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

Re: File No. CLL-16 — IPO Modernization (Chairman's Comment File opened May 26, 2026)

Dear Ms. Countryman:

Fenwick & West LLP is pleased to submit to the Securities and Exchange Commission ("Commission") comments in response to the Commission's request for public input on ways to modernize and improve the initial public offering ("IPO") process for issuers, underwriters and investors.

We represent a large number of privately- and publicly-held technology and life science companies, in, among other things, initial public offerings and periodic reporting matters. Our comments in this letter reflect our experience and our clients' experience.

As an introduction to our specific responses, we support the Commission's efforts to seek input directly from market participants on the practical frictions that discourage companies from accessing the public markets or entering the reporting system, or that unnecessarily increase the cost, complexity and timeline of doing so. We believe that our suggestions will lower compliance costs and provide companies with clearer guidelines for compliance, while at the same time continuing to ensure investor protection.

We organize our comments below by topic. For each, we describe the current rule or practice, the burden it imposes on reporting companies, a proposed change, and the expected benefit to capital formation, disclosure quality, and investor protection. We believe each of the recommendations below can reduce costs and delays for issuers without diminishing the quality or timeliness of information available to investors — and, in several cases, would improve the quality of that information by allowing issuers to focus their attention on genuinely material matters.

Modernize the Gun-Jumping Communications Regime

Broaden Permissible Communications Prior to Public Filing

Cooling-Off Period. The Commission should reconsider the 30-day bright-line period in Rule 163A under the Securities Act of 1933, as amended ("Securities Act"), in light of the significant changes in the information environment since the rule was adopted. When the Commission adopted Rule 163A in 2005, it explained that the 30-day period was intended to

Vanessa Countryman
September 30, 2026
Page 2

provide sufficient time for interest created by a communication to “cool” before the filing of a registration statement. Today, however, as a result of the prevalence of social and alternative forms of media, information that an issuer disseminates can be instantaneously distributed, republished, quoted, indexed, analyzed, and incorporated into subsequent reporting and commentary, and can remain widely accessible long after the original communication. In this environment, the passage of an arbitrary number of days provides an increasingly imperfect proxy for whether a communication is likely to condition the market.

The Commission therefore should consider shortening or eliminating the 30-day period, or adopting a more flexible framework that focuses on the nature and treatment of the communication rather than an inflexible temporal boundary. A modernized Rule 163A would recognize that, in a market characterized by continuous and rapid information dissemination, the risk of market conditioning is better addressed through requirements governing the content, attribution, dissemination, and disclosure of communications than through a bright-line 30-day blackout. Such an approach would preserve the certainty that Rule 163A provides, as well as reflect the realities of today’s information environment.

IPO-Specific Communications. The Commission also should expand the pre-filing communications framework to permit issuers to communicate more openly about their business and a contemplated IPO, subject to appropriate disclosure guardrails. In particular, the Commission should consider substantially revising or eliminating Rule 135 and adopting a communications framework modeled on the more flexible regime applicable to business combinations and other transactions registered on Form S-4. Under Rules 165, 166 and 425, parties to a business combination may communicate more broadly about the transaction before and after the filing of a registration statement, subject principally to filing requirements and appropriate antifraud protections, rather than being limited to specified categories of information. A similar framework should apply to IPOs, allowing an issuer to communicate regarding its business and the contemplated IPO prior to publicly filing its registration statement, provided that the written communications are filed on EDGAR once the registration statement is publicly filed and all communications remain subject to the prohibition against materially misleading statements. The Commission also should consider incorporating elements of Rule 134’s framework for specified offering-related information. This approach would recognize that an IPO, like a business combination, is a material corporate event about which investors may benefit from receiving information before the formal registration statement is filed. It would encourage the flow of useful information to the market while preserving appropriate filing, disclosure, and antifraud protections.

Broaden Permissible Communications After Public Filing

We believe the Commission should permit issuers greater flexibility to engage in communications once the IPO registration statement has been publicly filed. A modernized

Vanessa Countryman
September 30, 2026
Page 3

framework should differentiate between communications that inappropriately condition the market and communications that provide investors with useful information about the company or an offering that is already the subject of a public registration statement. In addition, we observe that due to the quick dissemination of information, companies, for legitimate business purposes outside of an offering, may need to react to media and press inquiries. For example, a number of clients have been the subject of incorrect, incomplete or confusing press coverage after publicly filing a registration statement. We have found the current communications framework ill-suited to allow companies to respond to such coverage – including to correct inaccuracies – without risking a violation of the gun-jumping rules. These press stories can have consequences far beyond the offering itself, potentially putting the company’s business at risk, including by affecting important relationships with customers, employees, and other stakeholders.

The Commission could allow issuers to utilize free writing prospectuses (“FWPs”) in connection with offering-related communications beginning upon the public filing of the registration statement, rather than, as most often is the case in current practice, upon the commencement of the roadshow. Such FWPs could be used regardless of whether a price range has been included in the prospectus, and would be subject to the existing legending, filing, and liability standards that already apply to FWPs generally. In this way, offering-related communications would be broadly available to the public but remain subject to antifraud requirements. Instead of subjecting issuers to heightened restrictions on offering-related communications once they file registration statements, modernized rules should recognize that the filing itself – which contains an issuer’s principal business, financial and offering disclosure – materially changes the information environment and warrants a corresponding increase in permissible communications. Alternatively, the Commission could provide safe harbors for responding to media inquiries following the public filing of the registration statement, provided that such responses are factual in nature, not misleading, and reference the IPO only as necessary to respond to the inquiries.

Eliminate Post-Effective Restrictions

Once an IPO has priced, the issuer and other market participants should no longer be subject to IPO-specific communication and delivery restrictions, and the regulatory regime should transition fully to the ordinary disclosure framework of the Securities Exchange Act of 1934, as amended (“Exchange Act”).

For example, Rule 174’s aftermarket prospectus delivery period, which was established at a time when investors depended on physical delivery of prospectus to obtain offering information, should now end at pricing in recognition that investors have immediate and continuous access to the IPO prospectus via EDGAR.

Vanessa Countryman
September 30, 2026
Page 4

Further, we recommend that the Commission clarify the current uncertainty around routine media interviews with management during and immediately following the IPO. While some such interviews may be accommodated under the FWP rules, the treatment of a live interview depends on whether it constitutes an offer, and the resulting compliance obligations can be difficult to reconcile with the ordinary media practices surrounding newly-public companies (such as interviewing executives of a newly-public company on the exchange floor after the bell ceremony). The Commission could, for example, adopt a safe harbor for post-effective communications that are materially consistent with the disclosure in the IPO prospectus.

Modernize Rule 169

We recommend that the Commission modernize Rule 169 to give IPO issuers greater flexibility to communicate factual business information, including appropriate factual and forward-looking information, even where the issuer has not historically disclosed information of that type. In particular, Rule 169(d)(1) currently conditions the safe harbor on the issuer having previously released or disseminated information of the same type in the ordinary course of its business, and Rule 169(d)(2) requires that the timing, manner, and form of the communication be consistent in material respects with similar past releases or disseminations.

These conditions can prevent an IPO issuer from communicating useful information about its business simply because it has not previously disclosed information of that type or in that manner. More specifically, these limitations can be particularly problematic for IPO issuers for which a new business development may be (i) precisely what makes the company an attractive IPO candidate and (ii) the first development the company has a reason – or, for competitive reasons, the ability – to discuss publicly.

A common example among our clients is a biotechnology company that reaches a significant clinical milestone that both strengthens the case for an IPO and creates a legitimate reason to communicate publicly about its business. The fact that the company did not previously disclose similar information should not, by itself, transform an otherwise ordinary-course business communication into an impermissible offering communication.

We therefore recommend that the Commission expand Rule 169 to permit appropriate factual and forward-looking business communications concerning new developments, subject to the existing safeguards against communications concerning the offering itself and the application of the federal securities laws' antifraud provisions.

Ease Publicity Restrictions for Issuers Pursuing a Concurrent or Alternative Private Financing

Companies that have filed or confidentially submitted a registration statement sometimes pursue an exempt private financing concurrently with or in lieu of completing the

Vanessa Countryman
September 30, 2026
Page 5

registered offering. For example, an issuer may need to conduct a bridge financing while its IPO registration statement is pending, or conduct a private placement after withdrawing a registration statement. Current practice requires such companies to navigate an uncertain overlap between the gun-jumping restrictions applicable to the pending registered offering and the prohibition on general solicitation applicable to a Rule 506 or Section 4(a)(2) private placement.

We recommend that the Commission adopt a safe harbor under Rule 152(b) for offerings involving investors that are eligible to receive testing-the-waters communications under Rule 163B. Specifically, the safe harbor should apply to any private offering that involves a qualified institutional buyer (“QIB”) or an institution that is an accredited investor, even if such investor participates in a concurrent public offering by the same issuer. This change reflects the reality that QIBs and institutional accredited investors often seek to participate in multiple, concurrent transactions with the same issuer. It would expand issuers’ capital formation opportunities while appropriately tailoring the integration rules to the sophistication and information access of these institutional investors.

Permit QIBs to Commit to IPO Purchases Prior to Effectiveness

We also encourage the Commission to consider permitting an issuer conducting a registered IPO to obtain binding commitments from QIBs to purchase securities in the offering prior to effectiveness of the registration statement, subject to appropriate safeguards. Current rules permit issuers to “test the waters” with QIBs before effectiveness, but do not permit those investors to convert QIB interest into binding commitments until the registration statement is effective. Allowing sophisticated institutional investors to make such commitments would provide issuers with greater certainty regarding the size and execution of an offering while preserving investor protections through the requirement that the commitments be based on the registration statement disclosure and remain subject to appropriate conditions, including effectiveness and pricing.

This approach would also eliminate unnecessary structural complexity where an issuer and a QIB could otherwise achieve substantially the same economic result through a concurrent private placement, which may create additional issues relating to restricted securities and subsequent resales. We believe that QIBs, by virtue of their sophistication and ability to evaluate offering disclosure, are well suited to participate in such a framework.

Shorten the 15-Day Pre-Roadshow Public Filing Requirement

Section 6(e) of the Securities Act requires a registration statement to be publicly filed at least 15 days before the commencement of a roadshow or the requested effective date. While this requirement may have been necessary when it was adopted to give investors the opportunity to review an issuer’s disclosure before marketing begins, it is no longer relevant.

Vanessa Countryman
 September 30, 2026
 Page 6

Given EDGAR’s immediate electronic availability, the pervasive distribution of information through traditional and alternative media channels, as well as various automated market data tools that did not exist when this requirement was adopted, institutional investors, analysts, and the financial press now review registration statements within days, not weeks, of public filing.

We recommend that the Commission reduce the Section 6(e) period to five business days. This change would meaningfully shorten the IPO timeline, thus lowering costs, increasing capital formation opportunities, and reducing market-timing risks for issuers.

Provide Safe Harbor for Valuation of Pre-IPO Equity Awards

We encourage the Commission to provide greater certainty regarding the valuation of privately held companies’ common stock for purposes of evaluating potential “cheap stock” issues in connection with an IPO. Under the current process, the staff (“Staff”) of the Division of Corporation Finance (“Division”) often raises detailed questions about an issuer’s valuation of equity awards, which cannot be appropriately answered by the company until late in the registration statement review process. This can create significant uncertainty and result in last-minute questions about whether equity awards granted before the IPO were issued at an appropriate fair market value, even where the issuer has obtained a professionally prepared Section 409A valuation.

We recommend that the Commission establish a safe harbor providing that, where an issuer has obtained a contemporaneous valuation of its common stock from an independent, reputable valuation firm using reasonable methodologies and assumptions, the valuation will be presumed to be reasonable for purposes of the Commission’s review of the issuer’s pre-IPO equity awards. The safe harbor could remain subject to appropriate exceptions – for example, where the issuer or its advisers had actual knowledge of material information that was not reflected in the valuation or where the valuation was materially stale. The Commission can condition use of this safe harbor on a certification by the issuer that the assumptions underlying the third-party valuation report are reasonable.

These changes would reduce unnecessary friction and give issuers and their advisers greater certainty in planning an IPO, particularly if the Commission reduces the current 15-day period for public filing before a roadshow to five business days as we recommended above.

Scale Financial Statement Requirements for Acquired Businesses in the Pre-IPO Context

For a pre-IPO or newly-public company, whose asset base, revenue and income are often small, even a modest acquisition can trigger the significance tests under Rule 3-05 of Regulation S-X, resulting in the requirement that the company file the financial statements of the acquired business and pro forma financials. This is a genuine impediment to ordinary-

Vanessa Countryman
September 30, 2026
Page 7

course business-building activities that often precede an IPO, such as the acquisition of small teams or technology assets to accelerate product development. The prospect of a costly audit requirement can deter companies from engaging in otherwise sensible transactions, discourage them from undertaking IPOs, or impose disproportionate diligence and accounting costs relative to the size of the transactions and offerings in question.

We therefore recommend that the Commission provide greater flexibility in applying the significance tests to acquisitions by companies preparing to go public. In particular, for an acquisition completed before or in connection with an IPO, the Commission should permit the registrant to use its current valuation or the valuation established in its most recent arm's-length financing round as an alternative to total assets in evaluating the significance of the acquisition. This approach would better reflect the economic scale of an asset-light, growth-stage company, for which total assets may bear little relationship to the company's actual enterprise value or the relative significance of an acquisition. It would reduce the risk that acquisitions of modest size, including acquisitions of technology or talent, are deemed significant solely because the registrant has a relatively small asset base, while preserving the Rule 3-05 requirements for acquisitions that are genuinely significant to investors.

Age of Financial Statements¹

Early-Year IPO Window

Current Regulation S-X requirements can create a significant timing constraint for IPO issuers seeking effectiveness soon after fiscal year end. Under Rule 3-12, an issuer that was not subject to Exchange Act reporting immediately before filing its registration statement generally may not have audited financial statements that are more than one year and 45 days old at effectiveness. In addition, for an initial registration statement, the third quarter financial statements generally remain sufficient only through the 45th day after fiscal year end, after which audited financial statements for the recently completed fiscal year must be included. Smaller reporting companies ("SRCs") receive a 90-day accommodation if specified conditions are satisfied, including an expectation of profitability for the most recently completed fiscal year and profitability in at least one of the preceding two years, but it is rarely the case that companies meet these requirements.

For calendar year-end, non-SRC IPO issuers, this framework creates an acute practical bottleneck immediately following year end. Such companies' registration statements generally cannot be declared effective after February 14 without including audited December 31 financial statements. As a result, an issuer that is otherwise ready to proceed with an IPO may be forced

¹ We recognize that the Commission recently proposed amendments that would restructure the current Regulation S-X financial statement age requirements. Our recommendation is intended to address IPO-specific timing issues regardless of the ultimate form of those amendments.

Vanessa Countryman
September 30, 2026
Page 8

to delay the offering simply because its year-end audit cannot be completed within approximately six weeks after year end, even though its financial statements remain sufficiently current for purposes of the ordinary periodic reporting timetable. This would also allow issuers submitting a draft registration statement early in the year to do so without first completing a new audit of their most recently completed fiscal year, which otherwise could substantially delay the initial submission and the IPO process.

Notably, market practice already reflects the reality that investors do not need to wait for fully audited financial statements to receive meaningful financial information during this interim window. It is common for IPO issuers to include estimated, unaudited flash results for a recently completed fiscal period whose full financial statements have not yet been included in the registration statement. Extending the accommodation to 90 days would therefore not create an informational vacuum; rather, it would formalize the flexibility that issuers and investors already rely on in practice, while eliminating the artificial bottleneck that forces issuers to delay offerings solely because year-end audits cannot be completed within approximately six weeks.

The Commission should consider extending the 45-day accommodation applicable to IPO registrants to 90 days, building on the existing accommodation available to SRCs, without conditioning that relief on the issuer's size or, as proposed by the Commission in its registered offering reform release, profitability.

Align Securities Act and Exchange Act Requirements

We also suggest that the Commission consider aligning the financial statement updating requirements applicable to an initial registration statement more closely with the issuer's Exchange Act reporting timetable. Once an issuer becomes subject to Exchange Act reporting, Rule 3-01(c) provides reporting companies that satisfy specified conditions with additional time beyond the 45-day threshold to update their audited annual financial statements, with the applicable period tied in part to filer status. Extending a comparable accommodation to an IPO registrant would eliminate an artificial distinction between an issuer immediately before and immediately after becoming a reporting company and would permit an issuer to complete its IPO without requiring audited year-end financial statements materially earlier than the financial statements would otherwise be required to be filed on Form 10-K. This reform would meaningfully expand the practical window for early-year IPOs while preserving the substantive requirement that investors receive audited annual financial statements.

Expand Draft Registration Statement Review of Financial Information

The Commission also should expand the accommodations available for the nonpublic review of draft registration statements to permit the Staff to commence its review, including the accounting portion of the review, even when certain financial information that ultimately

Vanessa Countryman
September 30, 2026
Page 9

will be required in the publicly filed registration statement is not yet available or finalized. The Staff's current policy permits it to process a draft registration statement that is substantially complete except for financial information that the issuer reasonably believes will not be required at the time of the public filing. We recommend expanding this accommodation to allow the Staff to review a draft registration statement notwithstanding the absence of financial information that will be required in the public filing or at the time of the offering, provided that the issuer undertakes to include all required financial information before publicly filing the registration statement. This accommodation could apply, for example, where financial statements for a recently acquired business, additional financial information resulting from an acquisition or other transaction, or other financial information is not yet available or finalized.

This approach would allow issuers to advance the substantive review of their registration statements while discrete financial reporting matters are being completed, rather than requiring the entire review process to wait until all financial information is available. It would be particularly valuable for IPO issuers, for which market conditions can change quickly and the ability to access the public markets at an appropriate time can be critical. Allowing the Staff to complete its review of the registration statement before all financial information is finalized would give issuers greater flexibility to respond to favorable market conditions without compromising investor protection, because all financial information required by the applicable rules would be included before the registration statement is publicly filed.

Streamline Requirements for Reverse Mergers and Former Shell Companies

Companies that become reporting companies through a reverse merger with a shell company, or that have recently ceased to be shell companies, are subject to certain disclosure and eligibility requirements that, at the time of their adoption, reflected the Commission's concerns regarding the use of shell companies to bring operating businesses into the public markets without the disclosure ordinarily associated with an initial registration. However, the application of these requirements often results in duplicative disclosure and continues to affect a company after any information gap associated with its former shell status has been addressed with comprehensive public disclosure.

We therefore recommend that the Commission modernize the requirements associated with reverse mergers with shell companies, and with former shell companies generally, by:

- simplifying and streamlining the financial statement and legal disclosure requirements related to reverse mergers by permitting a registrant to satisfy the Form 10 information requirement of Item 2.01(f) of Form 8-K after a shell-company transaction through incorporation by reference to equivalent information already contained in a recent proxy statement, registration statement or other Commission filing, supplemented to the extent necessary to disclose material changes or updates;

Vanessa Countryman
 September 30, 2026
 Page 10

- permitting a former shell company to satisfy the condition in General Instruction I.B.6 of Form S-3² after a reasonable period of timely Exchange Act reporting reflecting the combined operating business; and
- eliminating or substantially shortening the requirement in Rule 144(i) that a former shell company must have filed Exchange Act reports for the preceding 12 months and that one year has elapsed since the filing of its Form 10 information before it may use Rule 144.

These changes would preserve the enhanced disclosure protections that are most important when a shell company first acquires an operating business while reducing duplicative disclosure and allowing the consequences of former shell status to diminish once that history is no longer materially informative to investors.

Scale the Structured-Data Requirements

We recommend the Commission scale the Inline XBRL requirements for SRCs and emerging growth companies (“EGCs”), particularly during the period immediately following an IPO.³ While structured data facilitates automated analysis, comparison, and use of issuer disclosure, newly-public and smaller companies face disproportionately high compliance costs in establishing the systems and processes necessary to produce appropriate XBRL tagging.

We propose that the Commission (i) establish a phased approach under which newly-public SRCs and EGCs have a transition period following an IPO before becoming subject to the full scope of detailed Inline XBRL requirements, and (ii) exempt smaller issuers from detailed tagging of categories of information for which the incremental investor benefit of structured data is limited.

Such an approach would preserve the principal benefits of machine-readable disclosure while recognizing the particular compliance burden imposed on smaller and newly-public companies. It would also be consistent with the Commission’s broader use of scaled disclosure accommodations for SRCs and EGCs and with the phased implementation approach historically used in developing the XBRL regime. Finally, this approach recognizes that the value of XBRL-based structured data requirements may be diminishing, as investors and other market

² We recognize that the Commission’s proposed Registered Offering Reform rules contemplate eliminating General Instruction I.B.6, and we support such proposal. We nevertheless believe the underlying issue warrants consideration regardless of the outcome of that proposal, both because the proposed amendment may not be adopted as proposed and because similar restrictions relating to former shell-company status could remain elsewhere in the Commission’s rules.

³ We recognize that the Commission has proposed amendments that would simplify the current filer status categories. We support this direction and intend this recommendation to apply to non-accelerated filers (or any successor category) to the extent the proposed amendments are adopted.

Vanessa Countryman
September 30, 2026
Page 11

participants are increasingly able to extract and interpret information directly from filings using AI tools – a trend we expect to continue.

In addition, we propose that the Commission eliminate the XBRL requirement for Exhibit 107, as the information contained therein already is structured, formulaic, machine readable, and primarily used by the Commission for administrative purposes. Requiring Exhibit 107 to be XBRL tagged provides little incremental benefit to investors but imposes a disproportionately stringent compliance risk now that the Commission generally suspends filings rather than issues warnings for incorrect structured filing fee-related information, even if the total filing fee is ultimately correct. This requirement also creates heightened risk for time-sensitive filings because the XBRL tagging process can generally only be processed by financial printers during the hours in which EDGAR is open, and filing fees may need to be changed shortly before filing as the pricing terms of an IPO shift.

Modernize the Exhibit Filing Requirements

We propose that the Commission substantially streamline the exhibit requirements applicable to IPO registration statements, many of which no longer provide meaningful information to investors or serve a purpose that justifies the associated preparation and filing burden.

Material Contracts

The exhibit requirements of Item 601 of Regulation S-K are highly complex and, in our view, increasingly disproportionate to the benefits they provide to investors. In particular, our clients often express confusion about the detailed requirements of Item 601(b)(10) and spend a significant amount of time, often with the assistance of outside counsel, determining which agreements must be filed, and which may be omitted or redacted. Further, the costs associated with interpreting and complying with the requirements can outweigh the incremental benefits to investors. We also believe that investors generally derive greater value from the narrative disclosure in the registration statement describing the material terms of agreements than from reviewing the exhibits themselves.

As such, we recommend that IPO issuers should not be required to file material contracts, as long as they provide sufficiently detailed disclosure in the registration statement regarding the material terms of such contracts.

Other Exhibits

We further propose that the Commission substantially streamline the other exhibit requirements applicable to IPO registration statements, many of which no longer provide

Vanessa Countryman
 September 30, 2026
 Page 12

meaningful information to investors or serve a purpose that justifies the associated preparation and filing burden.

For example, filing a form of stock certificate, a list of subsidiaries, a description of the registrant's securities, and pre-IPO versions of the registrant's constituent documents can result in substantial administrative work while providing limited beneficial information to investors. It is advisable to eliminate these requirements where the information is duplicative, readily available from other sources, or unlikely to be material to an investor's investment decision.

In particular, issuers should omit pre-IPO versions of their organizational documents where those documents will be replaced or amended in connection with the offering, as well as the form of stock certificate, which has very little practical significance in today's book-entry securities environment.

A more principles-based approach would allow issuers to focus on filing agreements and other documents that are material to the offering or provide investors with substantive information about the registrant and the investors' rights in the stock (e.g., the post-IPO charter and bylaws), while reducing the time and expense associated with preparing exhibits that have little practical relevance to investors.

Simplify Registration Fee Calculation and Upsizing Mechanics

Rule 457(a) and Rule 457(o)

Issuers may calculate Securities Act registration fees under Rule 457(a), based on the number of securities registered and the proposed maximum offering price per share, or under Rule 457(o), based on the maximum aggregate offering price. Rule 457(o) is particularly useful in the early stages of an IPO because it permits an issuer to calculate its registration fee without specifying the precise number of shares or per offering approaches pricing, however, the interaction among the chosen fee-calculation methodology, the price range disclosed in the prospectus, and the 20% flexibility afforded by Rule 430A can create unnecessary mechanical complexity. In particular, because Rule 457(o) registers a dollar amount rather than a specified number of securities, an increase in the final per share price can cause the aggregate offering price to exceed the amount registered and require additional registration or a Rule 462(b) registration. By contrast, under Rule 457(a), an issuer registers a specified number of securities, so an increase in the offering price does not itself require registration of additional securities.

The Commission should simplify this framework by creating a unified Rule 457 regime that permits registrants to use either an aggregate offering-price methodology or a security-by-security methodology, as appropriate, and to move between those methodologies without unnecessary technical consequences (e.g., having to satisfy separate substantive requirements or otherwise reconfigure registration statements). A registrant should be permitted to change

Vanessa Countryman
September 30, 2026
Page 13

its fee-calculation methodology in a pre-effective amendment, with previously paid fees credited against the recalculated registration fee. More broadly, the amount of offering flexibility available to registrants should not depend on whether they initially elected Rule 457(a) or Rule 457(o). The Commission should provide registrants with a fungible pool of registered offering capacity that can be used to accommodate changes in the number of securities offered or the offering price, subject to payment of any additional registration fee that becomes due.

Rule 462(b) and Rule 430A

The Commission also should consider whether the existing limitations on an issuer's ability to increase the size of an offering under Rules 462(b) and 430A remain necessary in their current form. Rather than requiring an issuer to rely on a separate Rule 462(b) registration statement or limiting the extent to which changes in the offering price and volume may be reflected through a prospectus filed pursuant to Rule 424(b), the Commission could permit an issuer to increase the size of an offering by any amount, provided that the registration statement contains appropriate sensitivity disclosure regarding the impact of changes in the price and/or number of shares sold in the offering. Any additional registration fee could be paid through an amended filing fee exhibit that could be filed with the Commission within a specified number of days of the pricing of the offering. This approach would eliminate the need for issuers to determine (typically at the last minute before effectiveness or pricing) whether a particular increase falls within the technical limits of Rules 462(b) or 430A, would decrease the number of filings and commensurate expense required, and would allow an issuer to respond more readily to the evolving structure of the offering, as well as to investor demand and changing market conditions, while preserving the Commission's ability to collect the appropriate registration fee.

Post-Closing Payment of Filing Fees

The Commission also should consider permitting certain established issuers to defer payment of Securities Act registration fees until after the closing of an offering. Under such a regime, an issuer could file and become effective with respect to an offering without paying the registration fee at the time of filing, provided that the issuer pays the applicable fee within a specified period following the closing of the offering and appropriately updates its filing fee exhibit to reflect the amount due.

This approach would align the payment of the registration fee more closely with the point at which the issuer actually receives proceeds from the offering and would eliminate the need to determine and pay the precise registration fee before the final size and terms of the offering are known. The Commission could impose a short, specified payment period following closing and appropriate penalties or other consequences for failure to make timely payment. As

Vanessa Countryman
September 30, 2026
Page 14

with the Commission's existing pay-as-you-go framework for certain shelf offerings, the amount of the fee could be reflected in an updated filing fee table filed in connection with the offering.

Improve the Materiality, Consistency, and Industry-Appropriate Nature of Staff Comments

Reporting companies and their counsel often observe substantial variation across individuals and industry offices in how closely comments from the Staff reflect matters that are material to investors. Some groups apply a disciplined materiality standard when issuing comments, while others issue multiple rounds of comments addressing individually immaterial line-items or wording issues, particularly on topics that recur across an entire industry rather than reflect specifically on the registrant. Such variation leads to unpredictable review timelines and increased costs for issuers, without providing a clear improvement in investor protection, as immaterial comments do not affect the total mix of information available to investors.

We propose that Division leadership engage in three complementary steps. We further request that Deputy Directors and Associate Directors of the Division participate in the meetings and practices described below, in order to ensure that consistent practices are established across the industry offices, and that the industry offices remain accountable and responsive to the discussions and input they receive.

- Industry roundtables. We recommend the Division institute periodic, structured roundtables between the relevant Division industry offices, practitioners, and industry groups to address recurring disconnects between Staff expectations and current industry practice, disclosure conventions, and terminology in fast-evolving sectors.
- Overarching language addressing recurring, industry-wide, individually immaterial comments. Where the Staff has identified a recurring disclosure theme across an industry that is not independently material to a specific registrant, we recommend allowing registrants to address the theme with overarching disclosure statements that apply to the filing as a whole (such as a global explanatory note) rather than consistently requiring multiple rounds of comments focused on registrant-specific wordsmithing on the same underlying point.
- Periodic publication of frequent industry-specific comment themes. We recommend the Division expand its practice of periodically publishing summaries of frequently issued comments and current areas of Staff focus by industry, so that issuers and counsel can proactively address common issues before filing, reducing avoidable comment cycles.

Together, these changes would help ensure that Staff comments are consistently focused on matters material to investors, reduce review-cycle unpredictability and cost, and ensure the continued quality of disclosure review.

Vanessa Countryman
 September 30, 2026
 Page 15

Provide Greater Certainty for Operating Companies Under the Investment Company Act⁴

The Commission also should provide greater certainty for operating companies that may otherwise become subject to the Investment Company Act of 1940 (the “40 Act”) as a result of their cash management or other incidental holdings of investment securities. We observe that many technology companies have, in recent years, established corporate development programs that involve, among other activities, investment in private companies. These investments are made primarily for purposes of furthering a company’s business objectives and developing a pipeline of commercial partnerships and potential acquisition candidates, and not for the purpose of generating returns on such investments. We also observe that investors are valuing these companies based on their operating results and not on the performance of their investments. The current framework can produce uncertainty for asset-light, growth-stage companies that have substantial cash or other liquid investments following a financing or other capital-raising transaction, or that establish corporate development programs that invest in private companies, even where the company is plainly engaged in an operating business and has no intention of functioning as an investment company. The 40% asset test under Section 3(a)(1)(C) of the 40 Act can be particularly problematic for such companies because the amount of investment securities may constitute a significant percentage of total assets even though those securities are held principally to preserve capital and fund the company’s operating activities or further corporate business objectives aside from generating a return on investment. In addition, the determination under Section 3(b)(1) of whether a company is “primarily engaged” in a non-investment business generally requires a facts-and-circumstances analysis under the *Tonopah* factors, which can create uncertainty and require companies to seek individualized relief from the Commission. Law firms are often required to deliver legal opinions in connection with an offering that a company is not an investment company and often have difficulty doing so under the facts and circumstances analysis under Section 3(b)(1).

We recommend that the Commission establish an objective safe harbor under Section 3(b)(1) for companies that clearly derive the substantial majority of their revenues from non-investment activities. For example, a company that derives at least 70% of its consolidated revenues from operating activities, rather than from investing, reinvesting, owning, holding, or trading securities, could be deemed to be primarily engaged in a non-investment business for purposes of Section 3(b)(1). The safe harbor would provide a predictable means for an operating company to establish its status without requiring a separate, subjective *Tonopah*

⁴ We recognize that the recommendations in this section principally concern matters within the jurisdiction of the Division of Investment Management, rather than the Division of Corporation Finance. We nevertheless include these recommendations because the issues discussed can arise directly in connection with the IPO process, particularly for asset-light companies that hold substantial cash or other investments following an offering. Providing greater certainty on these issues would therefore remove a potential impediment to accessing the public markets and further the Commission’s broader objective of modernizing and facilitating the IPO process.

Vanessa Countryman
September 30, 2026
Page 16

analysis solely because the company exceeds the 40% asset threshold. The *Tonopah* factors could remain available for companies that do not satisfy the quantitative threshold. This approach would provide greater certainty while appropriately distinguishing companies whose principal business is operating a business from those whose principal business is investing in securities.

The Commission also should codify and expand the relief it has provided through individual exemptive orders addressing operating companies' cash-management activities. In recent years, the Commission has granted relief to operating companies that hold substantial amounts of cash and cash-equivalent investments or other capital-preservation instruments, recognizing that prudent cash management should not cause an operating company to be treated as an investment company. Requiring companies to obtain individualized exemptive orders to engage in ordinary cash-management activities can be time-consuming and costly, particularly where the company's need for the relief arises from a financing or other transaction. The Commission should instead establish a general exemption or safe harbor permitting qualifying operating companies to hold specified amounts of cash-management investments without regard to the 40% asset test, subject to appropriate conditions designed to ensure that the investments are incidental to the company's operating business and are held principally for capital preservation, liquidity, or other legitimate business purposes.

The Commission also should consider increasing the existing 10% limitation applicable to investment securities that fall outside the permitted cash-management instruments under the Commission's exemptive-order framework. A higher threshold would provide operating companies with reasonable flexibility to make strategic investments, manage liquidity, and respond to business opportunities without requiring them to seek individualized exemptive relief. Taken together, an objective operating-company safe harbor and a general cash-management exemption with a reasonable limiting amount would provide substantially greater certainty, reduce unnecessary administrative burdens, and allow companies to focus on their operating businesses without creating a risk that ordinary cash-management or incidental investment activities will unexpectedly subject them to the 40 Act. We also observe that the cash management orders are inconsistent with the exemption for research and development companies under Rule 3a-8 (the "R&D Exemption"). The cash management orders provide that no more than 10% of a company's total assets (excluding government securities and cash items) may consist of investment securities other than capital preservation instruments. By contrast, the R&D Exemption applies a 10% threshold based on the issuer's total assets without the same exclusions. Accordingly, an issuer seeking to utilize the cash management order has less flexibility than that currently provided under the R&D Exemption.

Each of the recommendations above targets a specific, identifiable friction in the current IPO process, but does not reduce the substantive disclosures investors receive. We believe that, taken together, these changes would meaningfully ease the cost and complexity of going

Vanessa Countryman
September 30, 2026
Page 17

public, encourage more companies to access the U.S. public markets rather than remain private or pursue overseas listings, and support the Commission's continuing efforts to ensure that disclosure and review requirements are calibrated to what is genuinely material to investors.

We appreciate the Commission's consideration of these comments. If the Staff would like to discuss any of the comments that we have provided in this letter, please feel free to contact Ran Ben-Tzur or Amanda Rose of this firm at 650-335-7613 or 206-389-4553, respectively.

Sincerely,

FENWICK & WEST LLP

A handwritten signature in black ink that reads "Ran Ben-Tzur". The script is cursive and fluid.

Ran D. Ben-Tzur

A handwritten signature in black ink that reads "Amanda Rose". The script is cursive and elegant.

Amanda L. Rose