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November 18, 2010

Gerald J. Laporte
Chief, Office of Small Business Policy
Division of Corporation Finance
U.S. Securities and Exchange Commission
SEC Office of Small Business Policy
100 F Street, N.E., Room 3650
Washington, D.C. 20549-3628

Re: ICBA's Comments to the SEC Government-Business Forum on Small Business Capital Formation

Ladies and Gentlemen:

The Independent Community Bankers of America[1] ("ICBA") represents nearly 5,000 Main Street community banks. Throughout the financial regulatory reform process, ICBA has supported strong reforms that hold accountable Wall Street and systemically dangerous financial firms and unregulated entities whose risky behaviors led to the financial crisis. The present financial and economic crisis clearly demonstrates that reform of Wall Street is needed to prevent this kind of catastrophe from ever again harming our nation's taxpayers and our communities. In passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Congress created an important precedent that recognizes two distinct sectors within the financial services spectrum-Main Street community banks and Wall Street megabanks. Congress' willingness to differentiate between community banks and large banks in important areas such as the FDIC assessment base, stricter oversight of too-big-to-fail institutions and protection for trust preferred securities will save community banks money and allow them to better compete, serve their communities and promote economic growth in their markets. These provisions of the Dodd-Frank Act establish the congressional policy for

[1] The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold $1 trillion in assets, $800 billion in deposits, and $700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

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tiered regulation that recognize Main Street community banks as having a different banking model from large and internationally active institutions.

Now that the Dodd-Frank Act has become law, ICBA will work to fix problem provisions in the legislation and minimize any additional burdens on community banks as regulations are written and implemented so community banks can continue to serve the needs of their local customers and do not continue to pay the price for an economic crisis they did not cause. While the many new banking regulations that will result from the mandates set forth in the Dodd-Frank Act are a primary concern of community banks, the rules of the U.S. Securities and Exchange Commission (the "Commission") applicable to publicly traded financial institutions are also vitally important as they have a direct impact on the small business capital formation. With the future advent of new, more stringent regulatory capital requirements required by the Dodd-Frank Act and the implementation of capital proposals of the Basel Committee on Banking Supervision ("Basel III"), many of the nation's community banks will be forced to access the capital markets over the next several years if they are to continue to meet the needs of their local communities and serve as an engine for economic recovery and growth. At this critical time, it is more important than ever that the rules of the Commission follow the lead established by Congress and differentiate between large banks and community banks in instances where new disclosure requirements could unduly burden community banks and other small issuers and inhibit small business capital formation. The Commission's rulemaking to implement the corporate governance provisions of the Dodd-Frank Act provide the Commission with a first opportunity to ensure that the capital formation process remains open to community banks.

Corporate Governance Requirements of the Dodd-Frank Act

The Dodd-Frank Act includes several corporate governance provisions, each of which could have a disproportionate burden on publicly-traded community banks and other smaller reporting companies.

1. Separate Votes on Certain Compensation Matters. Section 951 of the Dodd-Frank Act requires public companies with a class of securities registered under the Securities Exchange Act of 1934, as amended (the "Exchange Act") to give their shareholders a "say-on-pay" by including a separate, non-binding proposal allowing shareholders to vote on the compensation of executive officers at least once every three years, beginning with the first meeting of shareholders held after January 21, 2011. Section 951 of the Dodd-Frank Act also requires every proxy statement seeking a shareholder vote to approve an acquisition, merger, consolidation or proposed sale of all or substantially all of a reporting company's assets to include a to-be-prescribed form of disclosure regarding any agreements or understandings with any named executive officer of the seller concerning any type of compensation (whether present, deferred or contingent) that is based on or otherwise relates to the transaction and the aggregate total of such compensation. The proxy statement must also include a separate shareholder resolution to approve such arrangements, understandings or compensation as disclosed, unless they have been the subject of a prior annual, biennial or triennial say-on-pay vote.

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As with many provisions of the Dodd-Frank Act, many of the specifics of what must be included in "say-on-pay" and "golden parachute" proposals were delegated to the Commission to handle through its rulemaking process. The Dodd-Frank Act expressly permits the Commission, by rule or order, to exempt an issuer or class of issuers from the requirement to include say-on-pay and golden parachute votes in certain proxy statements and directs the Commission to take into account whether these requirements "disproportionately burden small issuers."[2]

Despite this directive, in its proposed rule, the Commission has proposed not to exempt smaller reporting companies from the say on pay or golden parachute votes, stating that it does "not believe our proposed rules would impose a significant additional cost or disproportionate burden upon smaller reporting companies**."[3] ICBA strongly disagrees with this conclusion and urges the Commission to reconsider this position in the final rule.** The Commission has acknowledged that "compensation arrangements of smaller reporting companies typically are less complex than those of other public companies."[4] In doing so, the Commission has established scaled disclosure requirements set forth in Item 402 of Regulation S-K for smaller reporting companies and do not require smaller reporting companies to provide a Compensation Discussion and Analysis or CD&A. **Despite the Commission's preliminary conclusion to the contrary, the fact remains that requiring separate votes on say on pay and golden parachutes *does* add significantly to the already onerous disclosure burden that publicly-traded community banks and other small issuers face.** In addition, the proposed rules create a new requirement to quantify golden parachute arrangements in merger proxies even though smaller reporting companies are not required to provide this quantification under current Item 402(q) in annual meeting proxy statements.

