



April 16, 2026
Vanessa Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: CLL-15; Cooley LLP Regulation S-K Comment Letter

Dear Ms. Countryman:

We are writing to comment on the Regulation S-K reform effort of the Securities and Exchange Commission (which we refer to in this letter as the “SEC” or the “Commission”). We thank the Commission for the opportunity to provide these comments and applaud its efforts to examine whether the current regulatory framework could be recalibrated to elicit material information and avoid compelled disclosure of immaterial information.

Cooley LLP represents thousands of emerging, growth-stage, and large-cap companies (as well as the investment vehicles which fund them) operating at the forefront of technology, life sciences, and other cutting-edge industries. With nearly 1,400 lawyers in 19 offices across the globe, our various practice groups have jointly advised companies and underwriters on more than 1,000 public offerings since 2016, as well as ongoing public company disclosures and corporate governance matters, giving us a unique perspective on the practical implications of the Commission’s rules for market participants.

Background principles and rationale

In our experience, the collective burden of the current disclosure regime dissuades many companies from going and staying public and thus contributes to a lack of investment opportunities for public market participants. This letter contains recommendations on Regulation S-K, as well as on forms and other rules that implicate Regulation S-K, including Form 8-K and Regulation S-X.¹ In prior letters submitted to the Commission, we and other organizations have identified matters relating to executive compensation disclosures and scaled disclosures that we continue to support.²

We expect the Commission will receive many thoughtful comments that address the current prescriptive and complex disclosure requirements in Regulation S-K.³ Our comments in this letter are aimed at rooting disclosure requirements in the long-standing traditional concept of materiality and scaling disclosure requirements with a company’s size and maturity – in each case, in a way that furthers the three prongs of

¹ See James Moloney, Director, Division of Corporation Finance, *Coming Attractions From the Division of Corporation Finance* (Feb. 13, 2026), available at <https://www.sec.gov/newsroom/speeches-statements/moloney-statement-coming-attractions-021326-coming-attractions-division-corporation-finance> (welcoming comments on Regulation S-X).

² See Letter from Cooley LLP (Aug. 15, 2025), available at <https://www.sec.gov/comments/4-855/4855-639727-1910274.pdf> (related to the Commission’s June 2025 roundtable on executive compensation disclosures); Letter from the Society For Corporate Governance (Aug. 27, 2025), available at <https://www.sec.gov/comments/4-855/4855-644367-1928454.pdf>; Letter from the Society For Corporate Governance (June 20, 2025), available at https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/5d47927b-105a-4bc7-9aef-821536f3505b/UploadedImages/SMCC_Reporting_Thresholds__Scaled_Disclosure_Letter_June_20_2025__final_signed_.pdf (related to scaling disclosure obligations for small- to mid-sized public companies).

³ Unless otherwise noted, the term “Item” in this letter means the applicable Item in Regulation S-K.

the SEC's core mission: protecting investors, furthering capital formation, and safeguarding fair, orderly, and efficient markets. Our comments reflect four principal themes:

1. Eliminate overly prescriptive, redundant and obsolete disclosure requirements;
2. Refocus disclosure requirements on traditional materiality principles;
3. Modernize and streamline rules to remove unnecessary friction from capital formation, while preserving material information; and
4. Consider alternative formats for presenting certain information.

As Chairman Atkins observed in a December 2025 statement (the "December 2025 statement"),⁴ the SEC's disclosure regulations have become so voluminous that the path to going public has become narrower, costlier and more burdensome for companies, causing more friction than benefit in the marketplace. Additionally, the voluminous nature of the current disclosure regime risks overloading investors with immaterial information that muddies the readability of information presented to investors. We encourage the Commission to return to a disclosure framework tied to long-standing notions of materiality – *i.e.*, reporting that is focused on matters that a reasonable investor is substantially likely to consider important⁵ – which aligns with the Commission's long-standing historical approach and ensures the Commission is operating within the confines of its statutory authority.⁶

As remarked by Chairman Atkins in the December 2025 statement, disclosure is most effective when primarily driven by market participants. Disclosure requirements that are keyed to materiality ensure that investors receive information needed to make voting and investment decisions, without overburdening companies with interpretive complexities and never-ending information gathering and verification – especially when it comes to disclosure exercises that modern technology has rendered obsolete.

Moreover, companies are best positioned to assess the probability and magnitude of developments that may affect their business and thus to determine what information is material to their investor base and how the information should be disclosed. Companies should be afforded deference and appropriate license to make these determinations within a simplified, primarily principles-based framework that better aligns with how management and boards of directors manage and assess business performance.⁷ A less prescriptive and more principles-based framework would enable companies to focus on more tailored disclosures and would allow for companies to minimize the production of immaterial information as the business and macro environment change, while also adapting disclosures to meet evolving information requirements of

⁴ Chairman Paul S. Atkins, *Statement on Revitalizing America's Markets at 250* (Dec. 2, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-120225-revitalizing-americas-markets-250>.

⁵ SEC Staff Accounting Bulletin No. 99: Materiality (Aug. 12, 1999), available at <https://www.sec.gov/interps/account/sab99.htm> (summarizing materiality to mean "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," citing *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976) and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)).

⁶ In the final rules adopted by the Commission in August 2020 revising the business, legal proceedings and risk factor disclosures under Regulation S-K (85 Fed. Reg. 63726 (Oct. 8, 2020)) and the final rules adopted in November 2020 revising certain financial disclosure requirements under Regulation S-K (86 Fed. Reg. 2080 (Jan. 11, 2021)), the Commission emphasized the amendments to such disclosure requirements reflected the Commission's long-standing commitment to a principles-based approach to disclosure framework.

⁷ While we recommend that the Commission consider a primarily principles-based disclosure regime, we have also provided specific recommendations within the framework of existing rules that we believe that would help with the Commission's regulatory review. See, e.g., our recommended edits to Item 404.

reasonable investors.⁸ Such a framework would further the SEC's core mission of investor protection while balancing burdens on companies.

We respectfully recommend the Commission consider the following:

1. Amend Item 10 (General) to add a materiality qualifier for all Regulation S-K non-financial disclosures.

- a. We encourage the Commission to further consider the materiality concept recommended by the American Bar Association (“ABA”) in 2015 and 2017. The ABA suggested adding the following text to Item 10:

“In addition to the information expressly required to be disclosed, the registrant shall disclose such additional material information, if any, as may be necessary to make the required statements in the light of the circumstances under which they are made not misleading. Issuers may omit information otherwise called for by a line item, except for Items 402 and 404, if such information is not material, as long as the effect of omitting the information would not be materially misleading. It shall be presumed, in the absence of facts to the contrary, that the omission of any disclosure called for by a Regulation S-K line item was an intentional omission by the registrant in reliance upon this subsection (g) and not a failure to provide the disclosure called for by such line item.”⁹

2. Limit the scope of Item 10 requirements by removing Instruction 2 from Item 2.02 of Form 8-K.

- a. Complying with Item 10(e)(1)(i)(A)'s equal or greater prominence requirement in earnings press releases is a significant pain point for companies, for the following reasons:
1. Division of Corporation Finance Staff interpretations of the equal or greater prominence requirement have increased the burden of compliance on companies and can result in the prominent presentation and discussion of metrics in earnings press releases that are not meaningful to investors.
 - i. See Non-GAAP Corporation Finance Interpretation (“CFI”) 102.10. In particular, the requirements articulated through the examples of non-compliance provided in that CFI result in the following adverse outcomes (example from the CFI, followed by adverse outcome):
 - A. “Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly

⁸ We believe the “reasonable investor” standard underscores the need for a principles-based disclosure regime. While it is important to acknowledge the views of particular investors and investor coalitions, the preferences of a defined group of investors – however large or sophisticated – do not themselves establish the standard for materiality under the federal securities laws, especially if their preferences drive prescriptive rules that apply to all public companies. The materiality analysis requires an objective inquiry into whether a reasonable investor would consider the information important in making an investment or voting decision, a standard that is not satisfied merely by demonstrating that a particular constituency finds the information useful or desirable, and which may vary by company depending on its investor base.

⁹ Letter from the Disclosure Effectiveness Working Group of the Federal Regulation of Securities Committee and the Law and Accounting Committee of the Section of Business Law of the American Bar Association (Dec. 15, 2017), available at <https://www.sec.gov/comments/s7-06-16/s70616-2812973-161696.pdf>. See also Letter from Disclosure Effectiveness Working Group of the Federal Regulation of Securities Committee and the Law and Accounting Committee of the Section of Business Law of the American Bar Association (Mar. 6, 2015), available at <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-32.pdf> (addressing Regulation S-K).

comparable GAAP measure(s) with equal or greater prominence” leads companies to present GAAP ratios that are not meaningful to investors (for example, net loss margin); and

- B. “Describing a non-GAAP measure as, for example, ‘record performance’ or ‘exceptional’ without at least an equally prominent descriptive characterization of the comparable GAAP measure” discourages companies from discussing the company’s results in the way management thinks about the business (for example, in earnings release quotations or headlines).
2. In addition, the equal or greater prominence requirement provides low-hanging fruit for plaintiffs’ firms looking to collect fees for alleging issuer non-compliance.
- b. At the same time, investors are protected by a reconciliation requirement that complies with Regulation G:
1. The reconciliation requirement under Regulation G already provides investors with everything they need to evaluate a non-GAAP financial measure against its most directly comparable GAAP measure. A clear, complete reconciliation gives investors full transparency into the adjustments management has made. The additional overlay of requiring equal or greater prominence of non-GAAP measures in earnings materials furnished to the Commission misapprehends how investors actually use earnings information. Companies typically present non-GAAP measures in earnings materials because investors and analysts have indicated, or companies have assumed, that those measures need to be conveyed to their investors and analysts in order to practically and/or more meaningfully assess operating performance and/or liquidity from period to period. In many cases, leading with a GAAP measure that investors regard as less informative buries the information they came to find. We believe that presenting the non-GAAP measures investors find most useful in the earnings release context, accompanied by a clear, complete reconciliation to the most comparable GAAP measure, provides investors with sufficient disclosure to avoid being “misled” by most companies’ attempts to present, in good faith to meet the informational needs of their investors and analysts, actually meaningful non-GAAP measures. Requiring companies to simultaneously restructure their presentation to foreground a corresponding GAAP measure that investors and analysts have deprioritized adds a compliance burden without a corresponding investor protection.
 2. The stated intent of the incorporation of Item 10(e)(1)(i) into the Form 8-K requirements was to protect investors by requiring companies to disclose, in addition to the baseline requirements already imposed by Regulation G, (a) the reasons management believes the presentation of non-GAAP financial measures presented provides information that is useful to investors and (b) to the extent material, the additional purposes for which management uses such non-GAAP financial information. Regulation G, for its part, already requires the inclusion of a presentation of the most directly comparable GAAP financial measure. Item 10(e)(1)(i)(A) goes further by requiring that such presentation be made with equal or greater prominence.
 - i. From the language of the non-GAAP adopting release,¹⁰ the Commission did not appear to focus on the difference between Regulation G’s requirement to include a presentation of the most directly comparable GAAP financial measure and Item 10(e)(1)(i)(A)’s requirement to include such a presentation, *with equal or greater prominence*.

¹⁰ *Conditions for Use of Non-GAAP Financial Measures*, Release Nos. 33-8176, 34-47226 (Jan. 22, 2003) [68 Fed. Reg. 4820 (Jan. 30, 2003)], available at https://www.sec.gov/rules-regulations/2003/03/conditions-use-non-gaap-financial-measures#P191_34868.

ii. The non-GAAP adopting release provides:

“After consideration of these comments, Item 12 of Form 8-K, as adopted, requires that earnings releases or similar disclosures be furnished to the Commission rather than filed. Regulation G would, of course, apply to these releases and disclosures. In addition, to provide certain of the protections provided by the amendments to Item 10 of Regulation S-K . . . to earnings releases, even if they are not filed, we have included in Item 12 of Form 8-K the requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K As a result, in addition to the requirements already imposed by Regulation G, registrants would be required to disclose:

- the reasons why the registrant’s management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant’s financial condition and results of operations; and
- to the extent material, the additional purposes, if any, for which the registrant’s management uses the non-GAAP financial measure that are not otherwise disclosed. . . .

The other amendments to Item 10 of Regulation S-K . . . would not apply” (emphasis added).

iii. Notably, the disclosure required by Items 10(e)(1)(i)(C) and (D) does not apply to earnings releases in most cases because Item 10(e)(1)(iii) provides that such disclosure is not required in a filing that is not an annual report on Form 10-K or Form 20-F if such disclosure was provided in a company’s most recent annual report on Form 10-K or Form 20-F or a more recent filing and does not need to be updated.

iv. Accordingly, Item 10(e)(1)(iii) essentially moots the entire original stated purpose for applying Item 10(e)(1)(i) to earnings releases.

3. Amend Items 101 (Description of business), 105 (Risk factors) and 106 (Cybersecurity) to eliminate overly prescriptive and repetitive disclosure requirements, and to refocus on traditional materiality principles.

a. Item 101. Description of business.

1. If a general materiality qualifier to Item 10 is not adopted, revise Item 101(c)(1) to adopt a more expressly principles-based approach, so that it is clearer that information need only be provided to the extent it is material to an understanding of the company’s business taken as a whole. We recommend removing the emphasis placed on certain discrete sub-topics within Item 101(c) – particularly the itemized example lists and qualifiers in the rule that steer disclosure toward particular subjects regardless of materiality to any given company.
2. For example, practice has demonstrated that Item 101(c)(2)(ii), which requires “[a] description of the registrant’s human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant’s business and workforce, measures or objectives that address the development, attraction and retention of personnel),” is creating unnecessary and repetitious disclosure that is inconsistent with the Commission’s goals of disclosure simplification. Prior to the 2020 amendments to Regulation

S-K that added this requirement,¹¹ companies were providing disclosure on human capital matters, to the extent material, in response to separate disclosure requirements.

- i. When the Commission amended Item 101(c) to its current form, it emphasized that disclosure would be required only to the extent the information would be material to an understanding of a company's business taken as a whole, and that the topics identified in Item 101(c)(2)(ii) may or may not be material, depending on the nature of the company's business and workforce.¹² However, the rule created confusion in practice because disclosure of material information about human capital matters was already required under pre-existing principles-based rules. In our experience, a "check-the-box" mentality arose among companies attempting to comply with a duplicative requirement, and many companies viewed the rule as mandating disclosure on the identified topics. We have observed lengthy disclosures that add complexity and expense without conveying information that meaningfully affects the company's business as a whole.
 - ii. Additionally, many companies voluntarily provide human capital information in response to the preferences of their particular investor base. We expect that if Item 101(c)(2)(ii) were eliminated, companies would analyze whether a significant portion of their particular investor base considers the underlying information important in deciding whether to invest in the company or how to vote at company stockholder meetings. If so, the company would have incentives to continue voluntarily making such disclosure.
3. We also recommend eliminating Item 101(e), which among other things requires companies to state whether they file reports with the SEC, that the SEC maintains an internet site for electronic filings, and whether the company makes its SEC filings available on its website. This requirement is obsolete in today's information ecosystem. Investors can easily gather information from online financial news websites, EDGAR or company websites. The repetitive disclosure by companies in periodic reports of the same information does not provide any meaningful benefit to the investor.
- b. **Item 105. Risk factors.** Streamline registration statements and reports that require Item 105 disclosures, including by:
1. Eliminating the requirement in Item 105(b) to summarize risk factor discussions that exceed 15 pages in length, in light of technology advancements that allow investors to rapidly summarize large volumes of information.
 - i. This would improve readability of registration statements and reports and reduce duplicative disclosures.
 - ii. Additionally, this would mitigate unnecessary burdens on companies. Currently, companies and their advisors must spend extra time and effort to craft a summary section, ensure it is consistent with the full risk factor discussion, and keep each section updated as changes are made. It opens the door to inconsistent and confusing disclosures and potential "foot-fault" liabilities, without providing meaningful benefit.

¹¹ *Modernization of Regulation S-K Items 101, 103, and 105*, Release Nos. 33-10825, 34-89670 (Aug. 26, 2020) [85 Fed. Reg. 63726 (Oct. 8, 2020)].

¹² *Id.* at 63739 (stating "a principles-based approach affords registrants the flexibility to tailor their disclosures to their unique circumstances, including by providing disclosure in accordance with some or all of the components of any current or future standard or framework that facilitates human capital resource disclosure that is material to an understanding of the registrant's business taken as a whole.").

