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April 13, 2026

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

Re: Statement on Reforming Regulation S-K

Dear Ms. Countryman:

Fenwick & West LLP is pleased to respond to the request of the U.S. Securities and Exchange Commission (the "Commission") for comments regarding potential amendments to modernize and simplify disclosure requirements of Regulation S-K.

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

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

I. Proposed Amendments

A. Form 10-K and 10-Q, as applicable

Item 101(c)(2)(ii) Human Capital Disclosure

We believe Item 101(c)(2)(ii) of Regulation S-K should be eliminated because it imposes substantial compliance costs on registrants without producing the standardized, material, or useful information that the Commission's disclosure framework is designed to produce. Since its adoption as part of the Commission's November 2020 Regulation S-K modernization amendments, the human capital disclosure requirement has proven to produce vague, duplicative, and, in some cases, competitively harmful information that is disconnected from the materiality principles that have long served as the bedrock of securities regulation.

Unlike financial disclosures governed by generally accepted accounting principles, Item 101(c)(2)(ii) provides virtually no specific guidance as to what must be disclosed, resulting in a fragmented patchwork of annual report disclosures — some limited to headcount figures and boilerplate recitations of corporate culture, others encompassing detailed workforce analytics. The principles-based approach of Item 101(c)(2)(ii) of Regulation S-K, while facially flexible, produces disclosures that are of limited practical utility to investors and arguably serve no coherent regulatory function.

Furthermore, Item 101(c)(2)(ii) compels disclosure of human capital resources irrespective of whether those resources are material to the particular registrant. The Commission should not subject investors to the task of navigating what is frequently immaterial information or compel registrants to incur the costs of disclosing it.

Workforce strategy, including compensation structures, talent sourcing approaches, and training investments, is sensitive commercial information that competitors can exploit. By mandating that registrants publish their “human capital measures or objectives” in publicly accessible annual reports, Item 101(c)(2)(ii) creates a structural mechanism through which proprietary workforce intelligence is made available to competitors. This concern is particularly acute in talent-intensive industries such as technology, financial services, biotechnology, and professional services, where talent acquisition and retention constitute primary competitive battlegrounds.

To the extent human capital information is genuinely material, it is already disclosed through existing channels. Registrants address the financial impacts of their workforce in their Management's Discussion and Analysis ("MD&A") pursuant to Item 303 and risks related to their workforce in the Risk Factors pursuant to Item 105, and many publish detailed sustainability or corporate responsibility reports. Item 101(c)(2)(ii) adds only redundancy and compliance cost. That burden is particularly disproportionate for smaller reporting companies (“SRCs”) and emerging growth companies (“EGCs”) that may lack centralized HR data systems and must invest in new infrastructure or outside consultants merely to comply with a rule that produces no material benefit for investors.

Item 105 Risk Factors

Summary Risk Factors

We believe that the current requirement in Item 105(b) that a company with risk factor discussions exceeding 15 pages must provide bulleted or numbered statements summarizing the principal factors that make an investment in the company or offering speculative or risky should be deleted.

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Item 105(a) already requires a company to discuss the material factors that make an investment in the company or its offering speculative or risky, and to explain how each risk affects the company or the securities being offered. A properly drafted risk factor section that satisfies these existing requirements—with clear subcaptions and concise explanations—already enables investors to identify and assess the principal risks without the need for a separate summary. The requirement to also include, in many cases, a summary of such risk factors does not provide investors with any additional meaningful information. Instead, it leads to duplicative disclosure and unnecessarily lengthens already dense filings, while increasing the disclosure burdens and costs of the company.

In addition, this requirement results in statements that necessarily fail to provide fulsome explanations of or context for the material risks facing the company, and that may therefore be considered misleading and/or incomplete. Such an outcome is in direct contradiction to Regulation S-K's goal of providing investors with clear, accurate, and complete information about the public companies in which they invest, and exposes registrants to potential liability for the very disclosures the rule compels them to make.

Finally, for companies whose risk factor discussions approach or exceed the fifteen-page threshold, the summary requirement creates a perverse incentive to condense or limit substantive risk discussion in order to avoid triggering the additional disclosure obligation—potentially resulting in the omission or under-development of material risk factors. Deleting the summary requirement would eliminate this distortion and permit registrants to devote their disclosure resources to the preparation of comprehensive, well-organized risk factor discussions that serve the interests of investors.

Item 201 Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters

Market Information

We believe that Item 201(a) should be deleted in its entirety. The required information, including the exchange listing, ticker symbol and trading prices of the company's stock (where there is no established public trading market), is readily and continuously available from market data sources, such as Nasdaq, NYSE, and online brokerages. Therefore, the inclusion of such information in filings is duplicative and unnecessary.

Further, Item 201(a) requires companies to provide information to investors that is inferior to the information they can obtain from other sources. The regulatory framework should encourage investors to rely on current market quotes when making their investment decisions instead of promoting their reliance on information that becomes outdated immediately upon being disclosed in a static filing.

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Eliminating this requirement would reduce the regulatory burden on companies, simplify disclosure, and increase the likelihood that members of the public will obtain useful, current and transparent data about the public companies in which they invest.

Holders

We believe that Item 201(b) should be eliminated in its entirety. Given changes in the nature of share ownership over the last fifty years, currently most investors, particularly individuals, are beneficial holders of stock who hold their securities in "street name" through record holders, such as brokers and custodians. Item 201(b) typically produces disclosure about a company's record holders and not its beneficial holders, the latter of which generally exceeds the former by hundreds or thousands. Information about a company's record holders is of limited value to investors and analysts, who we believe prefer to focus on meaningful data that reflects a company's economics, risk and governance practices (*e.g.,* ownership concentration, institutional vs. retail mix, public float). As a result, Item 201(b) no longer elicits information that is relevant or material to investors.

Dividends

We believe that Item 201(c)(2) largely should be eliminated, as it produces low-value, generic statements that clutter filings and do not provide meaningful insight.

For example, if a company has never declared a dividend in the past, that fact is readily apparent to the public (regardless of the company's perceived ability to pay dividends). It is our opinion that an investor should reasonably be expected to understand that a company's past practice with respect to the payment of dividends indicates its likely future intentions unless and until the company affirmatively states otherwise. Therefore, it is unnecessary for a company that has never paid dividends to disclose to investors that it does not intend to pay dividends in the future unless and until that approach changes (*i.e.,* the company declares a dividend).

We support maintaining the portion of the Item applicable to companies that have a history of paying dividends and do not plan to continue paying comparable dividends going forward. However, we believe that the language of the Item should be qualified by materiality. In determining whether and what kind of disclosure to make, companies should consider whether the change in dividend policy is material, and whether investors have a sufficient expectation that they will continue receiving dividends based on other disclosures the company has made.

Performance Graph

We believe that Item 201(e) should be eliminated for several reasons. First, the performance information required by this item is readily available elsewhere on both a historical and real-time basis, which renders this requirement redundant and outdated. Second, the required disclosure can be misleading or overly simplistic, for example if it exaggerates short-term turns in the market. And finally, the information provided in response to Item 201(e) often reflects macroeconomic factors and perceptions about the market, rather than useful disclosure about the company's operations, business, risks, governance patterns, and financial condition. Therefore, we do not believe that the informational benefit of this disclosure outweighs the compliance costs associated with gathering, distilling and preparing it.

Item 305 Quantitative and Qualitative Disclosures About Market Risk

We believe that Item 305 should be eliminated. The information required to be disclosed is often redundant with data that is contained elsewhere in a company's filings. For example, Item 303 of Regulation S-K requires disclosure about material market risks, trends and uncertainties, and ASC 815 requires disclosure about financial instruments, risk exposure and sensitivity analyses. We believe that investors prefer to rely on such narrative disclosures in Management's Discussion and Analysis and in the footnotes to the financial statements, rather than on Item 305's more technical and arguably overwhelming risk modeling presentations.

Further, because Item 305 permits companies to choose among several methods of presentation for the same information, it results in inconsistency and a lack of comparability across filings, thus creating further questions regarding its usefulness.

Finally, the information produced in response to Item 305 is static and only provided in periodic reports when, in reality, market exposures fluctuate daily. Because the disclosure becomes obsolete as soon as it is published in a filing, we believe it is of limited value to investors.

Overall, we believe that the requirements of Item 305 are burdensome and costly for public companies, and only produce duplicative disclosure that is of little practical value to investors.

B. <u>Proxy Statement</u>

Item 402 Executive Compensation

Pension Table

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Item 402(h) of Regulation S-K should be eliminated because it has become unnecessary, duplicative, and unduly burdensome in light of existing disclosure obligations and the dramatic decline in defined benefit pension plan usage by corporations.

The information Item 402(h) requires is already disclosed — in greater technical detail — in a company's financial statements pursuant to ASC 715. The Commission itself acknowledges this overlap by permitting registrants to satisfy actuarial assumption disclosure obligations through cross-reference to their financial statements, footnotes to the financial statements, or discussion in the MD&A. Because investors can access this information through audited financial statements, the incremental informational value of the Item 402(h) table is de minimis. The Commission's longstanding commitment to avoiding duplicative disclosure weighs strongly in favor of eliminating this redundancy.

Furthermore, the disclosure required by Item 402(h) is obsolete for the vast majority of companies. Item 402(h) expressly excludes tax-qualified and non-qualified defined contribution plans from its scope, rendering it inapplicable to the substantial majority of companies today and the overwhelming majority of technology and life science companies. The decades-long shift from defined benefit to defined contribution arrangements means that most filers bear ongoing compliance costs — in the form of legal review and annual verification — without generating any meaningful disclosure. A disclosure rule effectively irrelevant to most registrants fails the Commission's own cost-benefit standard.

Where Item 402(h) does apply, the resulting disclosure may mislead rather than inform. Computing present values using GAAP assumptions — modified so that normal rather than actual retirement age is assumed — produces figures that fluctuate with discount rate changes entirely unrelated to executive pay decisions, distorting investor perception of compensation levels. The companion narrative obligations compound this burden, requiring a systematic accounting of every structural plan feature — including retirement formulas, eligibility standards, compensation elements, and policies on granting years of credited service — a level of prescription demanded of no other executive compensation component and imposing meaningful legal, actuarial, and drafting costs each proxy season.

Should the Commission disagree with complete elimination of this table, we urge adoption of a cross-reference-only approach that fully satisfies Item 402(h) through reference to existing pension footnotes already included in the financial statements, or a materiality threshold exempting registrants where aggregate named executive officer ("NEO") pension values fall below a defined dollar amount or percentage of total executive compensation expense. Either alternative would preserve disclosure where executive pension benefits are material, while relieving the vast majority of registrants from compliance costs that generate no investor benefit.

Non-qualified Deferred Compensation Table

We urge the Commission to eliminate, or substantially curtail, Item 402(i) of Regulation S-K. Item 402(i) imposes compliance burdens that are disproportionate to any incremental investor benefit, given the substantial overlap with disclosures already required elsewhere in the proxy statement.

Item 402(i) is substantially duplicative of existing required disclosures. Item 402(i) requires companies to report each NEO's executive contributions, registrant contributions, aggregate earnings, aggregate withdrawals, and aggregate account balance at fiscal year-end with respect to each defined contribution or other plan that provides for the deferral of compensation on a basis that is not tax-qualified. The Instruction to Item 402(i)(2) itself acknowledges this redundancy by requiring a footnote quantifying the extent to which amounts reported in the contributions and earnings columns appear in the Summary Compensation Table ("SCT") for the last completed fiscal year and amounts reported in the aggregate balance at last fiscal year-end column appear in the SCT for previous fiscal years. Requiring a separate table that restates and cross-references SCT data does not advance disclosure; it merely increases proxy statement length without producing useful information for investors.

Item 402(i) also demands a narrative covering types of compensation eligible for deferral, the measures for calculating interest or other plan earnings, investment election mechanics, and payout terms for each plan maintained by the registrant — a granular and extensive undertaking that multiplies for registrants maintaining multiple non-qualified arrangements. Yet the informational benefit is, at best, marginal. The aggregate balance in column (f) is not current-year compensation; it is the cumulative product of multi-year deferrals already previously reported, employer contributions already captured in the SCT, and investment returns on deferred amounts. Presenting this cumulative balance alongside current-year pay data distorts rather than illuminates pay-for-performance analysis. The material terms of these plans are already accessible through exhibit filings and the Compensation Discussion and Analysis ("CD&A"), and compliance with the Item 402(i) narrative requirement consumes significant outside counsel, compensation consultant, and internal resources — all to reproduce information investors can already access.

The CD&A — a principles-based, materiality-driven vehicle — is the appropriate mechanism for describing non-qualified deferred compensation arrangements that are material to an understanding of a registrant's overall compensation program. The SCT already captures the current-year compensation value of any employer contributions. Together, these existing disclosures render Item 402(i) redundant. Eliminating this table and accompanying narrative would not create an information gap; it would remove a layer of mandated disclosure whose primary effect is to lengthen proxy statements, raise compliance costs, and potentially mislead

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investors by presenting cumulative deferred account balances in a current-year compensation context.

If the Commission is opposed to removing Item 402(i) in its entirety, the Commission should at minimum eliminate the column (f) aggregate balance requirement and permit the narrative disclosure to be satisfied through cross-reference to the CD&A rather than stand-alone plan-by-plan description.

Stock Award Disclosure in SCT

We respectfully encourage the Commission to consider recalibrating the disclosure requirements for long-term stock awards under Item 402 to better align with how those awards are recognized in registrants' financial statements over the vesting period under U.S. GAAP.

As executive compensation has increasingly shifted toward long-term, performance-based equity awards with multi-year vesting conditions, Item 402's grant date-focused disclosure framework has become misaligned with the economic reality of how such compensation is earned, realized, and evaluated by investors. Item 402 generally requires stock awards to be disclosed at full grant date fair value even where awards are subject to substantial service or performance contingencies that may never be satisfied. This approach can materially overstate compensation in the year of grant and obscure the timing and likelihood of actual economic benefit to executives.

By contrast, under ASC 718, equity compensation expense is recognized over the requisite service period, reflecting when compensation is earned and incorporating forfeiture risk and performance uncertainty. Investors already have access to equity compensation information through this vesting period framework in financial statements, yet proxy disclosure presents the same awards using a fundamentally different measurement basis. The resulting divergence complicates investor analysis and undermines comparability across disclosure documents that are routinely read together.

The Commission's adoption of Regulation S-K Item 402(v) (Pay versus Performance) reflects recognition of these concerns. Under Item 402(v), registrants are required to remeasure equity awards annually until vesting or forfeiture and to reflect changes in fair value over time in determining compensation actually paid. This lifecycle-based approach demonstrates the Commission's acknowledgment that grant date disclosure alone does not adequately convey executive compensation outcomes.

Aligning Item 402 stock award disclosure more closely with vesting-period recognition would improve clarity, reduce reconciliation burdens, and better reflect the long-term incentive structures used by compensation committees. It would also leverage valuation methodologies, controls, and governance processes that registrants already maintain for financial reporting purposes under ASC 718, minimizing incremental compliance costs while promoting internal consistency between proxy disclosures and financial statements.

For these reasons, we respectfully encourage the Commission to consider rulemaking or interpretive guidance that calibrates Item 402 stock award disclosure to vesting-period recognition, consistent with financial-statement accounting and the Commission's recent Pay versus Performance reforms. Doing so would materially enhance the usefulness and coherence of executive compensation disclosure for investors.

Security Expenses as Perquisites

In a 2006 release, the Commission took the position that security provided at a personal residence or during personal travel constitutes a perquisite for purposes of Item 402(c)(ix)(A), and is not "integrally and directly related to the performance of an executive's duties," even where the registrant has identified a bona fide, ongoing security threat to the executive. Pursuant to this guidance, personal travel on a corporate aircraft or with a company-provided car and driver is treated as a perquisite requiring disclosure, notwithstanding that such travel may be mandated by the registrant's security protocols.

We respectfully urge the Commission to reconsider its current position on executive security and personal travel. In our experience, the existing guidance places companies and their boards in an untenable position: providing personal security protection to executives facing genuine threats requires disclosure that may attract unwarranted scrutiny and adverse reactions from proxy advisory firms, while foregoing such protection in order to avoid disclosure may expose executives and their families to material safety risks. This framework effectively penalizes registrants for taking reasonable and prudent measures to protect their personnel. Moreover, the Commission's position is often inconsistent with tax guidance which allows for deduction of such costs as a business expense if certain requirements are met.

As Commissioner Peirce observed at the June 2025 SEC Roundtable on Executive Compensation Disclosure Requirements, there is a compelling case for "a more nuanced approach to personal security disclosure that considers the context in which those measures are provided." We concur with this view and encourage the Commission to revise its guidance to recognize that security measures provided in response to documented threats serve legitimate business purposes and should not automatically be classified as perquisites. Such a revision would better align the disclosure framework with the underlying policy rationale of Item 402 while enabling registrants to fulfill their duty of care to executives without incurring disclosure consequences that may themselves create additional security vulnerabilities.

CEO Pay Ratio and Pay versus Performance Table

We recognize that the Pay Ratio disclosure requirements under Item 402(u) and the Pay versus Performance disclosure requirements under Item 402(v) were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which limits the Commission's authority to eliminate these rules entirely. Nevertheless, we urge the Commission to exercise its discretionary authority to streamline these requirements and reduce the compliance burden on registrants, consistent with the concerns articulated by the Commissioners at the SEC Roundtable on Executive Compensation Disclosure Requirements.

These disclosure requirements impose substantial compliance costs on registrants while providing limited utility to investors. Many companies must engage specialized consultants to perform the complex calculations and prepare the disclosures mandated by these rules—an expense that does not translate into meaningful investor protection or more informed decision-making. As Commissioner Uyeda observed, "disclosures that are both costly and complex to produce while not material to investment or voting decisions are at odds with any form of good regulatory disclosure."

We further note that the CEO Pay Ratio rule, in particular, appears designed to advance policy objectives beyond investor protection. Commissioner Uyeda's observation that the rule carries a punitive motivation and that "the Commission's rulebook should not serve to further political agendas" reflects a concern we share. We also echo concerns raised in comment letters cited at the SEC Roundtable that the CEO pay ratio fails to provide meaningful comparisons of compensation practices across registrants. As those commenters observed, differences in workforce composition, geographic distribution, industry characteristics, and compensation structures render cross-company comparisons unreliable and potentially misleading. In our experience, investors and proxy advisory firms do not consider the pay ratio to be material. For example, ISS and Glass Lewis include the CEO pay ratio in their reports only for informational purposes, without factoring it into their voting recommendations.

If the Commission determines that it lacks authority to modify or eliminate the CEO pay ratio and Pay versus Performance disclosure requirements due to the Dodd-Frank Act's statutory mandates, we believe this further underscores the importance of extending the EGC on-ramp for these requirements. Providing EGCs with continued relief from these burdensome disclosures would offer meaningful regulatory flexibility where broader reform may not be possible.

Item 404 Related Party Transactions

Disclosure of Transactions after Fiscal Year End

Item 404(a) currently requires disclosure of related party transactions that occurred "since the beginning of the registrant's last fiscal year." As a result, in the context of a Form 10-K, companies must disclose not only related party transactions that occurred during the fiscal year for which the Form 10-K is being filed, but also related party transactions that occurred after the end of that fiscal year through the filing date of the Form 10-K. We believe that this language should be revised to cover, instead, only transactions that occurred "*during* the registrant's last fiscal year" (emphasis added).

This revision would align Item 404's disclosure timeframe with the timeframe used in other disclosure items, particularly Item 402 which requires compensation disclosure through the most recently completed fiscal year. Such a change would lead to the omission of disclosure that we believe is not useful or meaningful to investors, particularly given that investors rely on annual reports to cover events that occurred during – and not after – the most recently completed fiscal year. In addition, the requirement to include transactions after the end of the fiscal year that is the subject of the report will, by definition, result in duplicative disclosure when these post-year-end transactions are reported in the following year's disclosure documents.

Further, allowing a company to utilize a "cut off" date for related party transaction disclosure that precedes the filing of such disclosure by a reasonable amount of time would encourage the drafting of less rushed and more thoughtful disclosure, as well as provide companies with adequate time to present the disclosure to and obtain useful feedback from relevant persons, such as audit or disclosure committee members, as appropriate.

In addition, because companies currently are required to disclose transactions through the filing date of the Form 10-K, each company necessarily provides disclosure as of a different date, which results in such information being incomparable and therefore less useful to investors and analysts.

Currently Proposed Transactions

We believe that Item 404(a) should be revised to delete the requirement that "currently proposed" related party transactions be disclosed. It is unclear what is intended to be covered by this phrase, which leads to investor confusion and an inefficient use of resources by companies as they spend time attempting to determine which transactions should and should not be considered "currently proposed."

Further, this requirement leads to speculative and potentially misleading disclosure, as "currently proposed" transactions may or may not ever occur, or may occur on vastly different terms from those currently being considered. Companies interpret and apply this disclosure requirement differently, leading to disclosure that is incomparable and therefore less useful to investors and analysts.

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Threshold for Disclosure

We believe that the reporting threshold for related party transactions in Item 404(a) should be revised. The current threshold of $120,000 was established in 2006 and has not been adjusted since then, to reflect inflation or otherwise. This inertia has resulted in companies having to track and analyze transactions that are not material to investors' understanding of the companies' operations and governance practices, thus creating an undue financial and administrative burden on the companies.

We recommend that, instead of instituting a dollar threshold for the reporting of related party transactions, the threshold should be based on the materiality of the transaction to an investor of the registrant. If a transaction is immaterial, this approach would, from the outset, avoid the need for disclosure of transactions that the company believes are not important to investors, which aligns with other principles-based approaches to disclosures. This would allow a company to provide meaningful disclosure without having to engage in unnecessary tracking and analysis of a multitude of potentially relevant transactions. Further, we believe that such a principles-based materiality threshold, rather than a dollar threshold, aligns with the Commission's stated preference for rules that provide each company with the flexibility to evaluate what information is material to it and the opportunity to tailor disclosure that reflects its actual circumstances. This approach also mirrors the position taken in ASC 850, which considers the materiality of a related party transaction – as opposed to a numerical threshold – to be the appropriate measure for disclosure.

To the extent the Commission determines to maintain a dollar threshold, we encourage that it be revised to the greater of $200,000 or 5% of the company's revenue, which would provide a more meaningful and scalable measure of materiality across registrants of varying sizes. We further recommend that the rule build in automatic adjustments for inflation, in order to decrease the likelihood that it will capture immaterial transactions in the near future as inflationary pressures and market conditions evolve.

Pre-IPO Lookback Period for EGCs

We respectfully recommend that the Commission revise Item 404(a) to reduce the pre-IPO lookback period for related party transaction disclosure from three years to two years for EGCs. This revision would align the related party transaction disclosure period with the reduced financial statement requirements applicable to EGCs, which are permitted under the Jumpstart Our Business Startups Act (the "JOBS Act") to provide only two years of audited financial statements in their IPO registration statements.

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In our experience, the current three-year lookback period creates a disproportionate burden on companies undergoing the IPO process. Unlike established public companies, which typically have mature governance structures, robust policies for identifying and tracking related party transactions, and experienced legal and accounting personnel, pre-IPO companies are frequently at an earlier stage of institutional development. Many of these companies are founder-led organizations that have operated as private entities without the infrastructure, processes, or institutional knowledge necessary to efficiently identify and document transactions with related parties that may have occurred years earlier.

The practical effect of the three-year lookback requirement is to compel companies and their advisors to engage in a resource-intensive review of historical transactions that predates the period for which audited financial statements are required. This review often uncovers transactions that, while technically reportable, are immaterial, routine, or otherwise unremarkable — yet each must be analyzed, documented, and potentially disclosed. In some cases, the disclosure of historical transactions that occurred in an informal operating environment can create an inaccurate impression of the company's current governance practices.

More significantly, the requirement to disclose related party transactions from an extended historical period can materially impact IPO transactions. Unusual or informal arrangements that were entirely appropriate in a private company context may appear problematic when disclosed in a public offering document without adequate context. Because IPO prospectuses are scrutinized by investors, underwriters, and their respective counsel, the presence of unusual historical transactions — even immaterial ones — can delay offerings, require extensive diligence, or negatively affect pricing and investor perception.

For these reasons, we urge the Commission to revise Item 404(a) to provide that, in the case of a registration statement filed by an EGC in connection with its initial public offering, the lookback period for related party transaction disclosure shall correspond to the period for which audited financial statements are required to be included in such registration statement. This targeted revision would reduce compliance costs for EGCs, streamline the IPO process, and better reflect the realities of pre-IPO corporate governance without compromising investor protection.

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Clarification of Materiality Standard

We respectfully recommend that the Commission clarify the standard for determining whether a related person has a “material interest” in a transaction for purposes of Item 404(a). As currently applied, the materiality analysis under Item 404(a) requires companies to evaluate multiple factors, including the significance of the information to investors, the relationship of the related persons to the transaction and to each other, the importance of the interest to the person having the interest, and the amount involved in the transaction. This multi-factor approach creates unnecessary complexity and uncertainty for companies attempting to determine their disclosure obligations.

In particular, the current framework requires companies to consider materiality from the perspective of the related person — specifically, whether the related person has a material interest in the transaction — in addition to whether the information would be material to investors. The Commission’s adopting release for Item 404(a) states that the materiality of any interest is determined based on “the significance of the information to investors in light of all the circumstances,” but also indicates that “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.” This guidance has created significant interpretive challenges for registrants and their counsel. Companies are left to speculate about the subjective importance of a transaction to a related person — an inquiry that is inherently difficult to evaluate without direct knowledge of the related person’s financial circumstances, personal priorities, or business objectives. Compounding this uncertainty, the lack of clear guidance has resulted in inconsistent disclosure practices across registrants, with some companies adopting conservative approaches that capture transactions of marginal relevance while others apply more permissive standards, undermining the comparability and utility of related party disclosures for investors.

We believe the Commission should clarify that the materiality determination under Item 404(a) should be based solely on whether the transaction would be material to a reasonable investor, consistent with the standard articulated in *TSC Industries, Inc. v. Northway, Inc. and Basic Inc. v. Levinson*. This clarification would simplify the disclosure analysis by eliminating the need for companies to evaluate the importance of a transaction to the related person — an inquiry that is often speculative. It would also reduce over-disclosure of transactions that may be significant to a related person but are immaterial from an investor’s perspective, and produce more consistent disclosures across registrants.

For these reasons, we urge the Commission to issue guidance clarifying that the materiality determination under Item 404(a) should focus exclusively on whether the information regarding the related party transaction would be significant to a reasonable investor's investment decision, without regard to the materiality of the transaction to the related person or to the company itself.

Definition of Related Person

We believe that the definition of "related person" in Instruction 1 to Item 404(a) should be revised to focus more narrowly on relevant relationships that are appropriate proxies for familiarity. In particular, the term should refer to "immediate" family members, such as parents, stepparents, children, stepchildren, spouses and siblings. The term should not include the relationship of "mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law," as such relationships are too attenuated to suggest a level of closeness that raises concerns of control, influence, or attribution of financial information or financial benefit.

Aggregation Requirement in Instructions 6(a)(ii) and 6(b)

We respectfully recommend that the Commission revise Instruction 6(a)(ii) to Item 404(a) as follows (amendments in bold text)**:** "such person and all other persons specified in Instruction 1 to paragraph (a) of this Item, in the aggregate**, that are immediate family members of such person**" and Instruction 6(b) (together with Instruction 6(a)(ii), the "Instructions") to Item 404(a) to make a corresponding revision. As currently drafted, these Instructions exclude from the disclosure requirements transactions arising from the direct or indirect ownership of less than a ten percent equity interest in another person that is a party to the transaction — but only if the ownership interests of the related person and all other persons specified in Instruction 1, in the aggregate, remain below the ten percent threshold.

The practical effect of the aggregation requirement, as currently provided in the Instructions, is to compel companies to undertake burdensome inquiries to determine whether the combined equity interests of a related person and all of that person's family members, as well as the interests of all directors and executive officers and their respective family members, exceed ten percent. The requirement to aggregate with other directors and executive officers and their respective family members produces disclosure obligations that bear no rational relationship to investor protection. The policy rationale underlying Item 404 is to disclose transactions where a related person's interest in an entity may create a conflict of interest or otherwise influence the terms of a transaction with the registrant. A related person's direct or indirect ownership of a small equity stake in an entity that transacts with the registrant presents minimal potential for such influence, regardless of whether other persons — who may have no practical relationship with the related person — also hold equity interests in that entity. Aggregating the holdings of multiple individuals who may not coordinate their investments or

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share economic interests does not increase the risk of conflicted transactions; it merely increases the compliance burden on registrants without producing meaningful disclosure.

Moreover, in our experience, obtaining accurate information about the aggregate equity holdings of multiple individuals — particularly the holdings of other directors and officers and their family members — in a non-public entity is frequently difficult or impossible. Family members may be unwilling or unable to disclose their investment portfolios, and companies lack the legal authority to compel such disclosure. This creates an inherent compliance gap: companies cannot reliably determine whether the exclusion applies, yet remain subject to potential liability if they fail to disclose a transaction that, in retrospect, did not qualify for the exclusion.

Revising the aggregation requirement would simplify the analysis required to determine whether the Instructions apply, reduce compliance costs, and focus disclosure on transactions where a related person's individual equity stake, along with the stake of their immediate family members, is sufficiently large to warrant investor concern. We believe this approach better aligns with the Commission's stated objectives of reducing unnecessary disclosure burdens while preserving meaningful investor protections.

Transactions in the Ordinary Course

We believe that Item 404 of Regulation S-K should be revised to exclude from disclosure transactions that a company enters into in the ordinary course of its business (e.g., ordinary course commercial contracts). Such transactions generally are not material to an investor's understanding of a company's business, because they are routine, recurring, and do not meaningfully alter the total mix of information available regarding the company. Similar to the way that Item 601(b)(10) permits companies not to file material contracts if such agreements were "made in the ordinary course of business" and ASC 850 requires related party transactions to be reported only to the extent they are material, Item 404 should carve out related party transactions that reflect the ordinary operations of the business.

Item 601 already has an exception for transactions "where the rates or charges involved in the transaction are determined by competitive bids" but this is seldom used as ordinary course business transactions may not necessarily be subject to a competitive bidding process and also may not have been the lowest bid as set forth in Regulation S-K CFI 230.04. If the Commission were to not add an exception for transactions that the company enters into in the ordinary course of its business then it should consider whether to expand the instruction with respect to competitive bids to also cover transactions that were negotiated at arm's length.

Decoupling Item 404 from Section 16 Non-Employee Director Definition

Although the following recommendation extends beyond Regulation S-K, we respectfully recommend that the Commission consider decoupling the definition of “non-employee director” under Section 16 of the Securities Exchange Act of 1934, as amended, from related party transaction considerations. Under Rule 16b-3, the exemption from short-swing profit liability for equity compensation grants to directors requires that such grants be approved by a committee composed solely of “non-employee directors.” The definition of “non-employee director” under Rule 16b-3(b)(3)(i)(c), however, excludes any director who possesses an interest in a transaction for which disclosure would be required pursuant to Item 404(a), even where such transaction has been fully disclosed, reviewed by the audit committee, and was approved by the board of directors.

The practical consequences of this linkage are significant. If a director is disqualified from non-employee director status due to a related party transaction, that director may be unable to serve on the compensation committee for purposes of approving equity awards that satisfy the Rule 16b-3 exemption. In companies with smaller boards, this can create substantial governance challenges, as the pool of eligible directors may be reduced to a point where it becomes difficult to maintain a properly constituted committee. Moreover, the current framework may have a chilling effect on legitimate business transactions between a company and entities affiliated with its directors, even where such transactions are clearly in the best interests of both parties and have been subject to rigorous independent review. For example, in the context of an IPO, it is common for venture-fund affiliated directors to have a related party transaction disclosure with respect to a financing of the company by the fund affiliated with the director.

We believe that the policy rationale for the non-employee director requirement under Rule 16b-3 — ensuring that equity compensation decisions are made by directors who do not have a personal financial stake in the outcome — is not meaningfully advanced by disqualifying directors based on unrelated business transactions. A director who has a disclosed, board-approved commercial relationship with the company is not thereby rendered incapable of exercising independent judgment with respect to equity compensation matters. The audit committee and board approval process for related party transactions is specifically designed to evaluate and mitigate conflicts of interest, and transactions that have successfully navigated this process should not carry collateral consequences under a separate regulatory regime with distinct policy objectives.

Accordingly, we encourage the Commission to amend Rule 16b-3 to provide that a director shall not be disqualified as a non-employee director solely by reason of a related party transaction that has been disclosed pursuant to Item 404(a) and approved by the company’s audit committee or board of directors in accordance with the company’s related party

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transaction policies and procedures. Such an amendment would harmonize the regulatory treatment of related party transactions across the securities laws, reduce unnecessary compliance burdens on registrants, and permit companies to maintain effective governance structures without sacrificing the legitimate policy objectives underlying either Item 404 or Section 16.

Description of Related Party Transaction Policy

We believe that Item 404(b)'s requirement that a company describe its "policies and procedures for the review, approval, or ratification of any transaction required to be reported under paragraph (a) of this Item" should be eliminated.

The requirement elicits generic and process-oriented disclosure because companies are inclined to discuss the same "best practice" procedures, resulting in boilerplate language that is not specific to any particular company and that is therefore unhelpful to investors. Such a prescriptive requirement produces generalized descriptions of internal policies that are not tethered to specific transactions or company risks and that are unlikely to be material to investors.

Further, because Item 404(a) already requires disclosure of material related party transactions and Item 407 already requires disclosure of relevant governance processes, the discussion of related party policies adds a layer of abstract policy description that duplicates, rather than enhances, existing discussions.

The current requirement of Item 404(b) conflicts with the Commission's goal of reducing generic and immaterial information, as well as contributing to disclosure overload.

C. <u>Form 8-K</u>

Item 5.02

Alignment of Enumerated Officers Across Item 5.02

We respectfully recommend that the Commission align the list of officers subject to Items 5.02(b), 5.02(c), and 5.02(e) to provide consistent disclosure treatment.

Currently, Item 5.02(b) requires disclosure upon the departure of the principal executive officer, president, principal financial officer, principal accounting officer ("PAO"), principal operating officer, persons performing similar functions, or any NEO. Item 5.02(c) requires disclosure upon the appointment of the same officers (other than NEOs). Further, Item 5.02(c)(2) requires disclosure of the information in Items 401(b), (d), (e) and Item 404(a) for a PAO even if

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the company does not consider the PAO to be an executive officer, and this information is not required to be disclosed in Form 10-K.[1] Item 5.02(e) requires disclosure of material compensatory plans, agreements, or arrangements, but applies only to the principal executive officer, principal financial officer, or NEOs. Ultimately, this misalignment across Item 5.02 leads to confusion and inconsistent reporting.

We respectfully suggest that the Commission consider limiting the officers subject to Item 5.02(b), 5.02(c), and 5.02(e) to the principal executive officer and principal financial officer, which are generally the most material to investors. This approach would reduce compliance complexity and increase comparability across filings, while ensuring that disclosure remains focused on officers whose roles are most likely to be material to investors.

Extension of Filing Delay Exception

We respectfully recommend that the Commission extend the filing delay exception currently available under Item 5.02(c) to Items 5.02(b) and 5.02(e). The instruction to Item 5.02(c) currently provides that if an issuer intends to make a public announcement of an appointment other than by means of a Form 8-K, the issuer may delay filing until the day on which it otherwise makes the public announcement. This exception offers valuable flexibility, allowing issuers to announce executive transitions at a time that makes sense from a corporate governance and management perspective. Successful executive transitions are critical to maintaining investor confidence and stock price stability, and require careful coordination.

However, there is no corresponding exception for departure disclosures under Item 5.02(b)[2] or compensation arrangement disclosures under Item 5.02(e), which undermines the usefulness of the filing delay exception. In practice, companies typically time the announcement of a new officer appointment with the announcement of a corresponding departure. For example, when announcing a departure, a company typically wants to be able to announce a replacement at the same time to apprise investors of the transition that is taking place. The company may need to delay the announcement of a new appointment for legitimate business reasons, but may be forced into an earlier and more disruptive disclosure because of the four-business-day requirement under Item 5.02(b).

[1] See Question 117.06, Exchange Act Form 8-K, Corporation Finance Interpretations.
[2] See Question 217.06, Exchange Act Form 8-K, Corporation Finance Interpretations.

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We respectfully encourage the Commission to amend Form 8-K to extend this exception to Items 5.02(b) and 5.02(e) in addition to Item 5.02(c). This amendment would reduce confusion and facilitate a smooth transition of executive officers.

Elimination of Item 5.02(e)

We respectfully recommend that the Commission eliminate Item 5.02(e) of Form 8-K in its entirety. The disclosure requirement for material compensatory plans, contracts, or arrangements is vague, inconsistently applied, and ultimately redundant with disclosures already required under Item 5.02(c) of Form 8-K and Item 402 of Regulation S-K in the proxy statement.

The term "material" in Item 5.02(e) leaves significant room for interpretation, creating uncertainty and inconsistency across filings. Issuers take varying approaches when determining what constitutes a "material" compensatory agreement, plan, or arrangement, and the Commission has provided limited guidance to resolve these interpretive questions. For example, issuers apply divergent standards when determining whether annual salary increases or adjustments to bonus targets for named executive officers trigger an Item 5.02(e) filing obligation — some issuers disclose any change to base salary or target bonus opportunity, while others apply a percentage threshold or conclude that routine annual adjustments are immaterial as a matter of course. This ambiguity leads to disparate disclosure practices that undermine comparability and investor utility.

Instruction 2 to Item 5.02(e) compounds this problem by creating an exception that produces anomalous results. The Instruction provides that grants or awards materially consistent with the previously disclosed terms of an existing plan, contract, or arrangement need not be disclosed, so long as the registrant has previously disclosed such terms and the grant, award, or modification is disclosed when Item 402 requires such disclosure. In practice, this means that an issuer that has filed a generic bonus plan may award a large discretionary bonus to its chief executive officer without filing a Form 8-K, whereas an issuer that has not previously filed such a plan may be required to disclose a much smaller grant or award. The exception thus rewards formulaic plan disclosure rather than substantive transparency, and produces outcomes that bear no rational relationship to investor protection.

More fundamentally, Item 5.02(e) is redundant. For newly appointed officers, Item 5.02(c)(3) already requires disclosure of any material plan, contract, or arrangement to which a newly appointed principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions is a party or in which such person participates. For all named executive officers, compensation arrangements are already subject to comprehensive disclosure under Item 402 of Regulation S-K, which requires detailed reporting in the proxy statement of all compensation paid to, earned by, or awarded to executive officers, including salary, bonus, stock awards, option awards, nonequity incentive plan compensation, and all other compensation. The Summary Compensation Table, Grants of Plan-Based Awards Table, and accompanying narrative disclosures in the Compensation Discussion and Analysis provide investors with a more fulsome picture of executive compensation at the time when such disclosure is most useful — in connection with the annual meeting and say-on-pay vote. Further, disclosure of material compensation arrangements is often reflected in other disclosures, including a company's financial statements or in Section 16 filings. Registrants are also already required to assess the materiality of disclosing significant compensation arrangements earlier than the next proxy statement if, for example, they wanted to pursue an offering of securities or to facilitate trading by corporate insiders.

The incremental value of a current report disclosing an executive compensation arrangement — particularly one that will be fully disclosed in the upcoming proxy statement — is minimal at best. Requiring issuers to file Form 8-K disclosures for compensation arrangements that will be reported in detail under Item 402 imposes compliance costs without producing meaningful additional information for investors. Eliminating Item 5.02(e) would reduce this redundancy, decrease compliance burdens, and focus the current report regime on truly material events that warrant immediate investor attention.

Item 5.07(d)

Say-on-Frequency Determination

We respectfully recommend that the Commission revise Item 5.07(d) of Form 8-K to require disclosure of a registrant’s say-on-frequency determination only when the registrant’s decision differs from the frequency that received the most votes from shareholders. Under the current rule, registrants must disclose their decision on how frequently they will conduct an advisory vote on executive compensation no later than 150 calendar days after the annual meeting at which the say-on-frequency vote occurred, but in no event later than 60 calendar days prior to the deadline for submission of shareholder proposals under Rule 14a-8. This requirement applies regardless of whether the registrant adopts the frequency preferred by its shareholders.

In practice, the vast majority of registrants adopt the frequency that received the most votes. When a registrant’s board elects to follow the recommendation of its shareholders — which is the expected and ordinary outcome — no incremental information is conveyed by requiring an additional Form 8-K disclosure. The current rule thus imposes a filing burden that produces minimal informational value in the overwhelming majority of cases.

More concerning, the current disclosure requirement creates a compliance trap with disproportionate consequences. A registrant that inadvertently fails to disclose the issuer’s say-on-frequency determination — even where the issuer has adopted the frequency preferred by

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shareholders — risks losing eligibility to use Form S-3 for securities offerings. Form S-3 eligibility requires that a registrant have timely filed all required Exchange Act reports during the preceding twelve months. An issuer that overlooks the Item 5.07(d) filing deadline may find itself ineligible for Form S-3, which has significant consequences for capital-raising flexibility and transaction timing. In this scenario, such ineligibility seems disproportionate for simply failing to reaffirm that the company is acting in accordance with its shareholders' expressed preferences. Indeed, previously the Staff has been inclined to grant a waiver request if the frequency that was recommended by the company's board was adopted by a majority (and possibly a plurality) of the shareholders, and the company actually adopted that frequency because in these situations, the Staff agreed that everyone was on notice about the outcome of the vote.

We respectfully urge the Commission to revise Item 5.07(d) to require Form 8-K disclosure only when the registrant's board determines to adopt a say-on-pay vote frequency that differs from the frequency recommended by the shareholders. This targeted approach would preserve disclosure where it is most meaningful to investors — namely, when a board declines to follow shareholder sentiment — while eliminating a compliance obligation that, in the ordinary course, produces no useful information and exposes registrants to disproportionate penalties for inadvertent omission.

D. <u>General</u>

Scaled and Extended Disclosure for EGCs

We support the Commission's recommendations to increase scaled disclosure for SRCs and EGCs more broadly. Scaled disclosure serves a vital function in our capital markets by reducing the disproportionate compliance burden borne by smaller issuers, lowering the cost of accessing public capital, and encouraging more companies to enter and remain in the public markets. The Commission's continued efforts to calibrate disclosure obligations to the size and maturity of the issuer reflect sound regulatory policy, and we urge the Commission to move forward with these recommendations.

We also respectfully submit that the Commission should take this opportunity to simplify the framework by which a company qualifies as an EGC. Under the current regime established by the JOBS Act, a company loses its EGC status upon the occurrence of any one of several triggering events — including exceeding $1.235 billion in annual revenue, achieving a public float of $700 million or more, or issuing more than $1 billion in non-convertible debt over a rolling three-year period — in addition to the existing five-year time limitation measured from the date of the company's initial public offering. This multi-factor test creates unnecessary complexity, generates compliance costs as companies must continuously monitor each threshold, and produces unpredictable results. Companies may unexpectedly lose EGC status mid-year as a result of a single capital markets transaction or a spike in revenue, disrupting their disclosure

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planning and imposing sudden, material increases in compliance obligations. Moreover, many of our clients lose EGC status within a short period of time following their IPO – oftentimes at the end of their second full year as a reporting company – as a result of exceeding the public float threshold. These companies, despite having significant market capitalization, are still building out their public company resources and processes and thus should be afforded additional time to ramp their disclosure requirements.

We urge the Commission to replace the current multi-factor test with a single, bright-line standard: an issuer should be permitted to rely on EGC status for a period of seven years following the effective date of its IPO registration statement, without regard to its revenue, public float, or debt issuance levels during that period. A fixed seven-year window would provide issuers with certainty and predictability, enabling them to plan their disclosure and governance frameworks with confidence. It would also more closely align the EGC framework with the policy objective that originally animated the JOBS Act — namely, providing newly public companies with a meaningful on-ramp period to transition into the full reporting regime. Seven years represents a reasonable period during which a company can mature its internal controls, reporting infrastructure, and governance practices, ensuring a smoother and less disruptive transition to full compliance. By eliminating the complexity of the current multi-factor test, the Commission would also reduce the administrative burden on its own staff in evaluating EGC eligibility questions, allowing resources to be directed toward more substantive investor protection objectives.

Materiality Requirement

The Commission’s disclosure regime exists not to accumulate voluminous information, but to deliver meaningful information to investors. Any framework mandating disclosure beyond what a reasonable investor would consider significant (the materiality standard articulated in *TSC Industries, Inc. v. Northway, Inc.*, and affirmed in *Basic Inc. v. Levinson*) undermines the very objectives the Commission has stated it desires to advance.

When issuers are compelled to disclose information regardless of its materiality, the inevitable result is disclosure documents of staggering length and complexity that obscure, rather than illuminate, what investors actually need to know. This “information overload” — acknowledged by the Commission in its own disclosure effectiveness initiatives — leaves a reasonable investor functionally less informed than one who receives a concise, organized presentation of material facts. Mandatory immaterial disclosure does not empower investors; it burdens them.

The costs of preparing, auditing, and filing disclosures are substantial and fall disproportionately on SRCs and EGCs, which operate with more limited resources and for whom compliance obligations impose a proportionately greater strain on personnel, budgets, and

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management attention. These burdens are compounded when registrants are required to disclose immaterial information, imposing real and measurable costs while delivering no corresponding benefit to any market participant. The Commission's cost-benefit mandate under the Securities Exchange Act of 1934, as amended, requires that regulatory burdens bear a rational relationship to the investor protection objectives they are designed to advance, and requiring disclosure of immaterial information fails that standard categorically.

A disclosure regime calibrated to materiality produces markets that price information efficiently. Overbroad mandatory disclosure produces counterproductive results — issuers facing liability for any conceivably relevant omission will reflexively include voluminous boilerplate information, thereby degrading the quality of the disclosure environment. The materiality standard imposes a principled, judicially tested threshold that aligns the interests of issuers, investors, and regulators, demanding disclosure of what matters, and only what matters.

The Commission should reaffirm materiality as the governing threshold for all disclosure obligations. Requirements untethered from materiality impose unjustified costs, harm the investors they are designed to serve, and erode capital market integrity. We respectfully urge the Commission to ensure that all current and forthcoming disclosure rules are calibrated strictly to what a reasonable investor would consider important.

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.

Sincerely,

FENWICK & WEST LLP

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Ran D. Ben-Tzur

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