New York
Menlo Park
Washington DC
São Paulo
London
Paris
Madrid
Tokyo
Beijing
Hong Kong

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

212 450 4000 tel
212 701 5800 fax

November 4, 2016

Re: Comments on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters
Release No. 33-10198 – Item 402 of Regulation S-K
File No. S7-18-16

VIA E-EMAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Mr. Fields:

Further to our letter of October 31, 2016, we are submitting this letter in response to the request by the Securities and Exchange Commission (the "**Commission**") for comment on Subpart 400 of Regulation S-K discussed in the above-referenced release (the "**Release**"). We appreciate the opportunity to comment on the Release.

In this letter, we set forth recommendations on Item 402 of Regulation S-K that are consistent with the goals of disclosure effectiveness, including simplifying and modernizing disclosure of executive compensation while maintaining the SEC's goals of investor protection and efficient capital markets.

a. The Compensation Discussion and Analysis need not discuss boilerplate or redundant items.

Item 402(b)(2) enumerates material information to be disclosed in the Compensation Discussion and Analysis ("**CD&A**") section of the proxy statement, including a number of items that have become either boilerplate or redundant disclosure.

For example, Item 402(b)(2)(xii) requires the disclosure of the accounting and tax treatments of the particular form of compensation. This disclosure, which can occupy at least a half page, if not

more, of proxy statement text, has become relatively boilerplate. It typically covers the tax deductibility of compensation under Section 162(m) of the Internal Revenue Code (the "**Code**"), the registrant's compliance with or exemption from Section 409A of the Code with respect to its non-qualified deferred compensation, and the accounting treatment of equity compensation awards. Many registrants disclose that, while they take into account these considerations in the design of their compensation, these considerations are not dispositive. Even though they recognize that they need not provide this disclosure, many registrants feel compelled to do so nonetheless, due to the market practice that has developed. Given that this disclosure has become so anodyne and has never been viewed to be material by investors, we recommend that Item 402(b)(2)(xii) be eliminated altogether.

Item 402(b)(2)(xv) requires the disclosure of the "role of executive officers in determining executive compensation." This requirement seems redundant with the requirement at Item 407(e)(3)(ii) to disclose any "role of executive officers in determining or recommending the amount or form of executive or director compensation." Given that many investors and registrants consider the involvement of executive officers to be a matter of governance, we recommend that Item 402(b)(2)(xv) also be eliminated altogether.

b. The existing Bonus and Non-Equity Incentive Plan Compensation columns of the Summary Compensation Table should be combined into a single Bonus column.

Cash incentives are currently required to be reported under Items 402(c)(2)(iv) and (vii) in two separate columns of the Summary Compensation Table, with "bonuses" reported in the Bonus column, and "non-equity incentive plan compensation" reported in the Non-Equity Incentive Plan Compensation column. To streamline the disclosure and reduce confusion among investors, we recommend that all such cash incentives be reported in a single Bonus column. We also recommend that the same change be made to the Summary Compensation Table for smaller reporting companies (Items 402(n)(2)(iv) and (vii)), and that the Non-Equity Incentive Plan Compensation column of the Director Compensation table be renamed the Bonus column (Items 402(k)(2)(v) and 402(r)(2)(v)).

Cash incentives are required to be reported in the Non-Equity Incentive Plan Compensation column if they are earned under "any plan [that is not an equity incentive plan] providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other performance measure" (Item 402(a)(6)(iii)). Cash incentives that do not qualify as non-equity incentive plan compensation are required to be reported in the Bonus column.

Many investors are confused by the term "Non-Equity Incentive Plan Compensation," as they consider all cash incentives to be bonuses, in the lay sense of the term. And even investors who understand the term may not understand why a particular cash incentive is reported in one column and not the other. For example, investors may understand how an annual bonus that is paid solely based on a preestablished formula (which would be reported in the Non-Equity Incentive Plan Compensation) is different from a retention bonus that is paid solely based on service (which would be reported in the Bonus column). In other cases, however, the reason for the distinction may be less clear. For example, many registrants consider factors (which may be subjective, or may be objective but not preestablished) when applying negative discretion to reduce the actual payouts of bonuses that are initially determined according to a formula.

Investors may be confused as to why such bonuses are reported in the Non-Equity Incentive Plan Compensation column, rather than the Bonus column.

If an executive receives more than one form of cash incentive compensation for a year, a breakdown between these forms could be provided in a footnote to the Bonus column. The CD&A would also describe the various forms of cash incentive compensation.

c. **The aggregate grant date fair value of equity awards that are granted *for* prior year performance should be reported for such prior year in the Summary Compensation Table.**

Items 402(c)(2)(v) and (vi) require reporting in the Summary Compensation Table the aggregate grant date fair value of equity awards *for the year of grant*. Consistent with the views of other commentators, we recommend that the Commission require that such value be reported *for the performance year* for which the equity awards were granted, even if the awards are granted in the following year. We also recommend that the same change be made to the Summary Compensation Table for smaller reporting companies (Items 402(n)(2)(v) and (vi)) and the Director Compensation table (Items 402(k)(2)(iii) and (iv) and 402(r)(2)(iii) and (iv)).

Many registrants in a diverse range of industries, including insurance, healthcare, financial services, and energy, currently grant equity awards for services rendered in the prior year. Such registrants may wait until the following year to grant equity awards because compensation committees, in evaluating executive performance, wish to have the full information that is available only after the year ends, including whether relevant performance criteria have been attained.

This change would result in greater comparability and improved disclosure because the value of the awards would be reported for the year for which the compensation decision was made. Moreover, reporting for the year of grant the grant date fair value of an equity award granted for services rendered in the prior year may be misleading. For example, a registrant that performs well in 2015 could grant an equity award to a named executive officer in early 2016 as a bonus for performance rendered in 2015. Under the current rule, the grant would not be disclosed until 2017. If the registrant's performance declined in 2016, investors may believe that the award was intended to reward the officer for poor performance in 2016, rather than for good performance in 2015. This disclosure's tendency to confuse is evidenced by media reports that often inaccurately state that such awards are granted for the year of poor performance, further increasing investor misunderstanding. Because investors may not understand the existing rule, many registrants that grant equity awards for services rendered in the prior year provide a supplemental table that reports these equity awards for the prior year. Our recommendation would eliminate the need for such a supplemental table, making the CD&A shorter and clearer.

The existing rule appropriately requires that the amount of a cash bonus be reported for the year for which the bonus was earned, even if paid in the following year. Requiring the grant date fair value of an equity award granted for services rendered in the relevant year to be reported for such year would treat similarly all annual bonuses, regardless of whether they are paid in the form of cash or equity and regardless of whether they are paid in the year for which the performance was rendered or in the following year.

d. The existing Stock Awards and Option Awards columns of the Summary Compensation Table should be combined into a single Equity Awards column.

Items 402(c)(2)(v) and (vi) require reporting in two separate columns of the Summary Compensation Table the aggregate grant date fair value of full value awards (i.e., Stock Awards) and appreciation awards (i.e., Option Awards), respectively. To streamline the Summary Compensation Table, we recommend that all equity awards be reported in a single Equity Awards column (which would replace the existing Stock Awards and Option Awards columns). This would also be consistent with the reporting of both types of equity awards in the Equity column of the Golden Parachute Compensation table under Item 402(t)(2)(iii). A breakdown of the value of the equity awards between full value and appreciation awards could be provided in a footnote to the Equity Awards column.

We also recommend that the same change be made to the Summary Compensation Table for smaller reporting companies (Items 402(n)(2)(v) and (vi)) and the Director Compensation table (Items 402(k)(2)(iii) and (iv) and 402(r)(2)(iii) and (iv)).

e. The calculation of pension benefits for purposes of the Summary Compensation Table, as well as the proposed Item 402(v) "pay versus performance" disclosure under Section 953 of the Dodd-Frank Act, should be harmonized and should be replaced with the actuarial present value at fiscal year-end of the additional benefit that the named executive officer earned during the fiscal year.

Item 402(c)(2)(viii)(A) requires reporting in the Summary Compensation Table the value of pension benefits earned by a named executive officer for a fiscal year, with such value equal to the actuarial present value of accumulated benefits at the end of the fiscal year, minus the actuarial present value of accumulated benefits at the end of the prior fiscal year. Proposed Item 402(v) would require reporting the value of such pension benefits as a component of "actual pay" for the "pay versus performance" disclosure under Section 953 of the Dodd-Frank Act, with such value equal to the actuarially determined service cost for services rendered by the named executive officer for the fiscal year.

We believe that both calculations are flawed, and in both the Summary Compensation Table and the proposed pay versus performance disclosure, we recommend that they be replaced with the calculation proposed by Mercer LLC ("**Mercer**") in its comment letter in response to the proposed "pay versus performance" rule:[1] the actuarial present value at fiscal year-end of the additional pension benefit that the named executive officer earned during the fiscal year, measured using the same assumptions as the Summary Compensation Table pension calculations.

As Mercer notes in a report appended to its comment letter,[2] the value of the pension benefits included in the Summary Compensation Table overstates the compensation value of such benefits, is highly volatile from year to year, and does not allow for comparability with defined contribution benefits because it includes the change in the value of pension benefits earned in earlier years due to changes in interest rates, the named executive officer's age, or other actuarial factors. Replacing this value with accounting service cost substitutes these problems with new ones, as service cost includes an allowance for future pay increases that may never materialize but excludes some or all of the value of benefits actually earned when pay increases faster than expected or the plan is amended to enhance benefits.

---

[1] Gregg H. Passin, Senior Partner, Mercer LLC, Comment Letter on Pay Versus Performance Disclosure (July 6, 2015), https://www.sec.gov/comments/s7-07-15/s70715-43.pdf.

[2] Heidi Rackley & Aaron Pedowitz, Mercer LLC, *GRIST InDepth: SEC's Pay-for-Performance Proposal Swaps One Flawed Pension Value for Another* (May 20, 2015).

Mercer explains in its report how its proposed alternative calculation is a more appropriate measure of the value of pension benefits:

> Like the service cost, this measure would exclude the change in the present value of benefits earned in prior years caused by changes in interest rates, the executive's age, or other actuarial factors unrelated to the company's compensation decisions. But unlike service cost, this alternative measure tracks the actual pattern of benefit accruals and includes the full value of DB [defined benefit] benefit increases resulting from pay increases (whether expected or unexpected) and plan amendments. By better tracking actual benefit accrual patterns, this alternative would also be more comparable to DC [defined contribution] plans. What's more, this alternative measure can be readily calculated from available information.

Minimally, we recommend that the calculation of pension benefits be harmonized, given the likelihood of investor confusion at having two measures of pension, to no offsetting advantage. We also recommend that the same change be made to the Director Compensation table (Item 402(k)(2)(vi)(A)).

f. The Grants of Plan-Based Awards table should be eliminated.

Item 402(d) requires reporting in the Grants of Plan-Based Awards table information relating to stock and option awards that were granted during the fiscal year, including the grant date, the dollar value (or range) of estimated future payouts on satisfaction of the relevant conditions under non-equity incentive plan awards, the number (or range) of shares to be paid out or vested on satisfaction of the relevant conditions under equity incentive plan awards, the number of shares underlying stock and option awards that are not subject to performance conditions, the per-share exercise price of options, and the grant date fair value of stock and option awards. We recommend eliminating this table.

Much of this information is disclosed on a current basis on Form 4 or is provided in or can be derived from other sections of the proxy statement (e.g., the CD&A, the Summary Compensation Table, and the Outstanding Equity Awards at Fiscal Year-End table). In discussions with investors, even sophisticated ones, we have learned that many investors find the Grants of Plan-Based Awards table confusing because it encompasses both cash and equity awards, as well as short- and long-term awards, in one table. As a result, many investors do not use this table in a meaningful manner. We also note that the Grants of Plan-Based Awards table is not required for smaller reporting companies.

g. The Option Exercises and Stock Vested table should be eliminated.

Item 402(g) requires reporting in the Option Exercises and Stock Vested table information relating to options that were exercised and stock awards that vested during the fiscal year, including the number of shares acquired and the aggregate dollar value realized. We recommend eliminating this table.

For many investors, the information in the table is not particularly useful, as it does not relate to compensation decisions made during the year, nor does it report the extent to which any performance conditions were attained. Moreover, the value realized on exercise of options is not directly comparable with the value realized on vesting of stock awards, as the former is determined by when the executive officer elects to exercise the options, whereas the latter is determined by the vesting dates of the stock awards established by the compensation committee at the time of grant.

To the extent that investors are interested in this information, it is provided in or can be derived from other sources (e.g., the CD&A, the Outstanding Equity Awards at Fiscal-Year End table, Forms 4, and the proposed Item 402(v) "pay versus performance" disclosure under Section 953 of the Dodd-Frank Act). We note that the Option Exercises and Stock Vested table is not required for smaller reporting companies.

h. Former executive officers should be excluded from the Golden Parachute Compensation table.

Item 402(t)(1)(ii) requires, in any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A, disclosure of golden parachute arrangements with respect to the named executive officers of both the acquiring company and the target company. For purposes of this disclosure, we recommend the exclusion of individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year, and we believe that this exclusion should apply regardless of whether such individuals remain employed by the registrant at the time of the proxy or consent solicitation. Unlike Item 5 of Schedule 14A, golden parachute disclosure does not apply to directors of the registrant. Thus, the purpose of the golden parachute disclosure appears to be designed to inform investors about executive compensation or benefits and therefore should focus only on individuals who are actually executive officers at the time of the transaction.

In addition, we recommend that the Commission also exclude from this disclosure those individuals who are no longer employed by the registrant at the time of the proxy or consent solicitation, even if such persons served as the principal executive officer or principal financial officer of the registrant during the last completed fiscal year or were among the registrant's other most highly compensated executive officers at the end of that year. It is not clear what purpose is served by mandating disclosure of golden parachutes with respect to former employees, especially as they are unlikely to be receiving any new or additional agreements or understandings as a direct result of the transaction.

We appreciate the opportunity to participate in the comment process, and would be pleased to discuss our comments or any questions the Commission or its staff may have, which may be directed to Ron Aizen or Kyoko Takahashi Lin of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP