FENWICK & WEST LLP

SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041

TEL 650.988.8500 FAX 650.938.5200 WWW.FENWICK.COM

January 17, 2018

HORACE L. NASH

EMAIL [redacted]
Direct Dial [redacted]

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-08-17, Release Nos. 33-10425, 34-81851 FAST Act Modernization and Simplification of Regulation S-K ("Proposing Release")

Dear Mr. Fields:

Fenwick & West LLP is pleased to respond to the request of the Securities and Exchange Commission ("Commission") for comments regarding proposed amendments to modernize and simplify disclosure requirements of Regulation S-K, as described in the Proposing Release referred to above. We appreciate the Commission's extensive and thoughtful analysis of the matters covered by the Proposing Release.

We represent a large number of publicly-held technology and life science companies in initial public offerings and periodic reporting matters. Our comments in this letter are intended to reflect our experience and our clients' experience with issues raised by the Proposing Release.

As an introduction to our specific responses, we welcome the Commission's efforts to begin the overhaul of Regulation S-K, and urge continued effort to rationalize the regulatory disclosure burden on public companies. Eliminating redundancy, pruning away disclosures that are not meaningful to investors, and reducing compliance costs will lead to better and more comprehensible disclosures at lower cost, to the benefit of investors and issuers alike. In some cases, less prescriptive and more principles-based disclosure requirements are an effective mechanism to solicit information that is meaningful to investors but tailored to the realities of the technology and life sciences companies that we represent.

I. Proposed Amendments

A. Description of Property (Item 102)

Questions 1 – 3

We support the proposed amendments to Item 102. We believe that these amendments clearly direct companies to report information about their physical properties that is material to investors and that they will result in more meaningful disclosure.

It is not clear to us when the ability to provide property disclosure on a collective basis would be useful. We envision that that companies which have determined that they have no material properties may nonetheless provide some disclosure under the amended Item 102 about the aggregate amount of their physical properties (for example, number of facilities or approximate square feet owned and/or leased). We believe that companies would feel the flexibility to provide such information with or without this instruction. Having said as much, we appreciate that situations that do not immediately occur to us may exist where collective disclosure would be the most relevant disclosure to investors and accordingly support this amended element of the instructions to Item 102.

In those situations where a company determines that its real property is sufficiently material to require disclosure under amended Item 102, we expect that the company would elect to provide some information about why it has made this determination. Accordingly, we do not believe that more prescriptive disclosure requirements about material properties beyond what is currently included in the proposed amendments to Item 102 would provide meaningful disclosure. Such prescriptive requirements are more likely, we believe, to cause companies to provide check-the-box responses to any such requirements, regardless of the materiality of the particular disclosure item. In reaching this conclusion, we note that additional information about real properties is required elsewhere in periodic reports to which Item 102 applies, including financial information about leased and owned real property in financial statement footnotes and, in regards to leased property, in the contractual obligations table required by S-K Item 303(a)(5). Further, companies regularly include in risk factors information about risks that pertain to the location of their physical properties and we think this is an appropriate location for this type of information.

B. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)

Year-to-Year Comparisons (Instruction 1 to Item 303(a))

Questions 4 – 9

We support all of the proposed amendments to Item 303.

With regard to question 5, we support expanding the proposal to allow elimination of the third prior year MD&A if it has been included in a Registration Statement on Form S-1 or in a Form 8-K that has been filed on EDGAR.

We do not support the continued inclusion of the third prior year in MD&A, even with an ability to hyperlink to this disclosure in the prior year's report.

We do not believe that additional conditions beyond those included in the proposal for exclusion of MD&A for the earliest of the three years are needed to provide appropriate disclosure. As evidenced by question 6, the most likely causes of changes to the third prior year's MD&A would be a restatement of the company's financial statements for such year, or for the second prior year to which such earlier financial statements are being compared, or the

retrospective adoption of a new accounting principle for either of such prior years. We believe that the principles-based approach of the proposal, allowing elimination of the discussion of the third prior year if such discussion "is not material to an understanding of the registrant's financial condition, changes in financial condition and results of operations." will require companies to make a careful consideration of the impact of any such restatement or other event. If such consideration leads to a determination that a revised discussion of the third prior year is necessary to understand the company's current financial condition, then we believe that companies will include a discussion of the third prior year in the current report.

We do not believe that further discussion of the manner of presenting the year-to-year comparisons is necessary to encourage companies to select the manner of presentation that they believe provides their information in the most meaningful fashion to investors.

We do not believe that elimination of the reference to the possible discussion of the five year period covered by selected financial data will have a significant impact on the total mix of information available or will discourage companies from providing trend disclosure.

C. Management, Security Holders and Corporate Governance

Directors, Executive Officers, Promoters, and Control Persons (Item 401)

Questions 14 – 17

We support the proposal to move the instruction to Item 401(b) to a general instruction to Item 401. We also believe that it should apply to all the information about executives required by Item 401, including involvement in certain legal proceedings. This information can be as relevant as any other Item 401 information in evaluating the quality of a registrant's executive team, so we believe it is appropriate to present Item 401(f) information together with all other Item 401 information.

We believe allowing Item 401 information about executive officers to appear in the Annual Report on Form 10-K for incorporation into the proxy statement is a helpful practice, and the proposed adjustment to the instruction to Item 401(b) is a useful clarification. We do not support extending the principle to apply to Item 404 or other Part III information about executive officers.

We do not believe that the Commission should mandate disclosure of executive officer information in only the Form 10-K or only the proxy statement. Currently, practice varies widely among registrants, and while we see the merit of locating all related information for an issuer in a single location, we do not believe there is an overriding reason to mandate the Form 10-K or the proxy statement as that location.

We support the proposed plain English revision of the Form 10-K caption to "Information about our Executive Officers."

Compliance with Section 16(a) of the Exchange Act (Item 405)

Questions 18 – 21

For most of our clients, the Section 16 reporting persons are officers and directors of the company, so their Section 16 compliance is well-known to company personnel (and often completed by company personnel). Section 16 persons outside the company, whether an early investor or an investor that has accumulated a positon of greater than 10% of the stock, are typically well-advised on such matters. In preparing Item 405 disclosures, companies typically review both internal records and EDGAR filings and do not rely on external sources of information. Accordingly, we support the proposed revisions to Item 405. We do not believe this change substantially reduces the burden of complying with Item 405, nor that it will meaningfully affect compliance. We do not believe it is necessary to require Section 16 reporting persons to furnish reports to registrants, or to require them to notify the registrants when they file such reports.

We do not believe that registrants should be required, rather than permitted, to disclose delinquent filings, as Section 18 is sufficient discipline on registrant disclosure practices.

We agree that the heading "Delinquent Section 16(a) Report" accurately describes the required disclosures, and will encourage issuers to exclude disclosure where none is required, simplifying proxy statement disclosures. Eliminating the check box on the Form 10-K cover page is a welcome simplification.

Corporate Governance (Item 407)

Questions 22-23

We agree with the manner in which the Commission proposes to update the Item 407(d) reference to AU sec. 380. We believe that Item 407(g) is the appropriate location for the amendment to specify that emerging growth companies are excluded from the Item 407(e)(5) requirement.

D. <u>Registration Statement and Prospectus Provisions</u>

Outside Front Cover Page of the Prospectus (Item 501(b))

Question 24

We support the proposed streamlining of the instruction.

Question 25

We support the proposed change to permit registrants to include a cross reference to the explanation of how an offering price is determined, where it is impractical to state the price or formula on the cover page.

Question 26

We believe the instruction should not be amended to require a hyperlink, though registrants should be permitted to do so if they choose.

Question 27

We support the proposed requirement that markets other than national securities exchanges that are the principal market where the issuer's securities are traded and the issuer has, through engagement of a registered broker-dealer for this purpose, actively sought and achieved quotation.

Question 28

We believe the proposed disclosure should be limited to the principal U.S. market where the issuer's securities are traded.

Question 29

Where an issuer's securities are traded on both U.S. and foreign markets, and the issuer has, through engagement of a registered broker-dealer for this purpose, actively sought and achieved quotation of its securities on those markets, we believe it is appropriate to include disclosure of both the principal U.S. and the principal foreign market on which the securities are traded.

Question 30

We believe it is not necessary to extend the principal market disclosure on the cover page to include other markets.

Question 31

We do not believe additional guidance on what constitutes a principal market is needed.

Question 32

We believe registrants should have the discretion to modify the legend with respect to state law prohibitions on offers or sales, as proposed.

Risk Factors (Item 503(c))

Questions 33-35

We agree with the relocation to Item 105 of the principles-based risk factors disclosure currently located at Item 503(c). We also support elimination of the specific examples of potential risk factors currently in Item 503(c); we believe this change is likely to result in companies drafting risk disclosures that are more focused on company-specific risks.

Furthermore, we believe that it is not necessary to provide a new set of sample risks, because the concepts are by now well known in the registrant community and the risk disclosures of other registrants are readily available for reference.

E. Exhibits

Description of Registrant's Securities (Item 601(b)(4)

Questions 41-44

We support the proposed amendments to Item 601(b)(4), with a qualification discussed below.

We believe that the implementation of exhibit hyperlinks (per Release No. 33-10322; 34-80132) for most issuers on September 1, 2017 has created a more expeditious process for investors to gain access to previously filed exhibits than previously existed. In the same vein, we appreciate that requiring the filing of a description of a company's registered securities with its annual report on Form 10-K will facilitate investors' ability to access these descriptions.

We note that the description of capital stock required under Item 202(a) includes the elemental terms of the capital stock and does not require current information about the amount of such securities that are outstanding. This is appropriate, of course, as this information is included elsewhere in the annual report (for instance, the cover page, the balance sheet and the financial statement footnotes). As such, once a company has filed an initial description of its capital stock, it would be able to incorporate that description into the current filing until such time, if any, as it materially amends the terms of its capital stock. In contrast, the description of debt securities required under Item 202(b) and of warrants and rights required under Item 202(c) would appear to require updating in each annual report for current information ((b) – "total amount outstanding as of the most recent practical date;" and (c)(3) – "The amount of such warrants or rights outstanding"). To the extent that any material about of debt securities or warrants or rights are outstanding, this information would be reflected elsewhere in the annual report (financial statement footnotes). Accordingly, we do not support the admittedly less-frequently-arising obligation to update the description of such securities annually to include this current information.

We do not support a requirement to include an exhibit filing containing a description of securities that are not registered under Section 12 of the Securities Exchange Act of 1934, as amended ("Exchange Act"). This information is not as inherently relevant to investors as is a description of the class of securities that they own. To the extent a company has other outstanding classes of securities and the terms of these securities are materially relevant to the holders of the registered class of securities, these terms would be described in other parts of the company's filings (for instance, financial statement footnotes, disclosure of the company's liquidity under Item 303(a)(1) and (2) and disclosure of contractual obligations under Item 303(a)(5) and disclosures in risk factors under Item 503(c)). In addition, such a disclosure requirement would cause companies to evaluate all manner of contractual and other relationships

with third parties to determine if such relationships might be regarded as a "security" under the expansive definition of that term in Section 3(a)(10) of the Exchange Act.

Questions 45-47

We support the proposed amendment to Item 601(a) to add subsection (5).

We support the proposed inclusion in Item 601(a)(5) of a requirement to include a list of the contents of omitted statements, corresponding to the existing requirement to do so in Item 601(b)(2). We believe that such a list along with, of course, the filed agreement which would specify the contents of the attached schedules, would be sufficient to identify the contents of the omitted schedules and attachments. We believe that no additional guidance is necessary regarding the description of omitted schedules, and thus do not support the creation of any such additional filing instructions.

Question 48

We support the proposed amendment to Item 601(a) to add subsection (6).

Questions 49-52

We support the proposed amendment to Item 601(b)(10) to add subsection (iv).

We would not expect the disclosure in exhibits to change significantly under the proposed amendments. We note that Staff Legal Bulletins 1 and 1A set forth views of the Division of Corporation Finance regarding the requirements a company must satisfy when requesting confidential treatment for filed documents, and would expect companies and their advisers to continue to adhere to this guidance in redacting sensitive information. Further, staff review of redacted filings will, we believe, encourage companies to redact information in substantially the same manner as they do currently where staff approval of a confidential treatment request is required.

The requirement to describe the reason for refiling a document into which previously redacted information has been replaced per a staff comment seems inconsistent with the treatment of other amended filings. For example, if a company today amends a registration statement or periodic report in response to a staff comment, there is no requirement to explain the reason for such filing. We believe that the content of registration statements and periodic reports is much more likely to be material to investors than are filed exhibits, and see no reason for greater disclosure around an amended exhibit filing. We recognize that when they deem it helpful to investors' understanding of the reason for filing an amended registration statement or report, companies will voluntarily provide a brief description in the amended filing of the reason for such filing. Companies will, presumably, consider similar disclosure when refiling exhibits per staff comments. In light of these observations, we do not support requirements to either explain the reason for refiling an exhibit per staff comments or to highlight previously redacted information.

While we do not expect that such a provision would be frequently used, we support an amendment to Item 601 to allow companies to redact information from exhibits filed per Item 601(b)(2) in the same manner as has been proposed for Item 601(b)(10) exhibits. We are not able to identify any logical basis for not allowing the redaction of competitively harmful information from an Item 601(b)(2) exhibit in the same manner as proposed to be allowed for Item 601(b)(10) exhibits.

Questions 54, 56, 57

We support the proposed amendment to Item 601(b)(10)(i). Respectfully, we submit that retaining the requirement *for newly reporting registrants* to file agreements that were completed within the past two years would not provide material information to investors beyond information regarding such material agreements that is provided in the registration statement or report with which such exhibits are filed. Accordingly, we support the elimination from Item 601(b)(10) of the requirement to file the agreements completed in the last two years.

We do not support expanding the scope of Item 601(b)(10) to require the filing of agreements completed within the past two years by entities which the company has acquired or is merging. In our experience, acquired-entity's third party contracts may be handled in different ways in the acquisition context. If these agreements are deemed to be favorable by the acquirer, these agreements may be fully assumed. If unfavorable, the acquirer may require that the agreement be terminated prior to the acquisition. If an agreement with unfavorable terms cannot be terminated, the acquired entity's stakeholders may be asked to provide indemnity with respect to certain aspects of such agreement. Further, how would materiality even be measured for an agreement that has been terminated before the company even completes the acquisition or merger? For all of these reasons, we respectfully submit that requiring the filing of material agreements of acquired, or merged, entities that have been completed in the past two years would be at least as likely to create confusion for investors as to provide relevant information to them.

F. Incorporation by Reference

General Comment to Section II.F

The Staff raises in Section II.F of the Proposing Release closely related questions as to the advisability of streamlining and facilitating incorporation by reference. We determined that responding to these questions individually would result in us submitting substantially duplicative comments. As such, in this part of our letter we will respond to Section II.F of the Proposing Release generally and then respond to certain individual questions to the extent our comments provide incremental feedback or are not duplicative of the following general comments.

Consistent with our prior comments contained in our letter, dated August 1, 2017, in response to the Commission's Concept Release: Business and Financial Disclosure Required by Regulation S-K (Release Nos. 33-10064, 34-77599; File No. S7-06-16), we support the adoption of modernized rules or instructions that promote the use of incorporation by reference and establish associated hyperlink requirements. We also support streamlining and eliminating

redundancy in the Commission's rules and forms in connection with the adoption of said rules or instructions.

We believe that allowing for greater flexibility to incorporate by reference will improve readability by enabling companies to craft disclosure that more succinctly communicates material information. We acknowledge that, as noted by the Commission in the Proposing Release, incorporation by reference may create a burden for investors, particularly where there are multiple incorporations by reference in the same item or answer, but in our view, investors should be expected to make reasonable efforts to navigate EDGAR to find the relevant information, documents or reports incorporated by reference in order to achieve the greater good for all investors of promoting more succinct communication of material information in documents filed with or submitted to the Commission. Moreover, should registrants be required to include hyperlinks to any information that is incorporated by reference to documents available on EDGAR as called for by the proposed rules, the modest burden investors experience navigating EDGAR would be virtually eliminated.

Item 10(d)

Questions 65, 66

We support consolidating the various rules governing incorporation by reference in the manner proposed as we believe the consolidation of the incorporation by reference rules into Rules 411 and Rule 12b-23 (along with the provisions of the respective registration statements and reports) as proposed would sufficiently facilitate or streamline compliance with the rules. While we see the merits of combining Rule 411, Rule 12b-23, and Rule 12b-32 in a single item of Regulation S-K and would not object if that approach is taken, we do not believe doing so would be a meaningful improvement as compared to the proposal.

We do observe one potential issue with the proposed provisions for incorporation by reference. It is not clear to us that Rule 12b-23 as amended, or the instructions to Form 10-K, Form 10-Q or other Exchange Act filings, limit a registrant's incorporation by reference to information that has been included in a document filed with the Commission, on EDGAR or otherwise (except for the existing provisions of the General Instructions to Forms 10-K and 10-Q that allow incorporation by reference of material contained in annual or quarterly reports to security holders). Notably, new subsection (d) of Rule 12b-23 only requires hyperlinks to incorporated information that is publicly available on EDGAR, and that language might be read to suggest that information not on EDGAR or otherwise filed with the Commission could be incorporated by reference.

Since the vast majority of filings for the last 20 years are publicly available on EDGAR, we believe that the exceptions to Item 10(d) currently swallow the rule and the five-year limit has been largely rendered obsolete.

Securities Act Rue 411, Exchange Act Rule 12b-23 and Rule 12b-32 and Related Rules under the Investment Company Act and Investment Advisers Act

Question 68

We believe Rule 12b-23(a)(3) and Rule 411(b)(4) should be revised to eliminate the requirement that copies of information incorporated by reference be filed as exhibits to registration statements or reports. In our view, the exhibit requirement contained in these rules greatly reduces the use of incorporation by reference and thereby promotes the inclusion of more information in filings than may be necessary for effective disclosure. This is because, as a practical matter, it may take more time and effort to "EDGAR-ize" the content to be so incorporated by reference than including the same information in the filing itself.

As discussed in our general comment to this Section II.F, any difficulty that eliminating the exhibit requirement in Rules 12b-23(a)(3) and Rule 411(b)(4) would create for investors would be virtually eliminated should registrants be required to include hyperlinks to any information that is incorporated by reference to documents available on EDGAR as called for by the proposed rules.

Question 71, 73, 74

While we believe that requiring hyperlinks would pose only a modest burden to the vast majority of registrants, we are in favor of reducing the number of instances where hyperlinks are required; in this regard, we support exceptions to the proposed hyperlinking requirement for Forms 10-K, 10-Q and 8-K and definitive proxy statements because it can reasonably be expected that investors have accessed these materials or can quickly find them on EDGAR provided they are given the file number and date.

We agree with the Commission that it would result in more confusion than clarity if registrants were required to re-file disclosure to correct a hyperlink or to include a section solely devoted to corrected hyperlinks in the body of a periodic report or post-effective amendment. As the Commission notes in the Proposing Release, the disclosure requirements in proposed Rules 411 and 12b-23 will blunt any impact from inaccurate hyperlinks. For these reasons, we believe registrants should not be required to update hyperlinks except as contemplated in the proposed rules.

We do not believe is necessary to amend the Commission's forms to clarify that information incorporated by reference must include a hyperlink to where that information may be found on EDGAR. We believe that once the proposed rules are in place, the requirements will be well understood by professionals and compliance with the rules will be fairly intuitive to registrants.

Forms

Questions 82-84

While we see the merits of eliminating the requirements for most item numbers and captions to reduce duplicative disclosure, we believe that the modest benefits to be gained from doing so are outweighed by the difficulties investors may experience over time if there is a lack of uniformity in how Exchange Act filings are organized. The forces that drive for uniformity in organization of documents used in securities offerings -- where item numbers and captions are largely not required -- are less present in the context of Exchange Act filings. As such, we would expect that over time the organization of Exchange Act filings would become more variable and the task of locating specific information and comparing it across multiple registrants would become more time-consuming for investors.

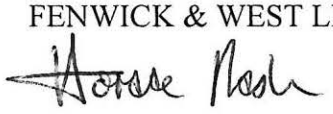
Questions 85

We do not believe there is a need to change the information that may be incorporated by reference into a prospectus under any of the Commission's forms. In our practice, our clients typically have not experienced challenges associated with the existing framework.

If the staff would care to discuss any of the comments that we have provided in this letter, please feel free to contact Bill Hughes, Horace Nash or Daniel Winnike of this firm at 650-988-8500.

Sincerely,

FENWICK & WEST LLP



Horace L. Nash