SOCIETY
for Corporate Governance

January 17, 2018

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: SEC Release (Release Nos. 33-10425, 34-81851, IA-4791, IC-32858; File No. S7-08-17) on *FAST Act Modernization and Simplification of Regulation S-K*

Dear Mr. Fields:

The Society for Corporate Governance ("we" or the "Society") appreciates the opportunity to provide comments on the proposing release (the "Release") for the FAST Act Modernization and Simplification of Regulation S-K as referenced above.

Founded in 1946, the Society is a professional membership association of more than 3,500 corporate and assistant secretaries, in-house counsel, outside counsel and other governance professionals who serve approximately 1,600 entities, including approximately 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters.

The Society applauds the Securities and Exchange Commission's (the "SEC") efforts to improve the quality and accessibility of disclosure in filings by simplifying and modernizing regulatory requirements. Achieving significant savings of resources, time and money for registrants without reducing material information and with increased accessibility is an achievable goal, and we commend the SEC for embracing it. Seeking to clarify ambiguous disclosure requirements, remove redundancies and further optimize the use of technology demonstrates that the SEC and its Staff appreciate the challenges faced by public companies and shareholders and are seeking to respond proactively to them.

The Society generally supports the proposals set forth in the Release. Below, we provide feedback on specific portions of the Release and discuss a few additional issues that the Society believes should be addressed in order to further reduce the burdens of public company reporting while continuing to achieve the SEC's fundamental mission of investor protection.

Item 102 of Regulation S-K (Description of Property)

The Society supports the SEC's proposal to emphasize "materiality" in relation to a registrant, as proposed. The Society believes that the emphasis on materiality of physical properties will allow registrants to focus on providing the information that they believe is important to their investors, rather than disclosure that may be immaterial but is aimed at ensuring compliance with a line-item disclosure requirement.

In addition, the Society supports the focus of the proposed revision to Item 102 on "physical" properties. We believe this language will avoid confusion with other types of properties that a registrant may own or use,

such as intellectual property, which may be addressed in other disclosure items where material. In addition, we believe that terms in the existing version of Item 102, such as "principal" plants and "major" encumbrances, which are relatively similar to "material" but not as well defined, should be eliminated from the Item to avoid confusion.

Finally, the Society does not believe that Item 102 should require additional disclosure concerning properties, such as information concerning properties located in designated areas where natural disasters are more likely to occur. Such natural disaster risks, including the potential effects of climate change, are best discussed in existing disclosure requirements, such as the risk factors section. We do not believe that registrants should need to decide whether disclosure may also be required under Item 102 for potential risks to material physical properties. We believe that investors are well-positioned to evaluate locations of disclosed material physical properties and assess any potential attendant risks in conjunction with registrants' existing risk factor disclosure. Further, disclosure of potential risks to physical properties in Item 102 may only duplicate existing risk factor disclosure, and run contrary to the objective of streamlining and eliminating duplicative disclosure.

Item 303 of Regulation S-K (Management's Discussion and Analysis of Financial Condition and Results of Operations)

The Society supports the proposal to permit, in certain circumstances, removal of a comparison of the earliest years' financial statements in filings where three years of financial statements are included and where the earliest years' comparison is already included in a prior year's filing.

Item 303 already requires a discussion of material known trends and uncertainties over the three-year period for which operating results are presented. Thus, if a material known trend or uncertainty does in fact exist over that time frame, registrants are required to discuss those factors. The Society also believes that Item 303's existing requirement that a registrant "provide such other information that [it] believes to be necessary to an understanding of its financial condition, change in financial condition and results of operations" and to discuss "the financial and other statistical data that [it] believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations" provides a framework and opportunity for registrants to disclose information about all periods covered by the report that are material to an understanding of financial condition and results of operations.

The narrative discussions that compare the registrants' earliest years' results repeat comparisons of those years' results that have been disclosed in prior filings. Rather than enhancing a reader's understanding of the registrants' financial condition, change in financial condition and results of operations, these repetitive disclosures can serve as a distraction. To the extent a reader desires to see the comparative information of the earliest years, that information is readily accessible in the registrant's prior filings that are publicly available.

However, as proposed, the revisions to Item 303 would create a default requirement to include the earliest years' comparison absent meeting certain conditions. The Society believes this may have the contrary effect of what is intended. As drafted, the proposal would require disclosure of the earliest years' comparison unless it is concluded to not be material. With disclosure as the default, registrants may choose to take the least risky path to compliance and continue the practice of repeating the earliest years' comparison, even if arguably immaterial. The Society believes that in light of the repetitive nature and likely immateriality of such information, the default requirement should be that the earliest years' comparison be excluded, unless the registrant concludes that it is material to an understanding of the registrant's financial condition, changes in

financial condition and results of operations for the current period. We believe that this modification will still require that registrants reflect on prior disclosures to determine what, if any, of such information remains material for purposes of inclusion in subsequent filings.

Finally, the Society believes that the ability to exclude the earliest years' comparison should not be predicated on the inclusion of such comparison in a prior years' Form 10-K. We believe that registrants should have the ability to exclude the earliest years' comparison in any circumstance where such comparison has been included in a prior SEC filing, whether or not that filing is a Form 10-K.

Item 401 of Regulation S-K (Directors, Executive Officers, Promoters, and Control Persons)

The Society supports the proposal to clarify that Instruction 3 of Item 401(b) applies to all disclosure about executive officers required by any section of Item 401. The Society further supports the proposed change to the caption for the disclosure, so that it would state: "Information about our Executive Officers." We believe that these changes are consistent with the objective of eliminating duplicative or overlapping requirements.

We believe registrants that elect to rely on General Instruction G of Form 10-K to incorporate portions of Form 10-K by reference to the their definitive proxy or information statements should continue to have the flexibility to choose to include the executive officer information required by Item 401 in the Form 10-K only, and that flexibility should extend to all the information regarding executive officers required by Item 401. In this regard, we do not believe that it would be appropriate to limit the proposed instruction to only certain paragraphs of Item 401, such as paragraphs (b) and (c) but excluding paragraph (f). We believe registrants should be encouraged to report all relevant biographical information about executive officers in one location.

Further, we do not believe that it would be appropriate to apply the instruction to other disclosure items that relate to executive officers, such as Item 404 of Regulation S-K, because it is more desirable to retain in one place a description of all of a registrant's reportable related person transactions, rather than trying to bifurcate the description of those transactions in separate filings based on an individual's role with the registrant.

We also do not support requiring that disclosure about executive officers be included only in a registrant's Form 10-K, or, alternatively, requiring that the executive officer disclosure be included only in a registrant's proxy or information statement. We support flexibility for registrants to elect where to disclose this information and believe that the current approach has provided effective disclosure to investors. Requiring that the disclosure appear in only one of the filings could prove confusing for investors who have become accustomed to the location and manner of presentation of biographical and other information about executive officers.

Item 405 of Regulation S-K (Compliance with Section 16(a) of the Exchange Act)

The Society supports the proposal to eliminate the requirement of Rule 16a-3(e) that reporting persons furnish copies of their Section 16(a) filings to the registrant. In addition, the Society supports the proposal to amend Item 405 to permit registrants to rely, in determining whether Item 405 disclosure is required, on reviews of electronically filed Section 16 reports and written representations that no Form 5 filing is required.

Since the advent of electronic filings of Section 16 reports, the manner in which registrants obtain information concerning insider transactions has changed significantly. We believe the proposed changes would serve the objective of modernizing and simplifying compliance with Item 405 while continuing to ensure that material information concerning Item 405's disclosure requirements is provided.

The Society also supports the elimination of the "checkbox" on the cover page of Form 10-K that states whether the Form 10-K contains, or whether the proxy statement that is incorporated by reference is not expected to contain, Item 405 disclosure. We believe that this checkbox often causes confusion and is of little value in assessing whether Item 405 disclosure will be required, as many registrants include Item 405 disclosure in their proxy statements.

The Society does not, however, necessarily support the proposal to change the heading of Item 405 disclosure to "Delinquent Section 16(a) Reports." The Society believes that the proposed instruction to Item 405 that clarifies that no Item 405 disclosure need be made in the absence of any delinquent reports will convince many registrants not to make "negative" disclosure under Item 405 concerning a lack of delinquencies. We believe that the existing Item 405 heading, which is language registrants and readers are accustomed to seeing, would still enable readers to identify registrants that disclose delinquencies and also would continue to describe accurately the substance of the disclosure contained in that item.

