in the market.

PARTICIPANT: Phil, did you have any comment? We are going to move on.

MR. CLOUGH: I would just comment that the shorter holding periods would be much appreciated and potentially is an opportunity to have transactions occur with lower fees to underwriters.

MR. BOCHNER: It sounds like the panel likes it, but we have concerns about hedging. We think maybe eventually the Form 144 ought to go away and be condensed with a Form 4 if possible, and then, Cromwell, your 15c2-11 concern about having more information when affiliates sell unlisted securities.

Why don't we move now to the smaller reporting company regulatory release. This is also an Advisory Committee recommendation that was picked up by the SEC in a rule proposal, to basically bring the accommodations afforded what we have called S-B filers in the past to a larger category of smaller public companies.

The SEC has proposed essentially a combining of what's been referred to as non-accelerated filers and S-B filers into one group called smaller reporting companies, and these would be given essentially the S-B accommodations, and all the S-B forms would effectively be eliminated, and there

would simply be an S-K, another line item for companies that meet the smaller reporting company threshold.

Anna, why don't you kick us off on thoughts about that proposal.

MS. PINEDO: Sure. Generally, I think it's a good proposal. I think it will help. I think eliminating the S-B forms probably does reduce unneeded duplication and the forms certainly can be combined.

I think the sort of ala carte approach, picking and choosing what you comply with, what you don't comply with, I think that will introduce some element of confusion. Here again, I wonder whether it wouldn't be more appropriate to shift some of the criteria for when a company is subject to review to favor smaller companies over larger companies, largely companies with a significant market cap have fewer disclosure issues.

If you're trying to reconcile the availability of good public information in order to justify expanded eligibility for S-3 and shortening 144, then I think it is kind of incumbent upon the staff to look at more of the registration statements for smaller public companies.

On the whole, I think it is a worthwhile change. I think it is good to get rid of the S-B forms. I would venture to guess that they aren't used as much, and in our practice when we do run across a small business filer, they

tend to provide more information than the form actually requires when they can, and that is simply because marketing almost seems to require that.

MR. BOCHNER: John?

MR. WHITE: I guess we thought in the proposal that we were following a recommendation of the Committee in terms of eliminating the S-B forms. We thought we were doing a good thing.

There are some comment letters at least that suggest we should keep the S-B forms or at least phase them out over time and so on. And maybe we weren't doing a good thing.

I guess I would be curious as to some thoughts on that.

MR. O'CONNOR: Why don't I take a crack at responding to that, as a practitioner who deals a lot with S-B filers.

I liked just about everything about this proposed rule, and I would adopt it pretty much as written. I will go through in a little more detail the reasons.

My experience is a little bit different than Anna's. Our S-B clients use Form S-B, they disclose under the more limited, more plain English instructions for disclosure. They do so because it is cheaper to do. It takes less legal review. A little easier to write. It gives

the accountants less to review and spend time on.

I think overall, when clients have been eligible to use S-B or shift into the S-B system, it is sort of one of the few bright spots on an otherwise bleak financial horizon.

On the good side, you can use S-B. We have had clients use S-B quite a bit when they are eligible to do so.

To address one comment that came through a few of the comment letters, which is to add a second audited balance sheet. I don't have a big problem with that. I think it is frequently available anyway to do the comparisons between the operating periods.

I think if the staff were to respond to that set of comments favorably, that wouldn't trouble me very much, and I don't think it would be a major imposition on the smaller reporting companies.

I like the pick and choose category of disclosure, option for disclosure. I think if a company wants to comply with the lighter MD&A/CD&A available to smaller reporting companies, that is a great idea for a lot of the reasons Phil alluded to.

I think people are having a tremendously difficult time with CD&A. If you can disclose on a more truncated, straightforward basis, that is a big win for companies that fall into the smaller reporting company category. If a company wanted to make fuller disclosure, that is already an

option that is available to a company.

I like the idea of having one form, and I think it will be easier to work with CFOs and people drafting the document. I think it will be easier to train the lawyers and accountants that assist companies in compiling and reviewing these documents.

I like the idea of having one set of forms and one disclosure rule that you can go through and figure out what to do item by item. I think that is a good idea.

Public float. We have talked about public float in a number of ways this morning. I think I'd prefer to see a market cap cut off, because it's easier. One of the comments that I was going through a couple of days ago said we should stick with public float because market cap was too uncertain and it introduced a level of market uncertainty, which I don't understand because I think you start with market cap and all those uncertainties, and then you apply another layer of analysis to get to what the public float is.

If we are going to use public float, I would suggest simplifying and making the definition a little bit easier. Use something like your executive officers and directors plus holders of more than ten percent of your stock. It is a pretty simple way to figure it out as opposed to who is an affiliate and who is not an affiliate, and the head spinning that sometimes results.

If we are going to use a public float threshold, then I would try to make it more mechanical and less subject to any subjectivity or doubt whatsoever.

Finally, on indexing, I think indexing is a good idea. I think we should keep all of the indexing consistent so the accelerated filer, well known seasoned issuer, and smaller reporting companies, you don't have gaps or overlaps.

Again, this is all around the edges stuff. I think inherently it is sort of one of those ideas that we say why didn't we think of this a long time ago. I think this is a good one.

MR. BOCHNER: You have reduced the complexity of regulation, reduced the costs for a larger category of smaller public companies by providing these accommodations to that larger category, and you have eliminated what we heard out there when the Advisory Committee existed of sort of a stigma of using S-B.

Those all sound like good things to me. I think it's a good thing, to answer your question.

The answer to this may be sort of this incremental change and towing the water kind of thing, but the Advisory Committee was intrigued with the idea for a much broader category of what we called smaller public companies going up to the six percent of the U.S. market cap companies with market caps at least at that point of around $780 million of

providing essentially the financial statement accommodations that are currently provided to S-B filers, hopefully soon to be provided to smaller reporting companies available to that category of issuer, too.

That may be something that the SEC wants to keep its eye on, whether there is a way, again, with all of the efficiencies of incorporation by reference and the way we can all get information on the Internet, are there ways that we can simply link to other filings, link to already audited financial statements, maybe eventually link to web sites as opposed to paying lawyers and accountants and others to assemble these documents.

Maybe we can just go down the row since we are down to our last couple of minutes, if anybody has any parting thoughts on simplifying and making more cost effective public company reporting for these issuers.

John, did you have any thoughts?

MR. WHITE: Just one comment on what you just said. I'm not quite sure how this follows from the earlier panel when we were listening to all the different accredited investor and so on definitions.

At least in this area, we have three definitions, large accelerated filer, accelerated filer, and non-accelerated filer, that we have figured out and works pretty well for us.

Again, just expressing my personal views. I guess I don't find a lot of excitement to move away from three definitions that work pretty well, and actually draw lines not too far off from the same lines you were drawing under the Advisory Committee report.

If I understand it right, the work that our Office of Economic Analysis has done, whatever it was, 125 million or thereabouts, really equates in almost all cases with 75. I guess I haven't heard whether the 787 equates with the 700 or not. I assume it probably is in the same ball park.

From our perspective, using the three definitions works well.

MR. BOCHNER: The question is over time, will you extend some of these accommodations and others as we get experience with it, sort of up from the new smaller reporting company level up to maybe larger categories of a dozen apparent investor protection, such as having the same sort of financial statement accommodations.

MR. WHITE: If Gerry is going to send us away, I did want to thank this panel and everyone on the prior panel.

This has been particularly helpful for me personally at this juncture to hear all of the remarks on both panels.

Thank you all for attending.

(Applause.)

(Whereupon, at 12:30 p.m., the roundtables were concluded.)