

Securities and Exchange Commission

Advisory Committee on Smaller Public Companies

Opening Statement of David N. Feldman, Managing Partner, Feldman Weinstein LLP

Ladies and Gentlemen, members of the Advisory Committee and distinguished guests. I am David Feldman, Managing Partner of the Manhattan law firm Feldman Weinstein LLP. Our boutique 19-attorney firm represents issuers, investment banks, investors and dealmakers primarily in combination and financing transactions, including reverse mergers and so-called PIPE transactions. Among other things, we have the unique distinction of having completed more PIPEs representing investors than any other law firm in both 2003 and 2004. We also represent a number of publicly-held entities in their periodic and other reporting obligations. I am honored to be here today to express my views on the direction and agenda of the Advisory Committee.

In general, I believe the Committee is setting the right tone and seeks to focus on the main primary areas which are ripe for attention. My hope is simply to ensure that the Committee looks especially closely at the smallest public companies, those under \$100 million in market capitalization, or less than \$100 million in revenues, and not adopt too broad a definition of "smaller public company" so as to dilute the interests of those most in need of assistance, namely the smallest of the small.

Some argue that these "smallest" companies probably should not be public in the first place, since they would not qualify for a traditional initial public offering. I strongly disagree, and believe that other methods of going public, such as a "self-filing" of Form SB-2 or Form 10-SB or a reverse merger, are legitimate and acceptable methods of obtaining a public market for an issuer's securities.

In the end, any company, of any size, seeking to grow by acquisition using publicly traded stock as currency, reward executives with valuable stock options, seek greater and easier access to capital or simply provide liquidity to founders and investors, can benefit from being publicly held as part of a long-term strategy. Congress, the Commission and the Committee, I hope, will seek ways to ameliorate the more draconian burdens on these smallest companies to improve their opportunities for growth through a publicly trading stock, rather than simply "write them off" as not needing protection from those who believe they were premature in going public in any event.

Many of the foci of the Committee, including reviews of the challenges in the areas of internal controls, corporate governance, statutory and regulatory burdens and periodic filings and SEC registration forms, are strongly applicable to these smallest public companies as well. However, the burden on a \$50 million, growing profitable public company of, say, developing,

testing and maintaining internal controls is much more significant, in terms of its relative impact on and cost to the organization, than the burden on a \$200 million company in a similar situation. In addition, some of the challenges faced by all smaller public companies in the area of capital formation apply even more so to the smallest. Thus, while the topics chosen are generally of significant importance to all manner of “smaller” public companies, I am hopeful that the Committee will seek to distinguish even within the smaller group to analyze the effect on the smallest.

There are five specific areas that I respectfully propose the Committee include in its focus beyond or within the items included in the proposed agenda, as follows:

1. Form 8-K reporting: In many cases it is difficult for a smaller (or smallest) public company to bear the cost of constantly monitoring its compliance with the new 4-day 8-K reporting requirements. I believe the Committee should review whether smaller companies should be provided the opportunity for additional time, or the right to extend the time in certain situations (comparable to Rule 12b-25) so as to avoid inadvertent noncompliance or particularly burdensome costs, such as “speedier” Edgar filing services.
2. Regulation S-B: In sum and with due respect to the authors of Regulation S-B and their intentions, I do not believe there are valuable or significant differences between Regulation S-B and Regulation S-K, other than the one additional year of financial reporting under Regulation S-K, which is really only a burden in the year a company goes public. I believe the Committee should review the possibility of a major overhaul of S-B with a view to more clearly streamlining the disclosure process for smaller companies, focusing more on materiality of disclosure as it does under Regulation D offerings to non-accredited investors and less on rote disclosure of categories of information that have no significance to a particular company.
3. Short-form Registration: I believe the Committee should look at streamlining the concept of “seasoned issuer” for eligibility for short-form registration. A strong company that has been public for a year or two and just happens not to have significant market capitalization, but which has been following all applicable rules and making all necessary disclosures, should be as able to avail itself of short-form registration to improve its ability to raise capital.
4. Improving the Pink Sheets: Many “non-reporting” companies’ securities trade on the Pink Sheets LLC, and I am pleased that

Cromwell Coulson is here today to talk about it so I will be very brief. There remains, in my view, significant fraud in this market. I propose, in order to improve the confidence of investors in the Pink Sheets, that the Committee seek rule changes. These rule changes should, in my view, begin the process of requiring minimal public filings by these issuers. For example, I believe that most pink-sheet traded companies do not, in fact, provide to market makers the information required by Rule 15c2-11. One change could be to require these issuers to file that information with the SEC or with a Pink Sheet-controlled website so that any investor may easily obtain the information, and so that compliance can be monitored better by the Pink Sheets and by the Commission staff. In addition, I suggest requiring the reporting of insider trading and stock accumulation by making Section 16(a) and Section 13(d) applicable to pink-sheet traded companies even if not registered under the Securities Exchange Act of 1934.

5. Capital Formation: I believe a key area of focus in capital formation is the treatment of brokers and finders. I am hopeful that the Committee can assist in providing stronger guidance to practitioners and issuers as to the treatment of these critical intermediaries. For example, staff guidance has not always been consistent with regard to the definition of a finder. I also believe broadening exemptions from registration will significantly aid in the growth of these companies. For example, Regulation D should be broadened to permit larger numbers of non-accredited investors so long as disclosure and non-general solicitation requirements are met, protecting these investors. I also believe the Committee should examine the effective prohibition on conducting private offerings while a public offering registration is pending. Technically, private offerings may continue through financial institutions, but this does little to help a small company seeking to "bridge" its operations through a public offering. These private offerings should be permitted so long as the investors are accredited and general solicitation is avoided other than through the filing of public offering registration statements.

In conclusion, I believe the Proposed Agenda represents a very positive step in analyzing the dizzying array of burdens, requirements and brick walls which are making it more and more difficult for the smallest public companies to see benefit in remaining public, or going public in the first place for that matter, despite the benefits to be gained in many cases. If the goal of the Committee is to make going public more attractive, this Proposed Agenda represents an excellent place to start.

Thank you for your consideration of my comments in this matter.

Respectfully submitted,

David N. Feldman, Managing Partner  
Feldman Weinstein LLP