- iii. The Commission approved the requirement to summarize risk factors in order to encourage companies to reduce the overall length of their risk factor disclosures.¹³ In our experience, the summary requirement has not significantly reduced risk factor disclosures – rather, in many cases, it has increased the overall length of the applicable filing. We encourage the Commission to examine whether the rule is operating as intended.
 - iv. The Commission could consider adding non-binding guidance, via an introductory note or instruction, that most companies should be able to describe their most material risks concisely and without unnecessary duplication, while stopping short of strict page limits, which most companies do not support, and which could curtail their ability to include disclosure protective to both companies and investors
2. Clarifying that companies could cross-reference to risk factors appearing in a separate filing, repository, or exhibit.
 - i. We would urge the Commission or Staff to provide instructions and/or guidance to clarify that this format would satisfy the requirements of the Private Securities Litigation Reform Act of 1995 (“PSLRA”).
 - ii. The PSLRA was adopted in 1995, at a time when most investors were reading disclosures in paper format and therefore it was important the disclosure document was “accompanied by” the meaningful cautionary risks statements. Modern technology allows disclosures to be accessed electronically in a manner where the “accompanied by” requirement could be satisfied by a hyperlink (or similar technology that may arise in the future).
 - iii. Rule 12b-23 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) generally permits incorporating information by reference, and existing disclosure items serve as precedent for leveraging exhibits and separate filings to streamline reports. For example, amendments adopted by the Commission in response to the Fixing America’s Surface Transportation Act moved descriptions of securities into an exhibit, and companies regularly provide the information required by Part III of Form 10-K through incorporation by reference to their definitive proxy statement.
 3. We are in favor of further consideration of enhanced safe harbor protections for companies that limit disclosures of “generic” risks, but it may be challenging in practice to draw the line on whether a risk is generic. Other efforts may be needed, in addition to an enhanced safe harbor, to mitigate excessive private securities litigation.
 - i. While we support streamlined, tailored disclosures, we urge the Commission to think carefully about restrictions on companies’ ability to repeat risk factors or to discuss company-specific impacts of macro conditions or events. It is important to both companies and investors that companies have the leeway to discuss factors that management deems to be material risks. The ability to cast a wide net provides an element of protection against after-the-fact litigation from the plaintiffs’ bar.
 - ii. If explored, enhanced safe harbor protections should recognize hypothetical, generic, or broadly understood risks may be omitted without triggering liability under federal securities laws.

¹³ *Modernization of Regulation S-K Items 101, 103, and 105*, Release Nos. 33-10825, 34-89670 (Aug. 26, 2020) [85 Fed. Reg. 63726 (Oct. 8, 2020)].

- c. **Item 106. Cybersecurity.** Amend Item 106 to remove Items 106(b) and (c), for the following reasons:
1. Our observations from three years of reporting indicate that cybersecurity risk management and governance disclosure is often highly generic and not informative for investors. Rather than allowing investors to assess whether a particular business faces unique cybersecurity issues, Item 106 as currently structured creates a prescribed disclosure regime that obscures decision-useful information. We encourage the Commission to evaluate whether the rule is operating as intended.¹⁴
 2. Companies are already required to provide cybersecurity information within other items to the extent material. For example, Item 407(h) already requires disclosure of the board's role in risk oversight. Companies are best positioned to determine the particular risk topics that should be described in more detail under 407(h) based on what is most relevant to a particular company and industry. Companies consistently provide robust and detailed disclosure about the board's role in risk oversight, including cybersecurity oversight where material, in annual meeting proxy statements is consistently, based on feedback from proxy advisors and investors. If the Commission elects to retain elements of Item 106, we recommend including sub-bullets or instructions within Items 101, 103, 303, and 407 reminding registrants to consider cybersecurity where material, rather than maintaining a standalone Item.
 3. Experience has shown that preparing Item 106 disclosure is particularly burdensome for newly public companies. These companies will often base their disclosure off precedent filings, which creates pressure to adopt conforming formal board and management governance practices that may not be practical or adapted to their needs and stage of development.
4. **Amend Item 201 (Market price of and dividends on the registrant's common equity and related stockholder matters) to eliminate redundant and obsolete disclosure requirements.**
- a. **Item 201(a). Market information.** Eliminate the Item 201(a)(1) disclosure requirement from periodic reports.
1. Item 201(a) is redundant of the cover page requirements of Form 10-K which, among other things, require a company to identify its trading symbol(s) and the name of the exchange on which the company's securities are registered.
 2. The requirements under Item 201(a)(1), including market information with respect to companies listed on the over-the-counter market or those companies with no established trading markets, have been rendered obsolete by the passage of time and modern technological advancements. Such information can be retrieved by investors from alternative sources in real-time with little or no cost to investors, which is likely to be more up-to-date and robust than the information disclosed in response to Item 201(a)(1). Since investors can retrieve this information from readily-available alternative sources, the effects of this amendment on investors should be minimal and will likely have the effect of facilitating more efficient collection of information. Additionally, removing this requirement will have the effect of eliminating outdated disclosure, thereby simplifying company compliance efforts. The Commission acknowledged these arguments in 2018 when the Commission amended Item 201(a) of Regulation S-K to eliminate certain disclosure requirements with respect to a company's market prices.¹⁵

¹⁴ In connection with this analysis, we would encourage the Commission to also evaluate whether Item 1.05 of Form 8-K, Material Cybersecurity Incidents, is operating as intended.

¹⁵ 83 Fed. Reg. 50148 (Oct. 4, 2018).

- b. **Item 201(b). Holders.** Eliminate the Item 201(b)(1) disclosure requirement from periodic reports.
1. As with the disclosure requirements under Item 201(a)(1), the requirement to disclose the number of registered holders has been rendered obsolete by the passage of time and modern technological advancements and, therefore, any effects of this amendment on investors should be minimal.
 2. Additionally, requiring the number of registered holders does not provide meaningful information to investors because shares of publicly traded companies are primarily held in street name through a bank or broker.
- c. **Item 201(d). Securities authorized for issuance under equity compensation plans.** Amend Item 201(d) to remove the tabular disclosure requirement and focus on simplified narrative disclosure.
1. The tabular disclosure required by Item 201(d) should be replaced with a simplified narrative requiring disclosure of the number of shares remaining available for future issuance under a company's equity compensation plans. The purpose of Item 201(d) is to provide investors with information regarding potential dilution from equity compensation. Shares available for future issuance under equity compensation plans is often viewed as the key metric for determining dilution. The additional disclosure currently required by the tabular requirement is unnecessary for the following reasons:
 - i. Requiring a distinction between compensation plans previously approved by security holders and those not previously approved is irrelevant and unnecessarily burdensome because potential dilution to be faced by investors is the same regardless of whether the compensation plan was or was not approved by company securityholders.
 - ii. Disclosure regarding the weighted-average exercise price of outstanding securities is typically disclosed in response to other disclosure requirements, for example, in the notes to financial statements. Given that this information is disclosed elsewhere, having a separate, stand-alone requirement provides little to no added value to investors.
 - A. Additionally, there has been a shift over time to companies granting restricted stock units or performance stock units as opposed to options. Given this shift, disclosure of weighted-average exercise price may be broadly less relevant.
 - B. Lastly, calculating the weighted-average exercise price can be time-consuming and burdensome for companies. The added compliance burden this requirement places on companies outweighs the little value that this disclosure provides to investors.
 2. Amend Item 201(d) to remove Item 201(d)(3).
 - i. Item 201(d)(3) requires companies to provide narrative disclosure regarding the material features of a compensation plan that was not previously approved by company securityholders. Similar to our recommendation with respect to Items 201(d)(1) and (2), given that the dilutive impact on securityholders is the same regardless of whether a compensation plan has been previously approved by securityholders, this requirement to provide narrative disclosure is less relevant and unnecessarily burdensome.
- d. **Item 201(e). Performance graph.** Eliminate the Item 201(e) disclosure requirement to provide a stock performance graph.
1. As with the disclosure requirements under Items 201(a)(1) and (b)(1), the stock performance graph required under Item 201(e) has been rendered obsolete by the passage of time and

modern technological advancements and, therefore, any effects of this amendment on investors should be minimal and will likely have the effect of facilitating more efficient collection of information.

5. Modernize Items 303 (Management’s discussion and analysis of financial condition and results of operations), 304 (Changes in and disagreements with accountants on accounting and financial disclosure) and 305 (Quantitative and qualitative disclosures about market risk) to reinforce usability and reflect today’s relevant disclosure lookbacks and information availability.

a. Item 303. Management’s discussion and analysis of financial condition and results of operations. Amend Item 303 to expressly clarify that companies are not required to discuss immaterial line items and permit cross-referencing other sections of the filing.

1. Eliminating prescriptive sub-items, or at a minimum adding a clear materiality qualifier, would reinforce more principles-based, dynamic disclosures.
2. The Commission should review and eliminate elements that duplicate information required in other sections of the applicable filing and should expressly permit cross-references.
3. The Commission should also work to enhance safe harbors and related guidance to reduce litigation risks associated with forward-looking MD&A disclosures.

b. Item 304. Changes in and disagreements with accountants on accounting and financial disclosure. Amend Item 304 to reduce the lookback period from the two most recent fiscal years and any subsequent interim period, to the most recently completed fiscal year and any subsequent interim period.

1. Reducing the lookback period under Item 304 to a more relevant timeframe allows companies to focus on material, current information. A reduced lookback period will also reduce the volume of immaterial information by eliminating duplicative or outdated information.

c. Item 305. Quantitative and qualitative disclosures about market risk. Eliminate Item 305.

1. The requirements of this item are lengthy and complex and create confusion and compliance burdens for companies, especially for companies that are newer to the public market.
2. Existing Item 305 disclosure is consistently highly generic, repetitive, and non-informative. These same concerns were identified in responses to the Commission’s 2016 concept release on Regulation S-K,¹⁶ and market practice in the subsequent decade has not indicated that Item 305 produces decision-useful disclosures.
3. Companies with relevant material risk exposures would naturally provide related risk factor or liquidity disclosures, based on a principles-based materiality determination. A universal requirement to provide disclosures in a dedicated section is therefore both overly broad and duplicative. We recommend that, in eliminating Item 305, the Commission incorporate the existing Item 305(d) safe harbor into Item 303 to preserve its availability when companies make forward-looking market risk disclosures as part of the MD&A.

