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April 14, 2006

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: Executive Compensation and Related Party Disclosure, File No. S7-03-06, 71 Federal Register 6542 (February 8, 2006).

Dear Ms. Morris:

The American Bankers Association ("ABA")[1] appreciates the opportunity to comment on the executive compensation and related party disclosure proposal recently issued by the Securities and Exchange Commission ("Commission"). Among other things, the proposal would amend current disclosure requirements for executive and director compensation, related party transactions, and director independence. These amendments would apply to disclosure in proxy and information statements, as well as periodic and other reports required under the Securities Exchange Act of 1934 ("Exchange Act"). The amendments would also apply to registration statement disclosures under the Exchange Act and the Securities Act of 1933 ('Securities Act"). Collectively, the proposals are intended to give investors a clearer and more complete understanding of a public company's executive officer and director compensation, as well as provide better information about any financial relationships between the publicly traded company and its executive officers, directors, significant shareholders and their respective family members.

The ABA has supported, on record, many of the important corporate governance measures undertaken by the Commission and others in recent years. As both providers of credit and financial services to, and institutional investors in, publicly-traded companies, the banking and savings institution industry (hereinafter collectively referred to as "banking industry") is a strong proponent of clear and comprehensive disclosure.

Additionally, as many of our bank and bank holding company members are publicly traded,[2] the ABA has taken a keen interest in corporate governance measures

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[1] The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country.

[2] We recognize that the Commission's executive compensation proposal does not apply to publicly traded banks that are required under Section 12(i) of the Exchange Act to file their securities

that address the composition and responsibilities of boards of directors and board committees, as well as prohibit companies from extending credit to executive officers and directors. Indeed, ABA has strongly supported requirements that listed companies have a majority of independent directors sit on company boards.[3]

Nonetheless, we have long maintained that, unlike the rest of corporate America, banking organizations are different as they are in the business of making loans, taking deposits, and providing trust and other services to customers—customers that include bank executive officers and board members and their companies. Unfortunately, the proposal does not recognize that distinction.

The proposal will force publicly-traded banking organizations to disclose to the world everyday, commonplace transactions. No director wants the contents of his or her bank and trust accounts or, for that matter, the loans extended to family member companies widely broadcasted. As a result, the proposal will have an exceedingly chilling effect on the ability of all banks and bank holding companies to find qualified directors to sit on their boards. Even more disturbing is the fact that banks listed on the NASDAQ will find themselves in violation of the NASDAQ listing standards that require a majority of listed company boards to be independent. We strongly urge the Commission to re-think its related party disclosure provisions and their deleterious impact on the banking industry.

DISCUSSION

Bank Depository and Other Services

Publicly traded banking organizations do not currently disclose transactions with executive officers, directors and their companies that involve bank depository, trust and similar services. Item 404(a) of Regulation S-K currently requires publicly traded companies to disclose any transactions over $60,000 involving the company or its subsidiaries in which a related person had a direct or indirect material interest. Item 404 defines "related person" as any executive officer, director, director nominee, significant shareholder, or immediate family member thereof.

Instruction 7 to paragraph (a) specifically excludes from this disclosure requirement transactions involving services as bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services. As a result, banking organizations are not required to disclose when directors, executive officers and other related parties have deposit (time, demand or savings accounts or certificates of deposit) or trust accounts with the banking organization. Nor do they disclose when related party

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disclosure documents with their federal banking regulators. However, because the federal banking regulators generally adopt securities law requirements similar to those required by the Commission, we comment on the proposal as if it applied to both banks and bank holding companies. See, 12 CFR §§ 11.1 to 11.4 (for nationally chartered banks); 12 CFR Part 335 (for state chartered nonmember insured banks); 12 CFR §§ 208.30 to 208.37 (for state chartered member banks); and 12 CFR Part 563d (for savings associations).

[3] See, e.g., Release No. 33-8173, 68 FR 2638 (Jan. 17, 2003); Release No. 34-48481, File No. S7-15-03, 68 Fed. Reg. 54590 (Sept. 17, 2003); Release No. 34-57516, File No. SR-NASD-2002-141, 68 Fed. Reg. 14451 (Mar. 25, 2003); Release No. 34-50625, File No. SR-NYSE-2004-41, 69 Fed. Reg. 65006 (Nov. 9, 2004).

companies have hired the bank to provide transfer agent, registrar or trustee services with respect to the company's securities.

The Commission proposes to eliminate this instruction under the theory that it establishes certain presumptions regarding materiality and may operate to exclude some transactions from disclosure that might otherwise be disclosed. As a result, publicly traded banking organizations will now be required to disclose these transactions in both Securities Act and Exchange Act registration statements, as well as periodic reports and proxy statements required under the Exchange Act.

The ABA strongly opposes any requirement to disclose related party deposit and trust accounts, as well as securities processing services provided to related party companies. Banks and bank holding companies generally draw board members from their local community. Indeed, banking law, as well as customary banking practice, dictates that a portion of a bank's board consist of directors who reside within the banking organizations' footprint.[4] Not surprisingly, directors and executive officer often obtain deposit and trust services from the same banking organization on whose board they sit.

In addition, firms affiliated with bank directors may use the banking organization to provide services such as cash management, payroll processing, travel agency, employee benefit trust and custody services, and securities processing services. Banks provide these services on an arm's length and ordinary course of business basis and are subject to strict examination and oversight by their primary banking regulator. Similarly, bank indenture trustee services are subject to the Trust Indenture Act and implementing rules promulgated by the Commission.[5] Furthermore, under the Exchange Act, banks are required to comply with the Commission's transfer agent rules and the Commission maintains regulatory supervision over bank transfer agency services.[6]

No reason exists not to exempt ordinary course of business transactions provided on a non-preferential basis, such as these, to executive officers, directors, director companies and other related parties. The Commission itself has recognized the appropriateness of doing so with respect to indebtedness disclosures required under both the current and proposed to be revised versions of Item 404. For example, new Instruction 4 to Item 407 excludes "amounts due from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business."[7]

This notion of ordinary course of business/non-preferential basis is carried forward by the Commission with respect to loans made by banks, savings associations and broker-dealers where general disclosure of loans extended on a non-preferential basis to bank executive officers, directors, director companies and other related parties is

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[4] See, e.g., 12 U.S.C. 72 which requires banks regulated by the Office of the Comptroller of the Currency to have at least a majority of national bank directors that reside within 100 miles of the bank.

[5] 15 U.S.C. 77aaa-77bbbb, 17 CFR Part 270.

[6] Exchange Act Section 17A(d)(3), 15 U.S.C. 78qA(d)(3).

[7] Current Instruction 2 to paragraph (c) of Item 404 provides a similar exclusion.

required.[8] Attribution of specific dollar amount loans to specific executive officers, directors and others is not required. The Commission has proposed to maintain this exemption in newly revised Item 404, an action the ABA wholeheartedly endorses.

We would strongly encourage the Commission to adopt a similar approach and recognize the appropriateness of excluding from disclosure depository, trust and securities processing services offered as ordinary course of business transactions conducted on a non-preferential basis.

We fear that adjusting the dollar threshold for disclosure from $60,000 to $120,000, as the Commission proposes to do, will not provide sufficient relief to our members. It is not uncommon for bank directors and their affiliated companies to have deposit, trust and other accounts that either individually or in the aggregate exceed $120,000.

Listing Standards

Our opposition to this proposed disclosure requirement is further heightened by the fact that any requirement to disclose director deposit and trust accounts will render that director "not independent" under NASDAQ listing standards. Specifically, recently revised NASDAQ Rule 4200(a)(15)(B)(vi) defines independence to include or permit directors to receive payments in excess of $60,000 in connection with the deposit of funds or other agency services. As a result, a director's independence currently will not be impaired if the director has deposit account or other agency account that meets the requirements of Rule 4200.

One of the conditions to this definition, however, is that the payments must not otherwise be subject to disclosure under Item 404 of Regulation S-K. If the Commission were to require publicly traded bank holding companies to disclose director deposit and trust accounts, many bank holding companies would find themselves without an independent board of directors, as required under the NASDAQ listing standards. Indeed, some of our members have informed us that this proposed change could detrimentally impact every member of their organizations' boards of directors.

The ABA strongly supported the NASDAQ's determination to exclude bank deposit and other accounts from any director independence analysis. Banking organizations want individuals who do business with their organization to sit on their company boards. In makes no business sense to force banking organizations to lose valuable and legitimate business by driving directors to seek to have their financial services needs met by competing organizations. Yet this will be the precise effect if the Commission's proposal were to be adopted as proposed, absent some parallel change by

[8] Instruction 3 to Paragraph (c) of Item 404 provides that "[i]f the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T …and the loans are not disclosed as non-accrual, past due, restructured or potential problems …, disclosure may consist of a statement, if such is the case, that the loans to such persons (A) were made in the ordinary course of business, (B) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (C) did not involve more than the normal risk of collectibility or present other unfavorable features." This instruction has been carried forward in revised form as new Instruction 7 to Item 404(a).

the NASDAQ. Disclosure of arm's length, ordinary course of business transactions should not be required.

In addition, NASDAQ listing standards require audit committees to approve any transaction involving related parties that also must be reported under the federal securities laws.[9] When considered in conjunction with the Commission's proposal to expand the definition of related party to include stepchildren, stepparents, and any person (other than a tenant or employee) sharing the household of a director, executive officer, director nominee or significant shareholder of the company's voting securities, audit committees may be forced to approve such routine transactions as the $120,000 CD deposited into an IRA trust account by a director's stepmother or the $120,000+ yearly fee for transfer agency services charged to the company operated by a director's stepfather! Audit committees have far more important work to do and should not be required to approve such commonplace transactions.

Besides the havoc any requirement to disclose bank depository, trust and securities processing services would have on bank director independence analyses, we would also note that this disclosure requirement when coupled with the expanded definition of related party will require extensive disclosures of relatively commonplace business transactions in registration statements, periodic filings and proxy statements. Investors will now be rewarded with more disclosure that is less meaningful and banking organizations will see their regulatory burdens increase by the necessity to conduct more expansive transaction reviews for a larger pool of related parties.[10]

Corporate Governance

New Item 407 would require disclosure of directors and director nominees that the company has identified as independent, using the applicable listing standard definition of independence. For those companies not listed, Item 407 would require the company to select either a national securities exchange or a national securities association definition of independence and then disclose those directors and director nominees that the company identifies as meeting the standard's independence criteria.

Item 407 would also require disclosure of any director transactions considered but later determined not to impact a director's independence.[11] As a result, it would appear that ordinary course of banking and borrowing transactions that are determined not be material would be required to be disclosed for each director, director company, and his or her family members and their companies. This, we would respectfully submit, is overkill and will, we fear, significantly discourage qualified business leaders from sitting on banking organization boards. The lack of qualified board members could pose significant safety and soundness concerns for banking regulators. We encourage the Commission to decline to adopt this aspect of Item 407.

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[9] NASD Marketplace Rule 4350(h).

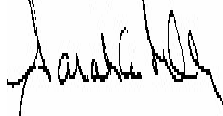
[10] Specifically, banking organizations will now be required to canvass their directors for new related party information and then review transactions to determine whether disclosure is required. For example, banks will have to conduct indebtedness reviews for all newly covered persons and their affiliated companies to ensure that they meet all the conditions of the exclusion for disclosure, e.g., normal risk of collectibility.

[11] See proposed paragraph (a)(3) to Item 407.

CONCLUSION

The ABA appreciates the opportunity to offer our comments on the proposed executive compensation rule. We hope our comments will help the Commission develop an effective rule that does not present unique difficulties for the banking industry. If you have any questions or comments with respect to the issues raised in this letter, please do not hesitate to contact the undersigned.

Sincerely yours,



Sarah A. Miller

cc: The Honorable Christopher Cox, Chairman
The Honorable Cynthia Glassman, Commissioner
The Honorable Paul Atkins, Commissioner
The Honorable Roel Campos, Commissioner
The Honorable Annette Nazareth, Commissioner
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Anne Krauskopf
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