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May 27, 2003

Chairman William H. Donaldson  
Commissioner Cynthia A. Glassman  
Commissioner Harvey J. Goldschmid  
Commissioner Paul S. Atkins  
Commissioner Roel C. Campos  
Alan Beller, Director, Division of Corporation Finance  
Stephen M. Cutler, Director, Division of Enforcement  
Gerald Laporte, Chief, Office of Small Business Policy  
Lawrence E. Harris, Chief Economist, Office of the Economic Analysis  
U. S. Securities and Exchange Commission  
450 5<sup>th</sup> St. N. W.  
Washington DC 20549

Re: SMALL BUSINESS ALERT: Response to the NASD Proposal to Adopt the BBX and Eliminate the OTCBB

Dear Sirs and Madam:

In the near future, the Commission will be asked to consider the NASD's application to become an exchange. As part of this application, the NASD is proposing to eliminate the over-the-counter bulletin board, or OTCBB, and replace it with the BBX.

This seemingly innocuous proposal has dramatic, drastic and unintended adverse consequences.

This proposal:

- **Represents the most significant anti-small business regulation ever considered by the SEC, harming both small business issuers and small business investors.**
- **Will lead to increased micro-cap fraud, in direct opposition to the SEC's long-standing micro-cap fraud enforcement efforts.**
- **Is contrary to congressional intent concerning small business issuers and investors in adopting the Sarbanes-Oxley Act.**

In this connection, please note that participants at the 2002 Government-Business SEC Forum on Small Business Capital Formation, including the undersigned, virtually unanimously opposed the proposal to eliminate the OTCBB, for one or more of these reasons.

Before acting upon this proposal, we urge the Commission to undertake the following:

- Find out if the adoption of the BBX will assist current OTCBB issuers to raise capital. Have the Office of Small Business Policy conduct a random, scientific survey of principals of companies currently trading on the OTCBB.
  - Ask the principals if they think it will be easier for their companies to raise money from investors if they were a BBX rather than an OTCBB issuer.
  - Ask the principals if they think it will be harder for their companies to raise money from investors if they were a Pink Sheet rather than an OTCBB issuer.
  - And while conducting the survey, ask the principals if they want the BBX at all, and if so, why.
- Have the Office of the Economic Analysis and the Chief Economist conduct a study of the loss in market capitalization and resulting loss of investment value suffered by investors in issuers relegated to the Pink Sheets following the adoption in 1999 of the SEC reporting requirement for OTCBB issuers.
- Seek input from the Division of Enforcement on the adverse impact the adoption of the BBX proposal will have on the micro-cap enforcement program after thousands of trading companies cease SEC reporting.
- Ask the Small Business Committees in the House and Senate if they believe a proposal that would have the effect of eliminating entirely compliance requirements for thousands of companies currently subject to the Sarbanes-Oxley Act is consistent with congressional intent.

We hope you will take the time to review our attached submission, **"IN RESPONSE TO THE NASD PROPOSAL TO ADOPT THE BBX AND ELIMINATE THE OTCBB."** We appreciate your consideration.

Sincerely,

/s/ Michael T. Williams

Michael T. Williams, Esq.

**IN RESPONSE TO THE NASD PROPOSAL  
TO ADOPT THE BBX AND ELIMINATE THE OTCBB**

Submitted by

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This seemingly innocuous proposal has dramatic, drastic and unintended adverse consequences.

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- **Will lead to increased micro-cap fraud, in direct opposition to the SEC's long-standing micro-cap fraud enforcement efforts.**
- **Is contrary to congressional intent concerning small business issuers and investors in adopting the Sarbanes-Oxley Act.**

We are not alone. Participants at the 2002 SEC Forum on Small Business Capital Formation, including the undersigned, virtually unanimously opposed this proposal, for one or more of these reasons.

**HARM TO SMALL BUSINESS ISSUERS**

The BBX proposal offers no significant benefits but causes serious harm to small business issuers. The BBX fails any cost/benefit analysis for small business issuers.

Increased costs: Even the BBX representative concede that the listing requirements of the BBX will cost small businesses at least \$100,000 more than an OTCBB qualification. We believe that number to be much higher.

No benefit: BBX representatives argue that because of the "higher standards" of the BBX exchange, small businesses will find it much easier to raise capital.

This claim is entirely unproven. Please study the NASD proposal carefully. It will not contain any independent corroboration for this assertion.

In fact, the BBX proposal will make it harder for small business issuers to raise capital. OTCBB companies not listing on the BBX will be relegated to the Pink Sheets. As such, most will cease to be subject to the 1934 Act reporting requirements and the provisions of the Sarbanes-Oxley Act, as they will no longer be required to do so. As such, adoption of the BBX proposal would result in the elimination of the federal law protections that currently exist for investors in OTCBB companies. Thus, it will be much harder for the significant majority of current OTCBB issuers to raise capital. Why? Investors will be much less likely to invest in unregulated, non-reporting Pink Sheet Companies.

Most commentators believe no more than one-third of the approximately 3500 companies currently listed on the OTCBB will apply for and secure a listing on the BBX, with some suggesting the actual number could be 750 or less.

With the elimination of the OTCBB, the 2,000 or more companies not listing on the BBX will be forced to the Pink Sheets. This means thousands more small business issuers will have greater difficulty in raising capital.

What should the Commission do: Find out if the NASD assertion has any validity. Have the Office of Small Business Policy conduct a random, scientific survey of principals of companies currently trading on the OTCBB.

- Ask the principals if they think it will be easier for their companies to raise money from investors if they were a BBX rather than an OTCBB issuer.
- Ask the principals if they think it will be harder for their companies to raise money from investors if they were a Pink Sheet rather than an OTCBB issuer.
- And while conducting the survey, ask the principals if they want the BBX at all, and if so, why.

### **HARM TO SMALL BUSINESS INVESTORS**

As noted above, with the elimination of the OTCBB, the 2,000 or more companies not listing on the BBX will be forced to the Pink Sheets.

There is ample evidence on the record to suggest that this will result in the loss of hundreds of millions of dollars in valuation of stock held by investors in these small businesses. The adoption of the SEC reporting requirement for OTCBB issuers was in January 1999, the last time there was an SEC regulation resulting in a large number of OTCBB companies being relegated to the Pink Sheets.

Given the fact that these investors have already lost millions of dollars in the markets in the past few years, it seems ironic that the SEC would adopt a proposal which would result in losses of hundreds of more millions of dollars by these same investors.

What should the Commission do: Have the Office of the Economic Analysis and the Chief Economist conduct a study of the loss in market capitalization and resulting loss of investment value suffered by investors in issuers relegated to the Pink Sheets following the adoption of the SEC reporting requirement for OTCBB issuers.

A similar loss in market capitalization and thus the value of investments owned by investors in these thousands of small business issuers relegated to the Pink Sheets can be expected if the BBX proposal is adopted.

### **INCREASED MICRO-CAP FRAUD**

Pink Sheet traded companies are not required to file current reports under the 1934 Act and are also thus not covered under the Sarbanes-Oxley Act.

It is likely that most OTCBB companies relegated to the Pink Sheets as a result of the BBX proposal will cease to be SEC reporting companies.

This means well more than 2000 current reporting companies will cease being subject to the reporting requirements, as they would no longer be required to do so. They would also not have to comply with the Sarbanes-Oxley Act. Thus, investors in these companies will lose the significant protections provided by the current regulatory scheme.

BBX representative argue that their proposal provides enhanced shareholder rights under their corporate governance rules. However, small business investors in OTCBB companies currently have many rights and protections, including 1934 Act reporting, Sarbanes-Oxley compliance, and state law remedies for breach of fiduciary duties. Little, if any, further protection would be provided by BBX corporate governance rules.

What should the Commission do: Seek input from the Division of Enforcement on the adverse impact the adoption of the BBX proposal will have on the micro-cap enforcement program after thousands of trading companies cease SEC reporting.

### **CONTRARY TO CONGRESSIONAL INTENT**

Although most provisions of the Sarbanes-Oxley Act apply to small business OTCBB issuers, in section 301 of the Act, congress specifically exempted OTCBB issuers from the independent director/audit committee requirements. These requirement impose a significant financial burden on small business issuers due to the need to compensate an outside director and to secure the ever-increasingly expensive D&O coverage that every independent director requires.

As noted on the SEC's website:

Will the rules relating to Section 301 apply to issuers whose securities are traded on the over-the-counter bulletin board market?

Answer: No. Securities traded on the over-the-counter bulletin board market currently are not considered listed securities.

The BBX does not provide a similar exemption. As such, the adoption of the BBX is directly contrary to congressional intent on this matter.

Further, if a large number of OTCBB companies choose not to apply to the BBX and subsequently cease to be reporting issuers, as we believe will happen, there will be many less rather than more investors protected by the Sarbanes-Oxley Act, which is certainly not consistent with congressional intent.

What should the Commission do: Ask the Small Business Committees in the House and Senate if they believe a proposal that would have the effect of eliminating entirely compliance requirements for thousands of companies currently subject to the Sarbanes-Oxley Act is consistent with congressional intent.