2. New Executive Compensation Disclosure Requirements. Section 953 of the Dodd-Frank Act directs that the Commission require companies to provide additional disclosures with respect to executive compensation. In particular, Section 953 requires the Commission to:

- *Pay versus Performance*: amend its disclosure rules for proxy statements to require a disclosure of the relationship between compensation actually paid to named executive officers and the financial performance of the issuer, taking into account changes in stock price, dividends and other distributions;
- *Internal Pay Equity*: amend its regulations to require that any prospectus, proxy statement or annual report filed with the Commission include a disclosure of (a) the median of the annual total compensation of all employees of the issuer (other than the chief executive officer), (b) the annual total compensation of the chief executive officer, and (c) the relationship between the foregoing amounts; and

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[2] See Section 14A(e) of the Exchange Act.
[3] SEC Release Nos. 33-9153; 34-63124; File No. S7-31-10 dated October 18, 2010.
[4] See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1. The scaled compensation disclosure requirements for smaller reporting companies are set forth in Item 402(1) [17 CFR 229.402(l)] through (r) [17 CFR 229.402(r)] of Regulation S-K.

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- *Hedging By Employees and Directors*: amend its proxy disclosure rules for annual meetings of shareholders of reporting companies to require a disclosure regarding whether any employee or member of the board of directors, or their designees, is permitted to purchase financial instruments (such as prepaid variable forward contracts, equity swaps, collars and exchange funds) that are designed to hedge or offset any decrease in the value of equity securities of the issuer granted by the issuer as compensation or held directly or indirectly by the employee or director.

These new requirements would require complex financial calculations and, in the case of Internal Pay Equity compensation disclosure, potentially significantly expand the universe of persons subject to, indirectly or directly, executive compensation disclosure requirements. In addition, it is unlikely that officers or directors of community banks would be engaged in hedging activities in connection with their compensation packages. As discussed in significant detail above, the Commission has acknowledged that compensation arrangements of smaller reporting companies typically are less complex than those of other public companies, has established scaled disclosure requirements set forth in Item 402 of Regulation S-K for smaller reporting companies and does not require smaller reporting companies to provide a CD&A.[5]

3. Clawback Policies. Section 954 of the Dodd-Frank Act expands Sarbanes-Oxley Act's rules regarding clawbacks of executive compensation by requiring that listed companies be required to disclose their policies for incentive-based compensation that is based on information required to be reported under the federal securities laws. It also requires that listed companies' policies require the recovery from any current or former executive officer (regardless of culpability) of any incentive-based compensation (including stock options awarded as compensation) received by the executive during the three-year period preceding the date on which the issuer is required to prepare an accounting restatement due to any material non-compliance of the issuer with any financial reporting requirements under the securities laws, based on erroneous data, to the extent the compensation exceeds the amount that would have been paid under the accounting restatement.

Despite the fact that they had nothing to do with the financial crisis, community banks are already having great difficulty in attracting and retaining qualified officers given the perceived hostile regulatory environment and the prospect of FDIC litigation and personal liability for officers and directors of failed banks. Officers of community banks generally earn compensation far, far less than larger institutions. **Given this lower compensation level, the enhanced prospect of a compensation clawback would make it even more difficult for community banks to attract and retain qualified officers**. **The clawback provisions could also make privately held community banks reluctant to become publicly-traded companies**

[5] See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1. The scaled compensation disclosure requirements for smaller reporting companies are set forth in Item 402(1) [17 CFR 229.402(l)] through (r) [17 CFR 229.402(r)] of Regulation S-K.

and, in doing so, inhibit their access to capital at a time when banks need capital most.

4. Proxy Access. Section 971 of the Dodd-Frank Act affirmed the Commission's authority to promulgate a so-called "proxy access" rule pursuant to which shareholders would be allowed to use the company's proxy statement to nominate candidates to the board of directors. New Rule 14a-11, the centerpiece of proxy access, was finalized by the Commission on August 25, 2010 and gives shareholders or shareholder groups that have collectively held both voting and investment power of at least 3% of a company's voting stock for three continuous years the right to use a company's proxy statement to include their nominees for up to 25% of the company's board of directors (but no less than one director).[6] While Section 971(c) of the Dodd-Frank Act specifically provided the Commission with the authority to exempt an issuer or class of issuers from requirements adopted for the inclusion of shareholder director nominations in company proxy materials and instructed the Commission to take into account whether such requirement for the inclusion of shareholder nominees for director in company proxy materials disproportionately burdens small issuers, the Commission chose to delay the implementation of the new rule until November 15, 2013 for smaller public companies rather than exempting such issuers from the requirements.[7]

Despite the fact that they had nothing to do with the financial crisis, community banks are already having great difficulty in attracting and retaining qualified directors given the perceived hostile regulatory environment and the prospect of FDIC litigation and personal liability for directors of failed banks. The enhanced prospect of a proxy contest would make it even more difficult for community banks to attract and retain qualified directors in the current challenging economic environment at a time when the industry needs them most. As is also the case with respect to the clawback provisions, it could also make privately held community banks reluctant to become publicly-traded companies and, in doing so, inhibit their access to capital at a time when banks need capital most to rebuild the strength of their balance sheets.

ICBA believes that the discussion above presents a compelling case that the corporate governance provisions of the Dodd-Frank Act disproportionately burden community banks and other small issuers. Accordingly, the Commission should use the authority expressly delegated to it by Congress to exempt community banks from such corporate governance provisions through its rulemaking authority. The Commission has had the wisdom and courage to differentiate between types of issuers before when it postponed the effectiveness of Section 404(b) of the Sarbanes-Oxley Act for non-accelerated filers. The Commission's decision was ratified by Congress in Section 989G of the Dodd-Frank Act which added a new Section 404(c) to the Sarbanes-Oxley Act providing that Section 404(b) of the Sarbanes-Oxley Act shall not apply with respect to any audit report prepared for an issuer that is neither an accelerated filer nor a large accelerated filer as defined in Rule 12b-2 under the Exchange Act. The Commission adopted amendments to its rules and forms to conform to this new Section

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[6] SEC Release Nos. 33-9136; 34-62764; IC-29384; File No. 57-10-09 dated August 25, 2010.
[7] Id.

404(c).[8] The Commission should not hesitate to utilize the discretion that Congress has explicitly delegated to it to minimize the regulatory burden on publicly-traded community banks. Doing so would significantly enhance the capital formation process.

Shareholder Thresholds for Registration and Deregistration Under the Exchange Act

As discussed above, with the future advent of new, more stringent regulatory capital requirements required by the Dodd-Frank Act and the implementation of Basel III, many of the nation's community banks will be forced to access the capital markets over the next several years if they are to continue to meet the lending needs of their local communities and serve as an engine for economic recovery and growth. In the discussion of exempting community banks from many of the new corporate governance and executive compensation provisions of the Dodd-Frank Act set forth above, we made the case that the imposition of new requirements would disproportionately burden publicly-traded community banks and other small issuers. We also made the case that the new requirements could make privately held community banks reluctant to become public companies and thereby inhibit the capital formation process. But the Commission can do more than use its delegated rulemaking authority to limit the applicability of new and burdensome requirements on publicly-traded community banks and other small issuers. **It can also proactively take steps that would enhance the access to capital for thousands of companies around the country (including but not limited to community banks) by updating the shareholder threshold above which companies must register a class of securities under Section 12(g) of the Exchange Act from the current 500 to 2,000 and increasing the shareholder threshold below which companies may de-register a class of securities under Section 12(g) of the Exchange Act to 1700.**

The current 500 shareholder threshold for registration is artificially low and deters many community banks from raising capital for fear that they will exceed the 500 shareholder threshold, be compelled to register under the Section 12(g) and incur the significant burden and expense associated with being a public company (some of which are discussed earlier in this letter). Unlike the Wall Street megabanks, community banks do not have the expense platform to absorb these costs and, as such, life as a public company is disproportionately expensive for community banks compared to larger institutions. Likewise, increasing the shareholder thresholds for deregistration would free many publicly-traded community banks from the significant cost of Exchange Act compliance, thereby making them more profitable, better able to raise additional capital when needed, and enhancing their safety and soundness. Many community banks would save annually over $100,000 if the shareholder threshold was raised.

It is important to note any change in the shareholder thresholds would not harm investors. Community banks, like all banks, are part of a highly regulated industry governed by numerous federal and state laws and regulations. Each community bank is supervised by one or more federal regulators at the bank and holding company levels, and

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[8] SEC Release Nos. 33-9142; 34-62914 dated September 15, 2010.

in the case of state-chartered banks, at least one state regulator as well. Every community bank files detailed publicly available financial reports with one or more federal regulators each quarter. All banks are required to make annual reports, including audited financial statements, available to their customers and investors.

Updating the shareholder threshold requirements under the Exchange Act would have a tremendously positive impact on capital formation. Such a change would also be consistent with the findings of this forum's November 20, 2008 Final Annual Report, which recommended that the Commission "provide relief to smaller banks and bank holding companies by increasing the Section 12(g) registration thresholds for those entities." The shareholder thresholds have not been updated since 1964. In this critical time, it is high time to change them.

ICBA appreciates the opportunity to comment on the SEC's recent proposals under the Dodd-Frank Act and to make recommendations on ways to improve small business capital formation. If you have any questions about our letter, please do not hesitate to contact me at 202-659-8111 or Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Senior Vice President and Senior Regulatory Counsel