Item 407 of Regulation S-K (Corporate Governance)

Item 407(d)(3)(i)(B) - Audit Committee Discussions with Independent Auditors

The Society supports the proposed amendment to existing Item 407(d)(3)(i)(B) of Regulation S-K to eliminate the specific, outdated reference to the applicable Public Company Accounting Oversight Board ("PCAOB") standard regarding audit committee communications with the auditor, and to replace that reference with a more general description of "applicable requirements of the PCAOB and the SEC's rules." We believe that the specific reference to an evolving auditing standard presents the possibility of registrants referring to different auditing standards when there are superseding auditing standards or the reorganization of the PCAOB auditing standards.

While we support the use of a more general reference to applicable PCAOB and SEC requirements for the purposes of the audit committee report, we do believe that it would still be helpful for the SEC to identify those specific PCAOB and SEC requirements that the SEC believes to be applicable in the case of audit committee communications with the auditor. Doing so would ensure that registrants fully understand what is intended to be covered by the disclosure requirement. This additional guidance, which we believe would be particularly appropriate in the form of a Staff Compliance and Disclosure Interpretation, would assist registrants and their audit committees from both a governance and disclosure controls and procedures perspective.

Item 407(e)(5)) - Compensation Committee Report

The Society supports the proposed amendment to the requirements for the compensation committee report to note that emerging growth companies ("EGCs") are not required to provide a compensation committee report. Consistent with the SEC's overall efforts to reflect in its rules the enactment of the Jumpstart Our Business Startups (JOBS) Act of 2012, we believe that Item 407(e)(5) should be revised to clarify that no

compensation committee report is required for EGCs given that, as with smaller reporting companies, EGCs are not required to include a Compensation Discussion and Analysis in their public disclosures to which the compensation committee report relates.

Item 601 of Regulation S-K (Exhibits)

Description of Registrant's Securities

The Society supports the proposal to require as a new exhibit to Form 10-K a description of a registrant's securities that are registered under Section 12 of the Exchange Act, provided the requirement permits registrants to satisfy it via incorporation by reference to the same description that is already included in *any* SEC filing by the registrant. We believe that requiring registrants to prepare new exhibits of the same descriptions of securities that have already been included in prior filings, whether as exhibits to Exchange Act reports or in Securities Act filings, would be unduly burdensome and would not enhance investors' understanding of their rights. When incorporating by reference, we would propose that registrants identify the portion of the document containing the description to the extent the information being incorporated is not a stand-alone exhibit.

Schedules and Attachments

The Society supports the proposal to expand Item 601(b)(2)'s existing accommodation that allows registrants to omit entire schedules and attachments from filed exhibits to all exhibits filed under Item 601. Schedules and attachments to exhibits often substantially lengthen filings and they frequently (i) lack material information and/or (ii) contain confidential information that must be redacted. Consequently, we believe the current requirement to file complete exhibits outside of Item 601(b)(2), without regard to materiality or disclosure elsewhere in the exhibit or disclosure document, places a costly burden on registrants without a corresponding benefit to investors and adds to the volume of immaterial information through which investors must sift.

The Society supports the proposal that Item 601(a)(5) require registrants to provide a list identifying, but not summarizing, the omitted schedules and attachments. We believe registrants are accustomed to providing such a list pursuant to the existing requirement of Item 601(b)(2), and we do not believe that extending a parallel requirement to Item 601(a)(5) would impose a significant burden on registrants.

Personally Identifiable Information

The Society supports the proposal that the SEC codify in Item 601(a)(6) the current Staff practice of permitting registrants to omit personally identifiable information ("PII") without the need to submit to the SEC a formal confidential treatment request. Similarly, the Society believes the investment company rules or forms should permit investment companies to omit PII from required exhibits. The Society does not believe that this type of information is necessary for the protection of investors, and incorporating the Staff's current practice into the text of the rule would remove any uncertainty and would simplify and reduce compliance costs for registrants.

Redaction of Confidential Information in Material Contract Exhibits

The Society believes registrants should be permitted under Item 601(b)(10) to omit confidential information from exhibits that is both (i) not material and (ii) competitively harmful if publicly disclosed, without the need to submit a confidential treatment request to the SEC. The Society agrees that simplifying and streamlining the confidential treatment process would be consistent with the FAST Act mandate to revise Regulation S-K in a manner that reduces the costs and burdens on registrants while providing investors all material information.

The Society does not believe the level of disclosure provided in exhibits would change under the proposed amendments. The Society believes the proposed amendments would largely effect a change to process only, and not to the level of disclosure of information. Registrants would remain responsible for determining whether all material information has been disclosed to investors and that any redactions in required exhibits include no more text than is necessary to prevent disclosure of competitively harmful information. Moreover, the Staff's selective review of filings to assess the appropriateness of redactions would continue to safeguard investors.

In the event the SEC and its Staff were to disagree with a registrant's redactions in a required exhibit filing and the registrant files an amendment including all or some of the previously redacted information consistent with the conclusions made in review process with the Staff, we do not believe that the SEC should require explanatory language describing why an amendment is being filed. In particular, we do not believe that registrants should be required to highlight in such an amendment the previously redacted information. While registrants may elect to provide explanatory language in such filings, we do not believe it should be a requirement. Moreover, such requirements would depart from current Staff practice and could be misleading and/or focus undue prominence on the previously redacted information.

The Society also believes registrants should be permitted to omit confidential information from *all* exhibits filed pursuant to Item 601, as the Society does not believe there is a reason to distinguish other exhibits from material contracts filed under Item 601(b)(10). Therefore, the Society believes a consistent approach to confidential treatment should be applied to Item 601. As with exhibits filed pursuant to Item 601(b)(10), registrants would have the responsibility to determine whether all material information has been disclosed to investors and that the redactions include no more text than is necessary to prevent competitively harmful disclosure. Moreover, we believe that adequate safeguards will exist given the Staff's ability to conduct selective reviews of filings to assess the appropriateness of redactions.

Finally, the Society believes the rationale for the proposed amendments to Item 601 of Regulation S-K is also applicable to forms that include their exhibits requirements in the form itself or do not separately reference Item 601 of Regulation S-K (e.g., Schedule 13E-3 and Schedule 13D). The Society does not believe there are special considerations associated with change of control transactions, going private transactions, or beneficial ownership reporting that would result in otherwise immaterial information under Regulation S-K being rendered material to an investment or voting decision in such contexts.

Incorporation by Reference

The Society supports the proposed amendments regarding incorporation by reference as an effort to promote more streamlined and efficient filings, as well as to improve the readability of public filings for investors. We believe that incorporation by reference is generally useful for investors because it helps highlight those items that have not changed since a previous filing, which in turn can be helpful in assessing updated information.

The Society also supports the streamlining of rules regarding incorporation by reference to help optimize the variety of different rules applicable to this topic. We believe the elimination of the five-year limit in Item 10(d) of Regulation S-K is sensible, as the physical document retention concerns underlying the prohibition from incorporating by reference documents that have been on file with the SEC for more than five years are no longer a concern with the SEC's electronic filing process through EDGAR.

We also support the proposed amendments to permit the use of hyperlinks to incorporate documents by reference. We believe hyperlinks allow investors to easily navigate to documents already filed on EDGAR, as well as simultaneously reducing duplicative disclosures between different filings. We encourage the SEC to continue to permit the use of hyperlinks in assisting investors to navigate throughout the same filing (i.e., from one section to another section in the same filing), as well as to permit the use of hyperlinks to information outside the EDGAR system, such as company websites.

Manner of Delivery

Tagging Cover Page Data

The Society does not support the proposal to require registrants to tag in XBRL additional information on the cover pages of public filings such as Forms 10-K, 10-Q, 8-K, 20-F and 40-F. We do not believe that the additional burden and expense associated with doing so would outweigh the potential incremental value to investors, if any. As a general matter, the Society does not at this time support the expansion of XBRL beyond its current requirements.

Additional Suggested Focus Areas

The Society believes that the proposed amendments represent an important step towards modernizing and simplifying the disclosure system in a way that reduces the costs and burdens on registrants, and we encourage the SEC to continue these efforts. Below are examples of significant areas that the Society has identified as potential additional areas for potential reform efforts. In addition, the Society's members have views on a range of other disclosure reforms that they would be pleased to discuss with the SEC going forward.

EDGAR

While the proposed changes in disclosure requirements included in the Release are a positive step, the Society encourages the SEC to also focus on the platform through which disclosures are made available to investors and the public at large – EDGAR.

We believe that a fundamental revision of EDGAR is called for, and that true disclosure reform would integrate this into disclosure requirements. Indeed, we believe that disclosure can only truly be made more "effective" if the two processes are combined.

A variety of changes to EDGAR have been considered over the years by the SEC and its Staff and others, such as establishing a site, or page, for each reporting company on which the company could post information and update it as needed. While we think this would be a significant improvement, we are not wedded to this or any other approach.

We believe that a reauthorization process for EDGAR has been underway for some period of time. However, neither the details of the process nor any discussions of alternatives to the current model have been discussed publicly.

Accordingly, we urge the SEC to provide additional transparency regarding the EDGAR reauthorization process and to seek out the views of interested parties. An approach we believe the SEC has used successfully in other contexts is holding public roundtables at which interested parties can express their views and offer suggestions. The Society would welcome participation in such roundtables or other forums, and to help in any other way.

Web- and Social Media-Based Disclosure

Simply stated, we believe that the SEC should allow – and, in some cases, encourage – greater reliance upon the web and, in due course, social media as platforms for disclosure.

We appreciate that as recently as 15 or 20 years ago, the web was new and untested as a mechanism for dissemination of information and that caution about its use for that purpose was understandable. However, with the passage of time, we believe such concerns have greatly diminished. We therefore believe that a fundamental shift is called for in the way in which the SEC views such disclosures.

For example, SEC pronouncements and interpretations over the years have discouraged the use of hyperlinks, whether to company websites or other information. These pronouncements can be read to suggest that use of a hyperlink or a reference to a website somehow brings into a Securities Act or Exchange Act filing every statement on the linked site, regardless of its pertinence to the disclosure in question or how clearly the link (or the information at the link) is circumscribed. The SEC's concerns with websites have created the impression that when a company refers to or incorporates from its website, it must "proceed at its peril", which no longer seems appropriate. Greater use of websites would eliminate duplicative disclosure, facilitate "layered" disclosure (discussed below), and make Exchange Act filings more effective. Moreover, to the extent that companies' websites contain information or language that is arguably inappropriate for purposes of Securities Act or Exchange Act disclosure, it seems more appropriate for the SEC to provide a safe harbor or for a company to correct its website than to effectively prohibit or discourage their use.

In short, we believe that by encouraging the use of linked information or website references, the SEC will help reduce the volume of disclosures and make information on websites more readily accessible. In many cases, company websites contain "basic" information that rarely changes from period to period; companies should be better able to refer to or incorporate by reference from their websites so that this basic information

need not be included in disclosure documents, thereby enabling investors to focus on what has changed or on other, more significant, disclosures. While hyperlinks or references to websites may not always substitute for disclosure, they would enable registrants to illustrate points and expand the scope of disclosure to the extent they deem appropriate, and would afford those investors who are interested the opportunity to learn more without increasing the length or complexity of disclosure for investors who are not interested in further information.

We understand that social media continues to present challenges in terms of its use as a disclosure vehicle. Accordingly, we understand that the SEC may be reluctant to "endorse" the use of social media for this purpose at the present time. However, we believe the time has come for web-based disclosures to be viewed separately from social media-based disclosures. At the same time, we would urge the SEC to be cognizant of the use of social media for this purpose and to consider a change in its approach to such use as circumstances warrant.

Layered Disclosure

For the reasons discussed above, we strongly believe that "layered" disclosure should be encouraged, if not required, as the SEC continues to focus on ways to simplify and modernize disclosure rules. Layered disclosure generally refers to first providing summarized information and then providing more detailed information, which provides readers more choice as to what level of detail they are interested in reviewing. Today, some companies already incorporate layered disclosure techniques within Exchange Act filings – one example of this is the inclusion of a proxy summary in the front of a company's proxy statement. We believe there are a number of ways the SEC could further encourage layered disclosure to make disclosure more "effective". This approach would also help reduce duplicative disclosures. For example, today, companies are required to post extensive information about their board committees on their websites, including copies of committee charters, that changes little or not at all from year to year. Yet proxy statements continue to include (and are required to include) similar and in many cases identical information about committees and charters. This duplication does not appear to serve any purpose and places burdens on companies and investors alike.

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We thank you for your consideration of these comments. We are available to answer any questions you may have on our comments and to meet with the Staff if that would assist in the SEC's efforts.

Respectfully submitted,

James G. Martin
SVP & General Counsel
Society for Corporate Governance

SOCIETY
for Corporate Governance

cc: U.S. Securities and Exchange Commission
Jay Clayton, Chairman
Michael S. Piwowar, Commissioner
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William Hinman, Director, Division of Corporation Finance