¹⁶ See, e.g., Letter from KPMG LLP (July 21, 2016), available at <https://www.sec.gov/comments/s7-06-16/s70616-246.pdf>; Letter from Ernst & Young LLP (July 21, 2016), available at <https://www.sec.gov/comments/s7-06-16/s70616-223.pdf>; Letter from General Motors Company (Sept. 30, 2016), available at <https://www.sec.gov/comments/s7-06-16/s70616-373.pdf>.

4. To the extent that certain industries, such as financial services and insurance, provide more substantive disclosures under Item 305, required disclosures under this item could be restricted to specific industry codes.

6. Streamline certain disclosure requirements in the 400 Series (Management and Certain Security Holders) to refocus on material information.

- a. **Item 403. Security ownership of certain beneficial owners and management.** We recommend that the Commission take the following actions on Item 403:

1. Eliminate Item 403(a), which requires furnishing the ownership of any person or group who is known by the company to beneficially own more than 5% of any class of the company's securities. This requirement duplicates public information provided by such holders under Section 13 of the Exchange Act and results in companies assuming unnecessary compliance burdens and risks.
2. If the Commission retains Item 403(a), we recommend these targeted improvements:
 - i. Focus on total beneficial ownership by eliminating the requirement in Instruction 2 to break down ownership into sole/shared voting or investment power. For holders of greater than 5%, this information is already disclosed in Schedules 13D/G, and for management at or below 5%, this breakdown is not material.
 - ii. Amend Instruction 3 to provide additional flexibility to companies reporting the beneficial ownership of greater-than-5% holders.
 - A. For example, consider amending Instruction 3 to state that, in addition to the ability to rely on the information set forth in statements filed with the Commission pursuant to Section 13(d) or 13(g) of the Exchange Act, companies may rely on the information set forth in forms filed pursuant to Section 13(f), if companies have reason to believe that the information is more accurate than the most recent Schedule 13D/G. We acknowledge that Regulation S-K CFI 229.02 indicates the concept of "investment discretion" reported on Form 13F is not the same as "beneficial ownership" in Item 403, but request the Commission and Staff of the Division of Corporation Finance consider whether the current Instruction and CFI expose companies to unnecessary confusion and risk in the absence of a reliable Schedule 13D/G. If needed, a company could indicate in a footnote that it is relying on Form 13F information as an approximation of beneficial ownership.
 - B. Alternatively (or in addition), emphasize that the "most recent practicable" date required under the rule is to be determined in the company's discretion, to reassure companies that the rule permits relying on information that they believe is most accurate, and that in no event does the date need to be more recent than the end of the company's most recently completed fiscal year. This would relieve companies of the burden of needing to update beneficial ownership tables in close proximity to filing deadlines when new Schedule 13D/G filings are received.
 - C. Currently, many companies spend time and money to update beneficial ownership tables when a 5% holder files a new or updated ownership report close in time to when the company is filing its proxy statement. As a recent example, an asset manager's internal realignment caused many Schedule 13Gs to be filed in late March reporting "zero" beneficial ownership, just as many companies were finalizing proxy statements. However, the asset manager did not simultaneously file Schedule 13Gs to reflect the entities to which the shares had been reallocated. Companies in the midst of finalizing

proxy statements spent time and money assessing whether and how to update their beneficial ownership tables, with little meaningful benefit to their investors.

- D. Recent amendments to Schedule 13D/G reporting requirements also mean that updates may be filed less frequently than annually. In our experience, companies spend unnecessary resources evaluating whether they have “reason to believe” that a holder’s beneficial ownership has changed when more than a year has passed since the holder’s latest filing.
 - iii. Eliminate indirect ownership descriptions by encouraging removal of layered or vehicle-based ownership explanations (e.g., LLCs, funds, trusts) where the ultimate voting and dispositive power is clear or otherwise disclosed. For holders of greater than 5%, details are provided in Schedules 13D/G; for management at or below 5%, such structural details are not material and often disclosed in Section 16 filings.
3. Simplify Item 403(b) to require tabular disclosure only for directors whose terms are expected to continue beyond the annual meeting, nominees, and the company’s current CEO and CFO, and to right-size group disclosure requirements.
 - i. Tabular disclosure should focus on the current CEO and CFO – rather than all named executive officers – because for many companies, year-to-year changes to the group of named executive officers turn the beneficial ownership table into a tedious and time-consuming compliance exercise, with little meaningful benefit to investors. These officers often hold less than 1% of the company’s outstanding stock on an individual basis. Moreover, investors can obtain ownership information for all executives through Section 16 reports. We believe the compliance costs likely outweigh any benefit that this disclosure provides to investors.
 - ii. Companies bear even more of a burden when it comes to executives who have departed from the company, and directors whose terms are not expected to continue beyond the annual meeting. The holdings of former and soon-to-be-former insiders are not materially relevant to investment and voting decisions, and it is challenging to obtain accurate information from individuals who do not have an ongoing relationship with the company.
 - iii. Limit required footnote disclosure of group ownership to directors whose terms are expected to continue beyond the annual meeting and named executive officers who are employed by the company as of the applicable cut-off date. The current requirement to include non-named executive officers in this figure is a source of confusion and does not provide material information to investors.
 - b. **Item 404. Transactions with related persons, promoters and certain control persons.** We recommend that the Commission take the following actions with respect to Item 404, which we have reflected on Exhibit A:
 1. Disclosure threshold included in Item 404(a):
 - i. Significantly increase the \$120,000 disclosure threshold, which has not changed since its adoption in 2006. Additionally, provide that the disclosure threshold will be subject to regular adjustments for inflation on a go-forward basis.
 - ii. Implement a sliding scale threshold, where disclosure is required if the amount involved exceeds either a set dollar figure (indexed to inflation) or a percentage of the company’s revenues. A fixed threshold is problematic because it is not appropriately tailored to

company size and therefore not designed to elicit information valuable to investors. A sliding scale may also better align with stock exchange independence determinations.¹⁷

2. Definitions provided in the Instructions to Item 404(a):

i. *Related person*

A. We recommend amending the definition of “related person” to lessen compliance burdens and focus on disclosure that is material to investors.

ii. *Immediate family member*

A. The current definition of “immediate family member” is so broad as to be both impractical¹⁸ and result in disclosure of questionable value to investors.¹⁹

B. We propose limiting the definition to family members sharing a household with directors, executive officers, director nominees, and significant security holders.

iii. *Significant security holders*

A. We propose raising the beneficial ownership threshold to be a security holder considered a “related person” to >10%.

B. 10% is aligned with the threshold companies use as a starting point when evaluating “affiliate” status of security holders.

C. At the current 5% threshold, the disclosure requirement picks up ordinary course, arm’s-length transactions with institutional investors.

¹⁷ See the question posed in the proposing release for the 2006 amendments: “Should the threshold also operate on a sliding scale (for example, the lower of \$120,000 or 1% of the average of total assets for the last three completed fiscal years or the lower of \$120,000 or a percentage of annual corporate expenses) to capture smaller transactions for smaller companies?” *Executive Compensation and Related Party Disclosure*, Release Nos. 33-8655, 34-53185 (Jan. 27, 2006) [71 Fed. Reg. 6542 (Feb. 8, 2006)]. The “sliding scale” concept was adopted, but only for “smaller reporting companies.” We propose to have a single “sliding scale” threshold applicable to all companies (including “smaller reporting companies”). See also NYSE Listed Company Manual, Section 314.00, which uses a sliding scale for a bright-line director independence test.

¹⁸ See Chairman Paul S. Atkins, *Remarks at the Texas A&M School of Law Corporate Law Symposium* (Feb. 17, 2026), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-02-17-2026-remarks-texas-am-school-law-corporate-law-symposium>: “Or consider the rules governing related-party transactions. Companies must disclose transactions between the company and an executive’s ‘immediate family members,’ a term that extends well beyond spouses and children to encompass all of one’s in-laws. The rule makes no distinction based on the closeness or continuity of a relationship. Perhaps a more workable standard for ‘immediate family members’ is whether the executive has shared a Thanksgiving meal with them in the past year.”

¹⁹ In our experience advising companies on related person transaction disclosure, we have encountered situations where the breadth of the current definition has resulted in required disclosures that are of no practical value to investors and create unnecessary administrative and reputational burdens.

- iv. *Materiality*
 - A. We propose including guidance with respect to the determination of “materiality,” as companies often struggle with the concept of materiality in the context of related person transactions under Item 404(a).²⁰
 - B. We propose, through the insertion of commas in the appropriate places, to clarify that “material” applies to both direct and indirect interests in transactions, *i.e.*, that only *material* direct interests need be disclosed pursuant to Item 404(a).
- 3. Safe harbors provided in the Instructions to Item 404(a): We propose certain additional changes, as marked in Exhibit A to this letter, in order to streamline certain of the existing disclosure safe harbors.
- 4. Policy disclosures required by Item 404(b): Allow companies to satisfy the Item 404(b)(1) disclosure requirements by posting their policies and procedures on the company website, with a statement to such effect in the applicable registration statement or report.
- 5. Related persons disclosure requirements applicable to smaller reporting companies (“SRC”) provided in Item 404(d):
 - i. We similarly recommend significantly increasing the dollar-based threshold and indexing to inflation on a go-forward basis (and leaving the asset-based threshold in place).
 - ii. In addition, the two-year lookback currently applicable to SRCs is repetitive of previously-disclosed information and the requirement to list parents is redundant of the beneficial ownership reporting requirement. We recommend eliminating Instruction 2 to Item 404(d) to conform the disclosure period to the requirements for non-SRCs, and eliminating Item 404(d)(3).
- c. **Item 405. Compliance with Section 16(a) of the Exchange Act.** Eliminate Item 405, for the following reasons:
 - 1. The benefit this disclosure may once have provided to investors is now obsolete. Section 16 filings, which indicate the transaction date(s) and the filing date, are readily available to investors, and easily trackable using current technology.
 - 2. The disclosure does not provide meaningful information to investors and may be misleading as Item 405 disclosures frequently relate to isolated administrative oversights than misconduct or systemic failures. By requiring line-item disclosure, Item 405 suggests to investors, who may not be as familiar with the intricacies and real-time deadlines of Section 16(a), that the company is experiencing material non-compliance issues.
 - 3. The Item 405 compliance burden outweighs the benefits to investors. For the reasons noted above, Item 405 disclosure tends to provide little benefit to investors in today’s modern information ecosystem. Yet companies must maintain tracking systems and disclosure controls to comply with the requirement and spend time and money preparing disclosures. In our

²⁰ Specifically, we propose including the following guidance from the 2006 adopting release: For purposes of paragraph (a) of this Item, *materiality* shall be determined on the basis of the significance of the information to the registrant’s investors in light of all the circumstances. The relationship of the related persons to the transaction, and with each other, the importance of the interest to the person having the interest and the amount involved in the transaction are among the factors to be considered in determining the materiality of the information to investors. *Executive Compensation and Related Person Disclosure*, Release Nos. 33-8732A, 34-54302A (Aug. 29, 2006) [71 Fed. Reg. 78338 (Dec. 29, 2006)].

experience, this line item requires outsized attention and expense during the preparation and review of the report, without providing meaningful value.

- d. **Item 407(c). Nominating committee.** Amend Item 407(c) to remove Item 407(c)(2)(vi).
1. First, the diversity requirement included in Item 407(c)(2)(vi) falls into the category of “regulation by shaming” or “comply or explain” disclosure requirements that have the effect of influencing companies’ underlying governance practices. These types of regulations overstep the Commission’s authority as a disclosure-based regulator.²¹ Requiring companies to disclose whether they have a board diversity policy, and how the nominating committee implements and assesses its effectiveness, sets an implicit expectation that companies should in fact consider self-identified diversity characteristics in assessing director candidates.
 2. Additionally, the benefits of diversity and the methods for measuring diversity continue to evolve. In the time period since Item 407(c)(2) was adopted, courts and many investors have shifted away from rules and policies that mandate demographic-based diversity disclosures. For example, in December 2024, the U.S. Fifth Circuit Court of Appeals vacated the Commission’s order approving Nasdaq’s board diversity disclosure rules²² and, in January 2025, the Commission approved Nasdaq’s proposal to seek removal from Nasdaq rules of these board diversity disclosure requirements.²³ As another example, in February 2025, a proxy advisor whose clients include many institutional investors, and whose voting policies are informed by feedback from those clients, updated its voting policies to no longer consider a board’s gender, racial or ethnic diversity when making director election recommendations. In addition, several prominent institutional investors have revised their voting guidelines to move away from narrowly-defined diversity targets.
 3. Furthermore, beginning in 2025, the current presidential administration has signed multiple executive orders aimed at dismantling diversity, equity and inclusion (“DEI”) programs in both public and private sectors, by, among other things, eliminating DEI rules, training and affirmative action policies. Item 407(c)(2)(vi) exposes companies to unnecessary risk by encouraging disclosure – and implicitly, implementation – of practices that other regulators and private plaintiffs may view as legally problematic.
 4. Lastly, the diversity requirement in Item 407(c)(2)(vi) is redundant and can elicit duplicative disclosure. Item 407(c)(2)(vi) separately requires companies to describe the nominating committee’s process for identifying and evaluating director nominees, and Item 401(e) requires companies to describe the experience, qualifications, attributes or skills that led to the conclusion that each director and nominee should serve as a director. These disclosures would pick up information regarding diversity policies. A stand-alone requirement under Item 407(c)(2)(vi) is unnecessary and removal would further the Commission’s goal of disclosure simplification.
- e. **Item 407(e). Compensation committee.** Amend Item 407(e) to reduce overlap with Item 402 and to remove the requirements set forth in Items 407(e)(3)(iii)(A) and (B).

²¹ See, e.g., Chairman Paul S. Atkins, *Remarks at the Texas A&M School of Law Corporate Law Symposium* (Feb. 17, 2026), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-02-17-2026-remarks-texas-am-school-law-corporate-law-symposium>.

²² *Alliance for Fair Board Recruitment v. SEC*, Case No. 21-60626 (5th Cir. Dec. 11, 2024) (en banc).

²³ *Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Repeal Nasdaq’s Board Diversity Listing Requirement*, Release No. 34-102281 (Jan. 24, 2025) [90 Fed. Reg. 8554 (Jan. 30, 2025)].

1. Disclosure currently required by Item 407(e) relates to topics that are also subject to disclosure under Item 402(b) – e.g., how a company determines amounts and elements of compensation. It may be possible to consolidate these requirements to reduce repetition in filings. Accordingly, we recommend the Commission consider expressly amending Item 407(e) to state that such information is not required to the extent the company is subject to the disclosure requirements of Item 402(b).
 2. The fee disclosure required pursuant to Items 407(e)(3)(iii)(A) and (B) is unnecessary due to the requirement under Item 407(e)(3)(iv) to disclose compensation consultant conflicts of interest.
 3. Items 407(e)(3)(iii)(A) and (B) are intended to elicit general disclosure regarding conflicts of interests of compensation consultants who are providing additional services to companies. However, Item 407(e)(3)(iv), which was added later by the Commission pursuant to the Dodd-Frank Act, requires more specific, detailed disclosure regarding the nature of the conflict of interest and how that conflict is being addressed. Having these two separate requirements can result in overlapping disclosure requirements, creating an unnecessary burden to companies.
- f. **Item 407(i). Employee, officer and director hedging.** Amend Item 407(i) to reduce overlap with Item 402 and to remove Item 407(i)(4).
1. As with the requirement under Item 407(c)(2)(vi) to disclose diversity policies for director nominees, the requirement under Item 407(i)(4) to disclose whether a company does not have a hedging policy falls under the category of “regulation by shaming,” whereby the Commission may be indirectly governing corporate governance practices.
 2. Item 402(b)(2)(xiii) already requires companies to disclose, to the extent material, policies regarding hedging the economic risk of security ownership. Item 402(b)(2)(xiii) is a more appropriate principles-based disclosure requirement, requiring companies to disclose hedging policies only if those policies are material to an understanding of the company’s executive compensation. Accordingly, we recommend the Commission consider expressly amending Item 402(i) to state that such information is not required to the extent the company is subject to the disclosure requirements of Item 402(b)(2)(xiii).
- g. **Item 408. Insider trading arrangements and policies.** Remove Item 408.
1. Item 408(a) is redundant and creates unnecessary disclosure risk.
 2. The 10b5-1 check box on Form 4 fulfills the purpose of this item, allowing investors to track how directors and officers are using 10b5-1 plans.
 3. In addition to the administrative burden of identifying covered individuals and tracking and reporting in Forms 10-Q and 10-K, Item 408(a) creates nuisance disclosure-based litigation risk. If Item 408(a) is retained, we encourage the Commission to evaluate and clarify the intended scope of covered individuals.
 4. Narrative disclosure under Item 408(b) is highly generic and uninformative. Given the final rule eliminated the requirement to disclose a company’s policies and procedures in the body of the report in favor of the requirement to file the policy and procedures as an exhibit, the current narrative disclosure required under Item 408(b) results in highly generic disclosure and does not provide material information to investors. In addition, as long as Item 601(b)(19) exists, the requirements of Item 408(b) are highly redundant and to the extent a company has not adopted insider trading policy and procedures the fact that they did not file an insider trading policy as an exhibit would alert investors to that fact and obviates the need for a specific statement to that effect in the body of the report.

7. Modernize and streamline the 500 Series (Registration Statement and Prospectus Provisions) to remove unnecessary friction from capital formation, while preserving material information.

a. Item 502(b). Dealer prospectus delivery obligations. Remove Item 502(b) regarding the dealer prospectus delivery obligation.

1. The dealer prospectus delivery obligation is mandated by statute and rules thereunder (*i.e.*, Section 4(a)(3) of the Securities Act of 1933, as amended (the “Securities Act”), and Rule 174 thereunder), such that its inclusion on the prospectus is a redundancy.
2. “Access equals delivery” under Securities Act Rule 172 is also available for many offerings.
3. Alternatively, the Commission can add an instruction that clarifies Item 502(b) is only required for offerings excluded from “access equals delivery” under Rule 172(d).

b. Item 506. Dilution.

1. Remove Item 506 and acknowledge a general materiality standard for dilution disclosure in offerings that could have a material dilutive impact on existing shareholders. The dilution disclosure provided in response to Item 506 imposes a cost and compliance burden for companies raising capital, including as it relates to the market-standard underwriter requirement to “comfort” that disclosure as part of the underwriter due diligence defense process, and does not provide material information to investors.
2. Additionally, we recommend that the Commission provide a definition of dilution that is aligned with market practice. For example, Item 506 characterizes dilution as disparity between offering price per share and historical net tangible book value per share, which is not how the market generally views dilution. The market views dilution as new issuances that increase the total number of shares outstanding and, thus, reduces existing holders’ ownership percentages and earnings per share.

c. Item 509. Interests of named experts and counsel. Revise Instruction 1 to Item 509 to increase the current \$50,000 threshold to a higher amount.

1. The current \$50,000 threshold amount included in Instruction 1 to Item 509 appears to be an arbitrary number and not connected to other monetary thresholds that are used to evaluate conflicts of interest, such as related party transactions.
2. The \$50,000 threshold is intended to signify that interests above this threshold are “substantial.” This threshold has become outdated and should be raised. Additionally, it should be keyed to inflation.

d. Item 510. Disclosure of Commission position on indemnification for Securities Act liabilities. Eliminate Item 510, which requires companies to state the Commission’s position on Securities Act indemnification.

1. The Commission’s position is widely known, and eliminating it reduces back and forth on registration statements.

e. Item 511. Other expenses of issuance and distribution. Eliminate Item 511.

1. The gross and net offering proceeds are well disclosed in numerous sections of the offering materials and provide the relevant information regarding the offering expenses called for by Item 511, making this disclosure requirement redundant.

2. Granular disclosure regarding specific offering expenses is immaterial to investors. Additionally, in our experience, the disclosures provided in response to Item 511 are estimates of certain offering expenses and such estimates do not impact an investors' overall decisions to participate in a particular securities offering.

f. **Item 512. Undertakings.** Remove the requirements in Item 512 for companies to include undertakings that confirm compliance with the Securities Act and the rules thereunder.

1. Specifically, Items 512(b), (i), (j) and (k) require companies to include undertaking language that confirms the treatment of subsequent filings by the Securities Act or existing Securities Act rules or confirms that the company will comply with other legal requirements. This is redundant and unnecessary, as it does not impact the company's underlying obligation to comply with the existing requirements.

2. For remaining undertakings included in Item 512(a), (g) and (h), either (i) retain in their current form and continue to require inclusion outside of the prospectus or (ii) retain, but require companies to include the undertaking language in an exhibit to the registration statement or supplemental correspondence to the Commission.

8. Consider alternative approaches to the exhibit requirements in Item 601.

a. Exhibit requirements are highly complex (Item 601 is 33 pages long) and this complexity is significantly out of proportion to the decision-usefulness of exhibits to investors. Information provided by exhibits is often redundant vis-à-vis narrative disclosure in filings. As practitioners, we are regularly struck by the uncertainty and administrative burdens that current exhibit requirements create for companies. For example, companies are often confused with the detailed requirements to file material contracts pursuant to Item 601(b)(10) and spend a disproportionate amount of time navigating these requirements with the assistance of outside counsel.

b. The following recommended changes to Item 601 are designed to lessen uncertainty and administrative burdens resulting from the lengthy and complex exhibit requirements:

1. **Item 601(b)(10). Material contracts.**

i. Amending Item 601(b)(10) and applicable forms to create an exhibit library or standalone filing that would serve as a repository for exhibits on each company's EDGAR page. This would eliminate the burden for companies of evaluating and exhibiting large numbers of exhibits at the time of individual filings.

ii. Amending Item 601(b)(10)(ii) to eliminate paragraph (D), containing the requirement to exhibit leases related to properties described in registration statements. Lease exhibits almost universally contain no material information and any material obligations and risks related to leases are generally described in narrative disclosure.

iii. Amending Item 601(b)(10)(iii)(A) to clearly limit the exhibit requirement to directors and named executive officers only.

A. If an executive officer is not a named executive officer, the officer's compensation is not required to be disclosed under Item 402 of Regulation S-K and, in most circumstances, is also not required to be disclosed under Item 404 of Regulation S-K. Accordingly, Item 601 should more clearly indicate that compensation arrangements for non-NEO executive officers are not subject to a separate exhibit filing requirement. Exhibit filing requirements for compensatory arrangements should be derivative of the underlying compensation disclosure requirements, rather than imposing an independent disclosure obligation for agreements relating to individuals whose

compensation is not otherwise required to be disclosed. Aligning Item 601 with Item 402 would reduce interpretive uncertainty, and focus disclosure on compensation arrangements that are material to investors and already subject to substantive disclosure requirements.

B. The current framework creates unnecessary complexity by requiring registrants to make an additional and independent determination of whether otherwise undisclosed compensation arrangements for non-NEO executive officers are “immaterial in amount or significance.”

2. **Item 601(b)(21). Subsidiaries of the registrant.** Removing Item 601(b)(21) – list of subsidiaries. This item does not provide useful information and creates significant administrative burdens, especially for newly-public companies.

9. **Refocus Items 701 (Recent sales of unregistered securities; use of proceeds from registered securities) and 703 (Purchases of equity securities by the issuer and affiliated purchasers) on material information.**

a. **Item 701. Recent sales of unregistered securities; use of proceeds from registered securities.**

1. Eliminate Item 701(a)-(e).

i. Since material information about unregistered issuances is already reflected in the company’s financial statements, footnotes to the financial statements and MD&A, the disclosure required by Item 701(a)-(e) is repetitive and does not provide additional material information to investors.

ii. Additionally, disclosure of the material terms of unregistered sales to related persons is generally required by Item 404(a).

iii. Finally, a reasonable investor would assume and understand that any unregistered insurance must have been effected pursuant to a valid exemption. Therefore, the requirement in 701(d) to indicate the exemption from registration claimed and to state briefly the facts relied upon to make the exemption available is technical legal disclosure that does not materially alter the total mix of information available to investors.

2. **Item 701(f). Use of proceeds.** Amend Item 701 to either eliminate Item 701(f), or limit Item 701(f) to require disclosure only when there has been a material deviation from the use of proceeds described in the applicable offering prospectus.

i. Disclosure about expected use of proceeds is included in the offering prospectus so that investors have insight into how the company intends to use the capital provided by the offering. Subsequent reporting, particularly where proceeds have been used in line with previous disclosure, is redundant, and reinforces the notion that public company disclosure requirements are needlessly burdensome.

ii. The foundational premise of requiring companies to track and report the use of proceeds from a specific offering, on an ongoing basis, is undermined by the basic economic reality that cash is fungible. Companies do not, and practically cannot, segregate offering proceeds into a dedicated account. Accordingly, companies are forced to conduct an arbitrary allocation exercise to provide the use of proceeds disclosures in periodic reports – which requires developing and applying internal allocation methodologies, documenting the methodology, and confirming disclosure accuracy against the methodology. This is a

needless administrative burden which does not provide meaningful information to investors.

- iii. An alternative to removing Item 701(f) in its entirety would be to limit its application to only those circumstances where there has been a material deviation from the expected use of proceeds disclosed in the offering prospectus.

b. **Item 703. Purchases of equity securities by the issuer and affiliated purchasers.** Amend Item 703 to eliminate the inclusion of “affiliated purchasers.”

1. The definition of affiliated purchasers in Rule 10b-18(a)(3) under the Exchange Act is broad, including persons acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer’s securities or an affiliate that directly or indirectly controls the issuer’s purchases of such securities, or whose purchases are under common control with those of the issuer. Requiring companies to first determine whether a purchaser is an “affiliated purchaser” and then to track repurchases made by such a broad range of individuals and entities creates a significant compliance burden.
2. Additionally, the purpose of Item 703 is to inform investors about a company’s repurchase behavior. Inclusion of affiliated purchasers, who may be deemed to control the company because of their affiliate status but are not acting at the company’s direction or who do not coordinate with repurchase programs of the company or other affiliates, can blur the lines between corporate treasury decisions and independent investment actions. As such, Item 703 has the potential to overstate the scope of the repurchase program, thereby potentially misleading investors.
3. Certain affiliated purchasers are already required to disclose purchases of equity securities under existing reporting obligations, for example, Section 16(a) of the Exchange Act and Section 13(d) of the Exchange Act, thereby making the requirements under Item 703 duplicative in many circumstances.

10. In Regulation S-X, consider revisiting the application of the definition of a business for SEC reporting purposes to more closely align with the definition of a business in ASC 805-10 for U.S. GAAP accounting purposes.

- a. See Rule 3-05(a)(2) of Regulation S-X and Rule 11-01(d) of Regulation S-X, Definition of a Business for SEC Reporting Purposes:
 1. ASC 805 currently provides a framework for companies or entities to use in evaluating whether an acquisition of an integrated set of assets and activities should be accounted for as an acquisition of a business or a group of assets. This framework includes an initial screen to determine if substantially all of the fair value of the gross assets acquired is concentrated in a single asset or group of similar assets. The initial screen is designed to identify a transaction that is clearly more akin to an asset acquisition and remove it from the scope of the U.S. GAAP business combinations guidance. If that “screen” is met, the acquisition of the assets and activities is not a considered a business for U.S. GAAP purposes. The framework also specifies the minimum required inputs and processes necessary to be a business.
 2. The definition of a “business” for SEC reporting purposes under Rule 11-01(d) of Regulation S-X differs from the definition under ASC 805 for U.S. GAAP purposes and focuses primarily on the continuity of revenue producing activities. For example, Rule 11-01(d) states, in part, “[T]he term business should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity’s operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations.” There is a presumption in Rule 11-01(d) that a separate entity, subsidiary,

or division is a business. A lesser component, such as a product line or license, also may be considered a business. In evaluating whether a lesser component is a business, Rule 11-01(d) requires registrants to consider the following: (a) will the nature of the revenue producing activity generally remain the same or (b) will the facilities, employee base, distribution system, sales force, customer base, operating rights, production techniques, or trade names remain after the acquisition.

3. Oftentimes, particularly in the life sciences industry, it is possible for the business determination of a particular acquisition to be different under U.S. GAAP purposes and SEC reporting purposes. A company is currently required to carefully evaluate the requirements in Rule 11-01(d) of Regulation S-X to determine whether an acquisition represents a business for SEC reporting purposes, and if an acquisition of a group of assets and liabilities does not meet the definition of a business for SEC reporting purposes, it does not have to file separate financial statements for that group. However, as described above, the definition of a business for SEC reporting purposes is not the same as the definition in ASC 805-10 for U.S. GAAP accounting purposes, and financial statements under Rule 3-05 of Regulation S-X may still be required if significant even if the acquisition does not meet the U.S. GAAP definition of a business under ASC 805. The current requirement to essentially conduct two separate analyses in this regard, which often can result in different outcomes, causes increased time, effort and costs for smaller public companies, particularly in the life sciences industry.
4. Accordingly, we urge the Commission to consider whether updates to ASC 805 that have occurred since the time Rule 11-01(d) was adopted have created greater-than-expected discrepancies between the U.S. GAAP definition of a business and the definition of a business for SEC reporting purposes. As part of this consideration, we request the Commission to consider whether the definition of a business for SEC reporting purposes should more closely align to the framework outlined in ASC 805. We believe if the definitions of a business are aligned for SEC reporting purposes and U.S. GAAP accounting purposes, it will significantly simplify and reduce the time, effort and costs for companies when analyzing asset acquisition transactions.

* * *

We appreciate the Commission's consideration of our comments and would be pleased to discuss them further at your request. Please do not hesitate to contact any of the Cooley LLP attorneys identified below should you wish to do so.

Sincerely,

Cooley LLP

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Exhibit A

Item 404. Transactions with related persons, promoters and certain control persons.²⁴

(a) **Transactions with related persons.** Describe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the registrant was or is to be a participant and the amount involved exceeds \$120,000, the greater of (i) \$[·] or (ii) [·]% of the registrant's consolidated gross revenues for the most recently completed fiscal year, provided that disclosure shall be required if the amount involved exceeds \$[·], regardless of revenue,²⁵ and in which any related person had or will have a direct₁ or indirect₁ material interest. Disclose the following information regarding the transaction:

- (1) The name of the related person and the basis on which the person is a related person.
- (2) The related person's interest in the transaction with the registrant, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.
- (3) The approximate dollar value of the amount involved in the transaction.
- (4) The approximate dollar value of the amount of the related person's interest in the transaction, which shall be computed without regard to the amount of profit or loss.
- (5) In the case of indebtedness, disclosure of the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.
- (6) Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Instructions to Item 404(a).

1. For the purposes of paragraph (a) of this Item, the term *related person* means:

a. Any person who was in any of the following categories ~~at any time during the specified period for which disclosure under paragraph (a) of this Item is required~~ when a transaction in which such person had a direct or indirect material interest occurred or existed.²⁶

²⁴ Suggested revisions are reflected as red underlined text (in the case of added language) and strikethroughs (in the case of deleted language).

²⁵ We recommend implementing a sliding scale test. The marked language is an example of what that could look like.

²⁶ The current look back and look forward periods to define "related person" impose significant burdens on companies (who must collect information from prospective directors and executive officers with respect to their family members and affiliated entities and attempt to collect such information from departed directors and executive officers, who may be unwilling and under no obligation to provide the information) all in quest of information of questionable value to shareholders. Limiting the definition of "related persons" to individuals who are/were executive officers, directors and director nominees or immediate family members of the foregoing when a transaction in which such person had a direct or indirect material interest occurred or existed will reduce both the burden on companies and the amount of information of little value to shareholders that companies disclose. Also see our recommended Instruction 1.a.iv, and the corresponding footnote.

- i. Any director or executive officer of the registrant;
- ii. Any nominee for director, when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director;
or

- iii. Any immediate family member of a director or executive officer of the registrant, or of any nominee for director when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such director, executive officer or nominee for director, and any other person (other than a tenant or employee),²⁷ sharing the household of such director, executive officer or nominee for director; ~~and~~

- iv. Any individual who was becoming or ceasing to be one of the enumerated persons in paragraphs a.i., ii., or iii of this Instruction, in connection with a transaction in which the registrant was or is to be a participant;²⁷

~~b. Any person who was in any of the following categories when a transaction in which such person had a direct or indirect material interest occurred or existed: i. A security holder covered by Item 403(a) (§ 229.403(a));~~

- v. Any person (including any “group” as that term is used in Section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than ten percent of any class of the registrant’s voting securities, determined in accordance with Rule 13d-3 under the Exchange Act; or

- vi. Any immediate family member of any such security holder, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such security holder, and any other person (other than a tenant or employee),²⁸ sharing the household of such security holder.

2. For purposes of paragraph (a) of this Item, *materiality* shall be determined on the basis of the significance of the information to the registrant’s investors in light of all the circumstances. The relationship of the related persons to the transaction, and with each other, the importance of the interest to the person having the interest and the amount involved in the transaction are among the factors that may be considered in determining the materiality of the information to investors.²⁸

²⁷ Prior to the 2006 amendments to Item 404 of Regulation S-K, the intent of the disclosure requirement appeared to be to capture transactions that occurred *while a person was a director, executive officer, director nominee, or immediate family member of the foregoing*. See *Executive Compensation and Related Party Disclosure*, Release Nos. 33-8655, 34-53185 (Jan. 27, 2006) [71 Fed. Reg. 6542 (Feb. 8, 2006)]. The 2006 proposing release noted, “We believe that, because of the potential for abuse and the close proximity in time between the transaction and the person’s status as a ‘related person,’ it is appropriate to require disclosure for transactions in which the person had a material interest occurring at any time during the fiscal year. For example, it is possible that a material interest of a person in a transaction during this proximity in time could influence the person’s performance of his or her duties.” *Id.* We urge the Commission to consider whether the manner in which the 2006 amendments addressed this concern – by imposing an arbitrary lookback period to determine who constitutes a “related person” – continues to serve the intended purpose. We believe that tying disclosure to transactions entered into in connection with a person becoming or ceasing to be a related person would better address the concern and mitigate the shortcomings of the current rule.

²⁸ This guidance was included in the 2006 adopting release; however, in our experience, companies struggle to understand the meaning of “material” in the context of related person transactions under Item

3. For purposes of paragraph (a) of this Item, a *transaction* includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships.

4. The amount involved in the transaction shall be computed by determining the dollar value of the amount involved in the transaction in question, which shall include:

a. In the case of any lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments due on or after the beginning of the registrant's last fiscal year, including any required or optional payments due during or at the conclusion of the lease or other transaction providing for periodic payments or installments; and

b. In the case of indebtedness, the largest aggregate amount of all indebtedness outstanding at any time since the beginning of the registrant's last fiscal year and all amounts of interest payable on it during the last fiscal year.

5. In the case of a transaction involving indebtedness:

a. The following items of indebtedness may be excluded from the calculation of the amount of indebtedness and need not be disclosed: amounts due to or from the related person for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business;

b. Disclosure need not be provided of any indebtedness transaction for the related persons specified in Instruction 1.b. to paragraph (a) of this Item; and

c. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T (12 CFR part 220) and the loans are not disclosed as past due, nonaccrual or troubled debt restructurings in the consolidated financial statements, disclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:

i. Were made in the ordinary course of business;

ii. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and

iii. Did not involve more than the normal risk of collectability or present other unfavorable features.

6.a. Disclosure of an employment or other service relationship or transaction involving an executive officer and any related compensation solely resulting from that employment or other service relationship or transaction need not be provided pursuant to paragraph (a) of this Item if:

i. The compensation arising from the relationship or transaction is reported pursuant to Item 402 (§ 229.402);

ii. The executive officer is not an immediate family member (as specified in Instruction 1 to paragraph (a) of this Item) and such compensation would have been reported under Item 402 (§ 229.402) as compensation earned for services to the registrant if the executive officer was a named executive officer as that term is defined in Item 402(a)(3) (§ 229.402(a)(3)) or 402(m)(2) ((§ 229.402(m)(2)), as applicable and such compensation had been approved, or recommended to the board of directors of the registrant for approval, by the compensation committee of the

404(a). We believe it would be helpful to include guidance with respect to materiality in the instructions to the Item. See *Executive Compensation and Related Person Disclosure*, Release Nos. 33-8732A, 34-54302A (Aug. 29, 2006) [71 Fed. Reg. 78338 (Dec. 29, 2006)].

board of directors (or group of independent directors performing a similar function) of the registrant; or

iii. The transaction involves the recovery of erroneously awarded compensation computed as provided in 17 CFR 240.10D-1(b)(1)(iii) and the applicable listing standards for the registrant's securities, that is disclosed pursuant to Item 402(w) (§ 229.402(w)).

b. Disclosure of compensation to a director need not be provided pursuant to paragraph (a) of this Item if the compensation is reported pursuant to Item 402(~~h~~) (§ 229.402(~~h~~)) or, in the case of a director who is an employee but not an executive officer and who does not earn compensation as a director, such director is not an immediate family member (as specified in Instruction 1 to paragraph (a) of this Item) and their compensation earned for services as an employee had been approved, or recommended to the board of directors of the registrant for approval, by the compensation committee of the board of directors (or group of independent directors performing a similar function) of the registrant.²⁹

7. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the registrant shall not be deemed to have an indirect material interest within the meaning of paragraph (a) of this Item where:

a. The interest arises only:

i. From such person's position as a director of another corporation or organization that is a party to the transaction; or

ii. From the direct or indirect ownership by such person and all other persons specified in Instruction 1 to paragraph (a) of this Item, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or

iii. From both such position and ownership; or

b. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in Instruction 1 to paragraph (a) of this Item, have an interest of less than ten percent, and the person is not a general partner of and does not hold another position in the partnership.

8. Disclosure need not be provided pursuant to paragraph (a) of this Item if:

~~a. The transaction is one where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;~~

~~b. The transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture, or similar services; or~~

²⁹ We recommend this change to address the current paradoxical result where an executive officer (who is not a named executive officer) who is also a director and does not receive any additional compensation for services provided as a director, does not need to disclose their executive officer compensation in Item 402 or Item 404 if the conditions of current Instruction 5.a.ii are meant, but if the director is instead an employee and not an executive officer their employee compensation must be disclosed. This change would effectively rescind Regulation S-K CFI 227.03 and provide that a director who is also an employee (but not an executive officer) who satisfies similar criteria as provided in current Instruction 5.a.ii does not need to disclose their employee compensation in Item 402 or Item 404(a).

a. The transaction is a commercial transaction entered into on an arms-length basis in the ordinary course of business; or

b. The interest of the related person arises solely from the ownership of a class of equity securities of the registrant and all holders of that class of equity securities of the registrant received the same benefit on a pro rata basis.

9. The dollar amount referenced in paragraph (a) shall be adjusted, by order of the Commission issued on or about May 1, 20[xx], and approximately every five years thereafter.³⁰

(b) *Review, approval or ratification of transactions with related persons.*

(1) Describe the registrant's policies and procedures for the review, approval, or ratification of any transaction required to be reported under paragraph (a) of this Item. While the material features of such policies and procedures will vary depending on the particular circumstances, examples of such features may include, in given cases, among other things:

(i) The types of transactions that are covered by such policies and procedures;

(ii) The standards to be applied pursuant to such policies and procedures;

(iii) The persons or groups of persons on the board of directors or otherwise who are responsible for applying such policies and procedures; and

(iv) A statement of whether such policies and procedures are in writing and, if not, how such policies and procedures are evidenced.

(2) Identify any transaction required to be reported under paragraph (a) of this Item since the beginning of the registrant's last fiscal year where such policies and procedures did not require review, approval or ratification or where such policies and procedures were not followed.

~~Instruction to Item 404(b). Disclosure need not be provided pursuant to this paragraph regarding any transaction that occurred at a time before the related person became one of the enumerated persons in Instruction 1.a.i., ii., or iii. to Item 404(a) if such transaction did not continue after the related person became one of the enumerated persons in Instruction 1.a.i., ii., or iii. to Item 404(a).~~³¹

A registrant may elect to satisfy the disclosure requirements of this paragraph by posting a description of their policies and procedures on its Internet website and disclosing, in the applicable registration or report, its Internet address and the fact that it has posted such description on its Internet Web site.

(c) *Promoters and certain control persons.*

(1) Registrants that are filing a registration statement on Form S-1 under the Securities Act (§ 239.11 of this chapter) or on Form 10 under the Exchange Act (§ 249.210 of this chapter) and that had a promoter at any time during the past five fiscal years shall:

(i) State the names of the promoter(s), the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or

³⁰ We recommend that the Commission evaluate the appropriate method for indexing to inflation and set forth that method in a subparagraph or instruction to Item 404.

³¹ If our proposed amendment to the definition of "related persons" is adopted, this instruction will no longer be needed.

indirectly, from the registrant and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(ii) As to any assets acquired or to be acquired by the registrant from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount, and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the registrant, also state the cost thereof to the promoter.

(2) Registrants shall provide the disclosure required by paragraphs (c)(1)(i) and (c)(1)(ii) of this Item as to any person who acquired control of a registrant that is a shell company, or any person that is part of a group, consisting of two or more persons that agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of a registrant, that acquired control of a registrant that is a shell company. For purposes of this Item, *shell company* has the same meaning as in Rule 405 under the Securities Act (17 CFR 230.405) and Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2).

(d) **Smaller reporting companies.** A registrant that qualifies as a “smaller reporting company,” as defined by § 229.10(f)(1), must provide the following information in order to comply with this Item:

(1) The information required by paragraph (a) of this Item for the period specified there for a transaction in which the amount involved exceeds the lesser of \$120,000 ~~\$.1~~ or one percent of the average of the smaller reporting company's total assets at year end for the last two completed fiscal years; ~~and~~

(2) The information required by paragraph (c) of this Item.; ~~and~~

~~(3) A list of all parents of the smaller reporting company showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent, if any.³²~~

Instructions to Item 404(d).

1. Include information for any material underwriting discounts and commissions upon the sale of securities by the smaller reporting company where any of the persons specified in paragraph (a) of this Item was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principal underwriter.

~~2. For smaller reporting companies information shall be given for the period specified in paragraph (a) of this Item and, in addition, for the fiscal year preceding the small reporting company's last fiscal year.~~

2. The dollar amount referenced in paragraph (d) shall be adjusted, by order of the Commission issued on or about May 1, 20[xx], and approximately every five years thereafter.³³

Instructions to Item 404.

1. If the information called for by this Item is being presented in a registration statement filed pursuant to the Securities Act or the Exchange Act, information shall be given for the periods specified in the Item and, in addition, for the related persons identified in the registration statement as (i) current executive officers or (ii) directors who will continue in office following the effective date of the registration statement.

³² The two-year lookback currently applicable to SRCs results in repetition of previously-disclosed information and the requirement to list parents is redundant of the beneficial ownership reporting requirement.

³³ We recommend that the Commission evaluate the appropriate method for indexing to inflation and set forth that method in a subparagraph or instruction to Item 404.

and the immediate family members of such persons enumerated in (i) or (ii), for the two fiscal years preceding the registrant's last fiscal year, unless the information is being incorporated by reference into a registration statement on Form S-4 (17 CFR 239.25), in which case, information shall be given for the periods specified in the Item.

2. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Item 7.B. of Form 20-F (17 CFR 249.220f) with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded.