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September 20, 2016

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

Re: Release No. 33-10198; 34-78687; File No. S7-18-16
Request for Comment on Subpart 400 of Regulation S-K

Dear Mr. Fields:

Fenwick & West LLP is pleased to respond to the request of the Securities and Exchange Commission ("Commission") for comments regarding Subpart 400 of Regulation S-K, per the Release referred to above.

We represent and have represented over the years a large number of publicly-held technology and life science companies in their initial public offerings and on their periodic reporting matters. The comments we provide in this letter are derived from our experience with this practice.

We understand that you are seeking comment pursuant to the mandate of the FAST Act to, among other things, "modernize and simplify" disclosures required by Regulation S-K and to avoid "boilerplate language" and "static requirements." With these goals in mind, we believe that there are specific areas within Subpart 400 of Regulation S-K that could be modified to reduce the length of disclosures contained in annual reports or proxy statements, while still providing investors with access to information on key corporate governance-related items.

Security Ownership of Certain Beneficial Owners

Item 403 requires companies to disclose the amount and nature of beneficial ownership of not only their directors and executive officers, but also, in subsection (a), of any person owning more than five percent of any class of the registrant's voting securities. This information is most typically provided in annual meeting proxy statements.

Commencing with the IPO (or other event causing the company to become subject to the public reporting requirements of the Securities Exchange Act of 1934), public companies will invariably have five-percent security holders with whom the company has no pre-existing relationship. While these investors have obligations under Section 13 of the Securities Exchange Act of 1934 to file reports on Schedule 13D or Schedule 13G, they have no other responsibility to report their current holdings to the company. Presumably recognizing this, Instruction 3 to Item 403 provides that for the purpose of this item companies are entitled to rely upon these holders' Schedules 13D and 13G "unless the registrant knows *or has reason to believe* that such information is not complete or accurate *or that a statement or amendment should have been filed and was not"* (*emphasis added*).

In our experience, companies struggle with the proper interpretation of Item 403(a) for security holders filing section 13 reports on Schedule 13G, which reports only need to be updated on an annual basis (while changes must be reported promptly by Schedule 13D filers). The company may be aware, or at least have reason to suspect, through a variety of means that a Schedule 13G filer has increased or decreased its holdings since the last Schedule 13G was filed (for example, in the periodic reports of their holdings filed by institutional investors, through filings under Section 16 of the Exchange Act by 10% holders, and through conversations with personnel of the security holder or with specialists and market makers and other stock market participants). The responsibilities of reporting companies facing these dynamic, and often uncertain, factual situations are not clear.

We believe that the appropriate scope of Item 403(a) is that in reporting beneficial ownership of holders filing reports under section 13, a company is entitled to rely upon a filed statement under section 13 unless the company <u>knows</u> that the Schedule was inaccurate or incomplete <u>when filed</u>. We do not believe that a company should be precluded from relying upon a filed schedule under section 13 if it does not have actual knowledge of the inaccuracy or incompleteness of a stockholder's filed reports under section 13, but is aware of facts that some would say result in it having "a reason to believe" that a filed report is inaccurate or incomplete. We also respectfully submit that a company should not be charged with undertaking to know if "a statement or amendment should have been filed and was not." Clearly the party most capable of providing this information, and the party charged with doing so by the Williams Act, is the security holder. Making the company responsible for evaluating the accuracy of this potentially ever-changing information on a once-a-year basis related to filing its proxy statement does not appear to us to be an appropriate method of providing this information to investors.

In light of the foregoing, we suggest that Instruction 3 to Item 403 be amended to provide that companies are entitled to rely upon Schedules 13D and 13G "unless the registrant knows that such information was not complete or accurate at the time the schedule was filed."

<u>**Indirect Material Interest: Item 404(a)**</u>

For many reporting companies in the technology and life science industries, it is common for boards of directors to include executive officers of other high technology or life science companies. These executives often bring relevant industry experience and offer valuable perspectives to the Board. In many instances, the public reporting company may also be a customer of the board member's company, or vice versa.

In our experience, these customer transactions consistently involve the sale of products and services in the ordinary course of business on terms that are consistent with those provided to other similarly-sized customers. Often, the executive is not aware that the transaction occurred, as the purchase decision would likely have been made as part of the reporting company's normal procurement process, with no involvement by board members.

In these situations, the dollar amount of the purchases often exceeds $120,000 in a year. The reporting company must then make a determination as to whether the board member has an indirect material interest in the transaction. The director would most likely not have any kind of interest in the transaction, other than the attenuated indirect interest that his or her company would make an additional sale, thus increasing the revenues and potentially the value of that company. However, because there are no specific safe harbor provisions that apply to ordinary course of business commercial transactions, we find that reporting companies are uncertain as to whether such ordinary course transactions should be discussed under Item 404(a).

In Release 33-8732 from 2006 (the "***2006 Release***") adopting changes to Item 404(a), the Staff did not adopt an ordinary course of business exception, but rather noted that "whether a transaction which was not material to the company or the other entity involved and which was undertaken in the ordinary course of business of the company and on the same terms that the company offers generally in transactions with persons who are not related persons, are factors that could be taken into consideration when performing the materiality analysis for determining whether disclosure is required under the principle for disclosure." 2006 Release, at p. 166.

We support principles-based disclosure requirements, which we believe is the goal of Item 404(a) as revised in 2006. However, the potential disclosures encompassed within the scope of transactions in which a director may have an "indirect material interest" and the natural conservatism attendant to dealing with sensitive matters such as related party transactions, has for 10 years resulted in reporting companies struggling with whether ordinary course, standard commercial transactions must be disclosed. This uncertainty has led to disclosure that we think is not meaningful to a reasonable investor and has also led to the indirect costs associated with evaluating these frequently-occurring transactions. We also believe that when companies choose to disclose these transactions as a result of the lack of a safe harbor for these types of transactions, it can have the effect of calling attention to ordinary, standard commercial transactions, suggesting that the transactions require additional scrutiny. We respectfully suggest that a more effective principles-based disclosure requirement would be an amendment to Instruction 7 of Item 404(a) to add an exception for commercial transactions in the ordinary course of business on standard terms and conditions.

We believe that the concept of explicitly excluding these types "ordinary course" transactions already exists within the current Instructions to Item 404(a), where ordinary course indebtedness need not be disclosed pursuant to Instruction 4 b and c, for example, as well as the other exemptions contained in the instructions to Item 404(a). In one case, the Staff was persuaded by a commentator where the related person would be unlikely to have influenced the transactions. 2006 Release at p. 164. Under an ordinary course type of exception, we believe that it is very unlikely that the related person would have influenced the transaction, if terms are largely the same as those for other similarly-situated customers.

Disclosures that do not tend to vary materially on an annual basis: Items 404(b), 406 and 407

Items 404(b), 406 and 407 of Regulation S-K contain many disclosure requirements that relate to corporate governance principles that do not change significantly over time. For example, Item 402(b) requires reporting companies to describe their policy regarding approval of related party transactions and Item 406(a) requires reporting companies to disclose whether or not they have adopted a code of ethics that applies to certain officers. As another example, Item 407(b)(2) and (c) require disclosure of policies on director attendance at annual stockholder meetings and whether a nominating committee has a charter and process for nominating directors. In our experience, the disclosures in annual meeting proxy statements regarding these and other items in Items 404(b) and 407 remain largely unchanged over the course of many years, and this redundant disclosure can in many cases be extensive.

Many of the reporting requirements of Items 404(b), 406 and 407 of Regulation S-K were adopted pursuant to requirements of the Sarbanes-Oxely Act of 2002 or were otherwise added at that same time as a greater focus was being brought to bear on corporate governance matters. Since the adoption of these disclosure requirements, The Nasdaq Stock Market and the New York Stock Exchange substantially broadened the scope of their corporate governance requirements for listed companies. Hence, many of the governance factors that are the subject of these Regulation S-K items are now commonplace, if not actually required, for listed companies, and investors are sufficiently familiar with these concepts that they need not be described anew each year.

We propose that reporting companies be required to disclose certain types of this static information once, either in an Annual Report on Form 10-K or proxy statement or perhaps an exhibit to a Form 10-K, with a requirement to only provide disclosures of any material changes to these items on an annual basis. If this information were to be included as an exhibit, reporting companies that did not materially modify any of their governance policies could simply incorporate the previously filed exhibit in the exhibit index contained in the Form 10-K. This would allow investors to locate this disclosure easily, and if the Staff implements its proposed rule set forth in Release No. 333-10201 requiring hyperlinks to exhibits, investor access to this information would be further facilitated. This approach would help to reduce the amount of text contained in an Annual Report on Form 10-K or proxy statement, while still providing easy access to these disclosures for interested investors.

The specific items that in our experience do not change materially on an annual basis and that we recommend the Staff of the Commission consider for this approach consist of:

Item	**Subject**
404(b)	Description of Related Party Transaction Approval Policy
406(a)	Disclosure of whether company has adopted a code of ethics for certain officers

407(a)(1)(ii) and (a)(2)	Description of independence standard
407(b)(2)	Policy regarding attendance at annual meetings
407(b)(3)	Description of the functions of standing Board committees
407(c)(1) and (c)(2)(i)-(vi)	Various disclosures related to nominating committees
407(d)(1)	Matters relating to the role of audit committees
407(d)(5)	Audit committee financial expert
407(e)(1)-(3)	Matters relating to role of compensation committees
407(f)(1)-(2)	Description of shareholder communication process
Item 407(h)	Description of Board leadership and risk oversight

We are not proposing to eliminate any of these specific disclosure items, rather, we are seeking to avoid the need to restate disclosure that remains largely unchanged on an annual basis.

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

Very Truly Yours,

Fenwick & West LLP