August 1, 2016

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

Re: File No. S7-06-16, Release Nos. 33-10064, 34-77599
<u>Business and Financial Disclosure Required by Regulation S-K</u>

Dear Mr. Fields:

Fenwick & West LLP is pleased to respond to the request of the Securities and Exchange Commission ("Commission") for comments regarding the modernization of certain business and financial disclosure requirements of Regulation S-K, per the Concept Release referred to above. We appreciate the Commission's extensive and thoughtful analysis of the subject matters covered by the Concept Release and hope and expect this will, in turn, lead to equally thoughtful comments.

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

As an introduction to our specific responses, we believe that investors and reporting companies will be served by a significant overhaul of Regulation S-K. The collection of disclosure items currently required of public reporting companies has, as the Concept Release notes, been required and inspired by a disparate collection of statutes, regulations, committee reports and comments and guidance from the Commission's Staff. This has produced disclosure requirements that are frequently redundant and often contained in disparate sources other than the actual text of Regulation S-K. The costs of preparing this disclosure (which are ultimately borne by investors in the company) are often not justified by the benefit provided to investors.

In addition, the largely prescriptive nature of those elements of Regulation S-K pertaining to business and financial disclosure in periodic reports results in companies providing specified information that is frequently of limited value to investors. We note this particularly in representing companies in the high technology and life sciences areas, as many of the prescriptive requirements appear to be more relevant to more mature companies in more traditional industries. We also believe that the prescriptive nature of these elements of Regulation S-K, along with the liability attendant to disclosures in documents filed with the Commission, could have the effect of discouraging companies from providing disclosure that they consider to be most responsive to the interests of their investors. In light of these concerns, our comments below consistently refer to ways in which a principles-based approach could enhance the relevance of information provided in periodic reports.

We have chosen to limit our direct responses to those questions in the Concept Release tied to specific Regulation S-K items. When we deemed it relevant to our particular response, we have addressed the more general disclosure topics raised in the Concept Release in our response to these specific questions.

In the few instances where we were able to do so, we have endeavored to estimate costs of complying with specific requirements of Regulation S-K. In doing so, we speak to the direct costs to the company of providing the required information in their reports. While we can speak to costs for certain items, such as the costs of preparing confidential treatment requests on behalf of our clients, there are many costs that we do not see. We have observed over the last 15 years that our clients devote additional resources in terms of hiring additional personnel, often multiple persons, and outside consulting firms, such as accounting, financial reporting, internal audit, legal, compensation advisors and investor relations, to support their periodic reporting obligations. While we are not privy to the total cost of these additional personnel, intuitively, companies incur additional costs in the form of compensation, benefits and third party fees. In addition, with the additional disclosure requirements that have been implemented over time, the length of quarterly and annual reports and proxy statements has increased significantly. Presumably companies incur increased printing and delivery costs for longer documents and additional costs associated with preparing the lengthier documents through the use of internal and external professional services.

There is a second category of costs associated with information provided in securities filings, related to the incorporation of material from a company's periodic reports into registration statements under the Securities Act of 1933 ("1933 Act") (or for ineligible issuers, the likely copying out of recent periodic reports into a 1933 Act registration statement) and private offering documents. When these companies seek to raise capital or otherwise use these registration statements, they typically would engage an underwriter, private placement agent or other financial intermediary to assist them. In order to fulfill satisfy the "due diligence" defense of the relevant sections of the 1933 Act for public offerings or as a matter of standard practice in non-registered offerings, company's produce support for assertive statements made and other data contained in the registration statement. When this information involves financial measures, this support often involves formal "comfort" letters from the company's independent registered public accounting firm. In our experience, the process of providing support and comfort to the intermediary is a significant one that at a minimum entails a very significant cost in terms of the time of company employees dedicated to this task. Companies frequently engage their outside counsel to assist in interacting with the intermediary to satisfy its due diligence requirements, and that entails an additional out of pocket expense. Smaller companies are less likely than large ones to have sufficient staff to support these demands of their financings internally, and thus are likely to bear a higher amount of these costs. In addressing costs of compliance below, we refer to these costs associated with information in 1933 Act registration statements and private offering documents as "Due Diligence Costs."

One of the general topics raised in the Concept Release is the assumed audience for periodic reports. The lack of a codified description of the intended audience for periodic reports is not problematic for the preparation of these reports by our clients. Furthermore, in light of the fact that companies face liability in private litigation for disclosures contained in periodic reports, we believe trying to define audiences to which periodic reports should be targeted potentially exposes companies to additional liability. For example, if a report was targeted to more sophisticated investors, we envision claims being asserted that the disclosure was not understandable to ordinary investors, or conversely, in attempting to disclose complex topics to less sophisticated investors, we could foresee claims being raised that key disclosures were omitted in the attempt to simplify a complex issue. Accordingly, in response to the questions in section III.B.2—Audience for Disclosure , we do not support an attempt to revise Regulation S-K to define different audiences for periodic reporting or the creation of different classes of disclosure for any such different audiences.

IV. Company's Performance, Financial Information and Future Prospects

A. Core Company Business Information

Description of Business (Item 101)

Questions 24-26

We believe that the requirement to describe the development of the company's business over the past five years does not, in general, provide meaningful information to investors. The overwhelming majority of companies filing Forms 10-K (and even the majority of companies filing Forms S-1) have been in business for more than five years. We believe that investors are focused on a company's current business and potential for future growth and that revisions to their business that may have been implemented, for example, four years ago are not generally meaningful to an investor's understanding of the current business. In virtually any situation that we can envision, a material revision to the manner in which a company conducts its business would require disclosure in MD&A for at least the periods covered by the financial statements included in the report. In furtherance of principles-based disclosure, we would suggest revising Item 101(a)(1) to require the disclosure of any material changes in the company's business that have occurred within the periods covered by the financial statements included (or deemed included) in the report to the extent that an understanding of such change is material to an understanding of the company's current business.

Question 27

We do not believe that a requirement to describe the company's strategy would provide useful information to investors beyond the other disclosure requirements of Regulation S-K. If pursued to the fullest degree, such a requirement could force companies to disclose sensitive information that could be harmful to their competitive position well before it is known how, or even if, the strategy will materially impact the company's financial results or condition. We believe that an appropriate understanding of a company's strategy can be readily obtained from a description of their current business in combination with disclosure required by Item 303. If the pursuit of a company's strategy will likely cause its most recent financial results to fail to be indicative of future results, Item 303 would require a discussion of the trends or uncertainties arising from this strategy that could cause such divergence.

Question 28

We believe the existing requirement of Item 101 to describe the company's business on an annual, typically, basis provides information that is more easily understood by investors than would a scheme that requires a historical summary and a more detailed description of current-period changes. Similarly, we do not believe that a requirement to provide a more complete description periodically, such as every three years, and a summarized version in the intervening periods, would be the most effective presentation for investors.

Questions 31-59

We have elected to address the multiple questions contained in the Concept Release regarding Item 101(c) in a single, unified section which, we respectfully submit, will provide commentary that is more meaningful than comments spread across the multiplicity of questions presented under this topic.

We believe that the disclosure requirements of Item 101(c), as further interpreted by Instruction 1 to Item 101, would provide more useful information than is currently the case if sub-items (c)(i)-(xii) were made more principles-based, and less specific, and if certain of these sub-items were eliminated. We further believe that the requirement to describe the business on a segment basis does not result in the provision of meaningful information to investors, and in particular when such information is not significant to the company's business taken as a whole (see, the last sentence of Instruction 1). We further elaborate below.

We believe Item 101 would provide for the delivery of more meaningful information if it required the company to describe its business, identifying certain aspects of the business to be commented upon *to the extent material to an understanding of the business*. The aspects would then be provided as the sub-items of 101(c). The following are such sub-items that we believe are most likely to provide material information to investors, along with our suggested content of these sub-items (the roman numbers at the beginning of each paragraph correspond to the existing sub-item of such paragraph under Item 101(c)):

- (i) The requirement to describe the company's principal products and services is clearly material to investors.

- (ii) We believe that a description of publicly announced new products that will require the investment of a material amount of assets of the company, or that are otherwise material, is useful information (subject to retaining the final sentence of existing section (c)(ii) regarding competitively-sensitive non-public information).

- (iii) For our technology and life science clients an understanding of the sources and availability of raw materials is frequently not material, but we think it is appropriate to retain this requirement with the materiality overlay suggested above. Many clients in these industries obtain commercially available materials and components from third party contract manufacturers, and often a detailed discussion of this nature would not provide investors with any additional meaningful information

- (iv) We believe that companies should disclose information regarding their intellectual property rights to the extent material to an understanding of the company's business. For our clients, intellectual property is typically very important but this intellectual property comprises a complex web of contractual rights and formal intellectual property such as patents, copyrights and trademarks. We think a principles-based disclosure requirement for intellectual property would provide more useful information than the current requirement to describe "the duration and effect of all patents, trademarks, licenses, franchises and concessions held." It is infrequently the case that any of these items currently listed in (c)(iv) is material in and of itself and that the disclosure that we frequently see of the number and duration of formal IP rights is of little use to investors.

- (vii) If a single customer accounts for a significant amount of a company's revenue, this fact would be meaningful if the loss of that customer would likely result in the loss of future revenue, such as where a customer has the option to replace its use of the company's products with products of a competitor of the company. On the other hand, for example, where a customer that accounts for a material amount of revenue is a distributor selected by the company, and the company has the ability to replace that distributor with another distributor, the existence of that distributor may not be regarded as material by investors. Accordingly, we believe this sub-item should require the disclosure of each significant customer the existence of which is material to an understanding of the company's business. To be clear, we believe that disclosure of the percentage of revenue should only be required for those customers that the company has determined are material. We note the potential for redundant disclosure here with information required in financial statement footnotes, as FASB Accounting Standards Codification Topic 280, at paragraph 39, requires disclosure in financial statement footnotes of revenues from each external customer that accounts for 10% of more of the company's revenues.

- (viii) For our technology and life science clients, the concept of a backlog of firm orders is generally not material to an understanding of the company's business. This disclosure requirement seems to be premised on customers submitting orders for physical products for which some meaningful time is required to fulfill the order. This is very rarely the case. However, we have observed over the years that the Staff on occasion interprets the requirement to report as backlog other items, such as the contract value of some types of subscription software products. In these situations, companies have been required to state the contract value as of a year-end where the revenue is actually recognized in very small, immaterial amounts, on a quarterly basis over a long period of time. This expansive definition of backlog and uneven application has resulted in confusion in companies in the industry, with some companies reporting non-traditional items of backlog and others not. We think it would be more appropriate to require disclosure of backlog under Item 303 if the amount of future revenue covered by such backlog represents a material trend or uncertainty subject to the disclosure requirements of that item.

- (ix) For a company that does a material amount of business with government agencies under contracts that allow for renegotiation of profits, or termination, in a different manner than for standard commercial contracts, than we believe a brief description of this fact would be material to investors and should be provided.

- (x) For our technology and life science companies, as is the case for most companies, an understanding of the competitive conditions in the markets for their principal products and services is usually important to an understanding of the business. As such, we believe a disclosure of competitive conditions, including the principal methods of competition, should be provided if such information is material to an understanding of the company's business. We do not believe that an across-the-board requirement to describe the positive and negative factors of the company's competitive position is appropriate. If fully observed, this requirement could lead to the disclosure of highly sensitive competitive information that likely would be of more value to the company's competitors than to its investors. Further, if the company's competitive position is subject to uncertainty that a represents a material trend or uncertainty for its business, then such situation would be required to be addressed per Item 303.

In addition to the above sub-items which are currently required under Item101(c), we would add an additional item for disclosure of governmental regulation. This item would require disclosure of government regulations that are material to the company, such as, where applicable, FDA regulations.

As the foregoing discussion indicates, we do not believe that the current disclosure requirements of Item 101(c)(v) (seasonality), (vi) (working capital matters), (xi) (research and development costs), or (xiii) (employees) result in the provision of material information that is not more appropriately provided elsewhere. Seasonality is routinely discussed in MD&A to the extent material to a company's business. Research and development expenses, where material, are presented as a line item in the statement of operations and discussed in MD&A, and working capital matters are discussed in MD&A per Item 303(a)(1) and (2). We do not believe that stating the number of a company's employees is material to investors, other than in such rare instances that the number of employees would be a metric worthy of discussion in MD&A. Of course changes in the number of employees that have had, or would be expected to have, a material effect on the company's results of operations would be required to be disclosed per Item 303. As noted above, we would include any discussion of environmental compliance, as currently subject to (c)(xii) within a broader category of government regulations.

We do not believe that the current requirement of Item 101(c) to address the specified items on a per-segment basis is appropriate. This disclosure requirement seems to be premised on segments that are distinct operating groups pursuing different business. Our clients operating in more than one segment often have different types of segments, such as segments based on geography or types of revenue. In these cases the per-segment discussion contemplated by Item 101(c) is not meaningful. We further note that the financial statement footnotes report operating results on a segment basis. We submit that requiring discussion of the business on a segment basis, as opposed to discussion based on materiality to the business taken as a whole, does not provide the most meaningful information to investors, particularly in light of segment information that is otherwise required in the financial statements.

We do not believe that Item 101 should require a disclosure of the company's industry. As indicated in the Concept Release, some companies elect to provide this information, presumably where the company has determined this information will assist investors in understanding their particular business. We think these companies, which are most likely to be companies producing new types of products or services or pursuing novel business models, will continue to provide this description to attract investor interest. For companies in industries of which it is reasonable to assume investors have an adequate understanding, such a disclosure requirement would not be meaningful.

In our experience, companies incur very substantial external fees, and dedicate a significant amount of the time of their own personnel, in drafting the Item 101 disclosure for the first time (usually in connection with disclosure in a Registration Statement for an initial public offering). Occasionally companies will again incur significant fees, and dedicate significant internal resources, to revising their Item 101 disclosure for future rounds of public fund raising, particularly if a substantial amount of time has passed since their IPO. On an annual basis for cases other than those where a transformative event in the Company's business has occurred, the preparation of Item 101 disclosure still requires a significant amount of close attention by internal personnel to appropriately update the discussion for developments since the last annual report. In addition to internal resources, companies will often incur third party fees, such as legal, investor relations and marketing, for the review of the updated disclosure.

When a public company registers securities for additional fund raising, or offers securities with a private placement memorandum, the Business discussion in the prospectus or memorandum will typically be largely derived from the Business section in the most recent Form 10-K. By definition this will be the case when the company uses a registration on Form S-3 and incorporates the Business section of the most recent Form 10-K. In our experience, the Due Diligence Costs associated with providing the "back-up" for the data in Business section can be substantial. The dollar amount varies widely depending upon the amount of specific data provided in the Business section, but the third party fees for assisting the company in providing the support required by the financial intermediary can be as low as several thousand dollars and be as high as tens of thousands of dollars.

Description of Property (Item 102)

Questions 60-66

We note that Item 102 is, at least partially, principles-based, requiring disclosure of "the principal" properties, and Instruction 2 incorporates the materiality concepts of Instruction 1 to Item 101 to establish the disclosure requirement. However, Instruction 1 to this item refers to disclosure that will inform investors of "the suitability, adequacy, productive capacity and extent of utilization of facilities," without an express overlay of materiality. In our experience, this disclosure directive results almost universally in some description of properties in company's annual reports.

For our technology and life science clients, we find that the disclosure of physical property in response to Item 102 is of virtually no value to investors. For these companies, the physical properties consist of headquarters and other office space and in some cases light industrial properties. Such properties are generally leased but in some cases are owned. It is rare that there is any specific characteristic of the property used by these companies that is important for an investor to understand in order to evaluate an investment in the company.

Depending primarily on a company's financial wherewithal, it could be important to investors to understand the future financial commitments related to leased properties. However, this type of financial information is rarely provided in the Item 102 disclosure, but is provided in the relevant footnote to the financial statements and in the contractual obligations table required by S-K Item 303(a)(5). We note that more expansive financial statement disclosure regarding leased properties will be required when ASU No. 2016-02, Leases (Topic 842) becomes effective. When property is owned, the cost basis and, if applicable, accumulated depreciation, is presented in the relevant footnote to the financial statements. It is rare that an understanding of the underlying value of property owned by our clients is a factor that is material to investors.

We recommend that Item 102 be retained but revised to more clearly be a principles-based requirement, mandating disclosure when an understanding of the size, location and ownership or leased status of a property would be meaningful to investors. In this case, we further suggest that the instructions to such a revised Item 102 acknowledge that financial obligations related to leased property are presented under other Regulation S-K and financial statement disclosure requirements and, accordingly, these financial commitments would not be an independent reason to determine that a property is material.

We do not believe that Item 102 should be expanded to require a discussion of the availability and cost of properties. These are, largely, generic risks applicable to any business. If there is risk unique, or at least relatively unique, to the company with respect to its properties, we would expect this to be addressed in other required disclosure sections, such as Business, MD&A or the Risk Factors.

B. Company Performance, Financial Information and Future Prospects

<u>Selected Financial Data (Item 301)</u>

Questions 67, 68, 69, 70, 72 and 73

The questions identified above generally seek comment on the utility of selected financial data required by Item 301 and we thought that it would be most efficient to respond to these questions collectively.

As the Staff notes in its discussion, the operating statement information for each of the last three years and the balance sheet information at the end of each of the last two years required by Item 301 is redundant with other disclosure requirements of the annual report (or two years and one years, respectively, in the case of emerging growth companies). Accordingly, the relevant inquiries are whether (i) the presentation of this, admittedly redundant, specified data in the manner required by Item 301 meaningfully enhances an investor's ability to review such data, and (ii) requiring the data for the years not otherwise provided in the annual report results in the provision of useful information to investors. We believe each of these questions is appropriately answered negatively.

With regard to the first question posed in the preceding paragraph, each of the items specified in Instruction 2 to Item 301 is a specific line item in, or otherwise easily derived from a review of, the financial statements in the company's annual report for the periods covered by such financial statements. There is no reason to believe that a separate reporting of this information per Item 301 facilitates its review by an investor seeking to understand this information.

With regard to the second question posed in the second preceding paragraph, we believe that it is rare that the operating statement information provided for the fourth and fifth preceding years and the balance sheet data at the end of the third, fourth and fifth prior years, is material to an investor's understanding of the information presented in the annual report in which such data is provided. If it were the case that information for such prior periods was difficult to obtain, sound disclosure policy might possibly tip in favor of providing such historic information. Obviously with prior reports readily available on EDGAR, this justification for the inclusion of such information does not exist. Furthermore, in the case of Emerging Growth Companies, the disclosure of these "out years" is not required, and in our experience working with many of these companies, there is little investor demand to present this information.

In our responses in the preceding two paragraphs, we speak not only to the availability and materiality of the specific financial data but also to the availability and materiality of whatever trends are revealed by that data. Item 303 of Regulation S-K specifically requires trend disclosure for the periods covered by the financial statements included in the annual report. We do not believe that an investor interested in understanding any such trends for such periods would be disadvantaged by being "limited" to the disclosure provided per Item 303 without the benefit of Item 301 data. As the staff notes, even with Instruction 1 to Item 303(a) requiring, where relevant, discussion of material trends for the five-year period covered by Item 301, such five-year trend information is universally not deemed to be relevant by companies in the preparation of their annual reports. If it were the case that investors felt otherwise, we believe that companies would indeed consistently provide this information. In submitting this response, regarding the lack of utility of Item 301 information for periods not covered by the annual report in which presented, we appreciate the possibility of such prior period data being subject to retrospective adjustment per subsequent developments in more recent periods. We do not believe that an understanding of the impact of such developments for these preceding periods is material to investors in their review of the current annual report.

As indicated by these responses, we do not believe that any additional disclosure requirements should be added to Item 301 if it is retained.

Question 71

If Item 301 is retained in some fashion, for the reasons set forth in the prior response we support the requirement to apply the same reporting requirement as now applies to Emerging Growth Companies.

Question 75

As outside counsel, we are typically only peripherally involved with the provision of the financial data required by Item 301 and are not in a position to comment specifically on the costs of doing so. When there have been no subsequent developments requiring retrospective adjustment of the periods predating the current period financial statements, the direct costs of providing this information would be modest. As further noted below, we believe there is a potentially substantial indirect cost. Where there have been subsequent developments requiring retrospective adjustment of such prior periods, the cost in terms of the time spent by company employees would vary with the complexity of the changes.

There is a potential for significant Due Diligence Costs for Item 301 information when this information is included in a prospectus or private placement document in connection with a company's capital raising activity. In public offerings and private placements it is, in our experience, almost universally required that the company's independent public accountant provide "comfort" letters covering all of the information in the Item 301 table. Even when that information is derived from previously audited financial statements, we understand that the accountants' fees can be meaningful. When the "out" years have been previously audited by a different independent registered public accounting firm, companies typically incur significant additional costs, both in terms of direct costs and internal resources to procure these comfort letters. Of course, if the information is required for periods for which no audited financial statements are otherwise required, or for periods that have been the subject of a retrospective adjustment not reflected in audited financial statements, the costs of this comfort can be much more substantial. For the reasons discussed above, we do not believe that this cost is justified by any corresponding benefit to investors.

Questions 76 and 78

We believe that Instruction 2 provides sufficient flexibility and has not proven to be an impediment to companies' selecting the information to provide in the Item 301 table. As noted in the preceding responses, we do not believe that the information required is material and do not support adding additional items to Instruction 2.

Question 77

We do not believe that additional auditor involvement in the presentation of Item 301 information would enhance the quality of information provided in response to this item. In the vast majority of Forms 10-K in which the Item 301 data is provided, this data is extracted from previously audited financial statements, and that would always be the case for the information for the years covered by the actual financial statements included in the report. We are not able to speak directly to the actual cost of greater auditor involvement. However, it seems likely that were an auditor required to perform additional procedures with respect to financial information, companies would incur additional accounting fees. This cost could be substantial with respect to information presented for periods not covered by the financial statements included in the report, such as those cases where retrospective adjustments to such prior period data is required. As such, the cost would be greatest to involve the auditors in the production of information that we think investors would regard as the least relevant.

Supplementary Financial Information (Item 302)

Question 79, 81 and 87

We believe that Item 302(a) should, in the spirit of principles-based disclosure, require the provision of the specified quarterly information only in those instances in which (i) a retrospective change in the company's quarterly financial statements will be required for any quarter in the most recently completed fiscal year, (ii) such change will cause the adjusted financial statements to contain results of operations or financial position for any such quarter that differ materially from that which was previously reported by the company on Form 10-Q, and

(iii) such adjusted results have not previously been reported in a Form 10-Q or a Form 8-K that has been filed with, not simply furnished to, the Commission. Other than in the limited instances identified in the prior sentence, the provision of quarterly financial information in the company's annual report is redundant with information on the EDGAR website and easily accessible to investors. For the first three quarters of its fiscal year, a company will have previously provided quarterly financial statements in its Form 10-Q. While quarterly information for the fourth quarter is not otherwise required per Regulation S-K or Regulation S-X in the annual report, the technology and life science companies that we represent universally report their fourth quarter results in earnings releases.

Question 80

We believe that fourth quarter information is important to investors and for this reason companies universally provide this information to them in the form of quarterly earnings releases even though not required to do so. Please see our prior response for our suggested reporting of non-duplicative quarterly information under Item 302(a).

Question 82

We do not believe that additional auditor involvement in the presentation of Item 302(a) information would enhance the quality of information provided in response to this item. In the vast majority of Forms 10-K in which the this data is provided, it is extracted from financial statements that have previously been reviewed by the company's auditor (in the case of information provided for the first three quarters) or developed based on the completion of audited year-end financial statements. In those situations where the reported quarterly results differ from the results previously reported, our clients consistently involve their auditors as they deem necessary to ensure their concurrence with the revised results, lest they find that the auditors do not concur with the revised results when reviewing the quarterly financial statements for a future period that will include the corresponding prior year period. Per Rule 8-03 of Regulation S-X, it is not required that the quarterly financial statements of smaller reporting companies be reviewed by the company's auditor. We do not believe that this reasonable concession made to smaller reporting companies should be eliminated or seriously compromised by required auditor involvement in the preparation of Item 302(a) information in the annual report. We also note that while we are unable to quantify the cost of any additional auditor involvement, it would stand to reason that auditors would charge additional fees for any formal involvement (whether for a review or audit or other procedures).

Content and Focus of MD&A (Item 303)

Questions 88-89, 93, 95, 98

As we have noted elsewhere in this letter, we believe that Regulation S-K should focus on principles-based disclosure, as opposed to prescriptive disclosures that may not be relevant to all reporting companies. This principles-based approach is even more critical in in the MD&A section of periodic reports. As noted by the Staff in various interpretative releases devoted to the MD&A, "MD&A is intended to give the investor an opportunity to look at the company through the eyes of management" and "it is the responsibility of management to identify and address those key variables and other qualitative and quantitative factors ***which are peculiar to and necessary for an understanding and evaluation of the individual company***." (emphasis added). (See 1989 MD&A Interpretative Release at p. 3, see also 2003 MD&A Interpretative Release, p. 8 (defined terms cited in this letter have the same definition as set forth in the Concept Release).

We agree with the Staff's that MD&A is an opportunity for reporting companies to discuss the key factors, variables, uncertainties and other items materially affecting their operating results and financial condition. This discussion will necessarily be unique among companies in differing industries, as well as to each company within a specific industry.

We believe that the current provisions of Item 303 (as augmented by Staff guidance) generally serve to accomplish the goals noted above. Item 303(a) and the related instructions focus on providing explanations of items that did or could have material effects on a reporting company's financial results or condition. We do not think that the imposition of disclosure thresholds is necessary to improve MD&A disclosure, and that companies should be tasked, as they are now, with presenting information that is material to investors.

We believe, in fact, that while the Item 303 and supporting Staff commentary generally result in effective MD&A disclosure, the existing prescriptive provisions of Item 303 sometimes lead to disclosure that is not meaningful. Item 303(a)(iii) provides:

> (iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

Our clients frequently receive Staff comments to disclose whether changes in revenues were driven either by pricing or volume of goods sold. For these companies, this price/volume approach to viewing revenue changes is typically overly simplistic as the products and services being sold are not commodities, and the reason for revenue changes is typically a combination of many factors. Similarly, disclosure that is of little relevance is often provided in response to Item 303(a)(iv) which requires a description of the impact of inflation.

Accordingly, we propose that Item 303 require a description of the material factors that contributed to any material change in results. Qualitative or quantitative factors could be listed as examples of the types of factors that could be discussed in the MD&A, without prescribing disclosure that may not be relevant.

Question 90

As noted in the Concept Release, the Staff has issued numerous releases over the years containing a great deal of guidance for various MD&A topics. Companies frequently receive comments from the Staff citing to recommendations contained in these releases. While the external reporting teams at many of the clients we represent are well versed in the specifics of Regulation S-K and Regulation S-X, many have not had the experiences, or do not have the resources, to identify and locate and reviewed the large number of releases that address MD&A

topics.

We believe that providing a consolidated set of guidance with respect to MD&A disclosure would facilitate the production of MD&A that is more consistent with the Staff's views on effective disclosure, especially for smaller companies with more limited resources. Further, in the past the Staff has published observations regarding certain types of disclosures (see for example, Staff Observations in the Review of Executive Compensation Disclosure, October 9, 2007). We believe that as the Staff, from time to time, perceives a similar broad-based need to identify improvements to MD&A, that publishing or making public similar observations related to MD&A sections would also facilitate the production of effective MD&A.

Question 91

In response to the Staff's recommendations in the 2003 MD&A Interpretive Release, many companies in the high technology market include an overview section in the MD&A providing information with respect to key trends, or a summary of financial and other business metrics. We believe that these sections can provide a helpful "dashboard" of key information, particularly for companies with large and complex business models. However, we do not believe that similar overview disclosure would provide material benefits to investors in many other cases. For example, many companies in the life sciences industry are in the development stage, with no revenues. A summary section in the MD&A for these types of companies would not be needed to highlight important information to investors and would simply result in redundant disclosure.

We note the recent introduction of the Interim Final Rule (Release No. 34-77969) ("10-K Release") regarding Form 10-K summaries. In the 10-K Release, the Staff noted that the amendment to the Form 10-K to expressly permit a summary section was "principles-based and affords a company choosing to include a summary the flexibility to decide which items to summarize as long as the information is presented fairly and accurately." (10-K Release at p. 4). We believe that a similar approach would offer the flexibility for companies with complicated business models or financial statements to present summary information in a single location, while also not requiring companies with less complicated businesses or financial statements to include duplicative disclosures.

Question 96

We do not support a formal requirement in Item 303 that auditors have a specific role in the review of MD&A. Companies currently incur significant auditor costs with respect to the public filing of audited and interim financial statements. Depending on the size and scope of operations, our clients in the technology and life sciences industries incur substantial costs, ranging from over $500,000 to amounts that can be in the millions of dollars per year for auditors to audit and review financial statements included in their periodic reports . While we cannot estimate the cost of various potential levels of formal auditor involvement in the MD&A drafting process, we can assume that such procedures would necessarily require the adoption of specified procedures by the auditors to complete any required reviews. We think the potential costs of these reviews could be substantial. Equally importantly, we do not believe that requiring additional involvement by such firms would provide additional material benefits to investors, and certainly not to justify the added costs. It is our experience that auditors consistently review and, as appropriate, provide commentary on MD&A in connection with their audit or review of the financial statements, so a formal requirement is not needed to achieve input form the auditors.   Finally, we think there is a risk that formal auditor involvement could potentially detract from a key aim of MD&A, which it to have this section address the business through the eyes of management. With a formal requirement for auditor review, we envision the potential for management to limit their commentary and observations to obtain the necessary sign-off from the auditors.

<u>Forward-looking Information</u>

Questions 99-102

As noted in the Concept Release, reporting companies are subject to varying standards requiring disclosure of forward-looking information, including under the accounting standard relating to accounting for loss contingencies, under applicable case law as well under Item 303. There is also additional guidance regarding the definition of materiality--for example, SEC Staff Accounting Bulletin: No. 99-Materiality. In advising companies in their ordinary course (i.e. not in connection with the preparation of a periodic report but for such matters as closing trading windows or issuing a press release) disclosure issues, we typically analyze the materiality of a particular item in the context of the case law noted in *Basic v. Levinson*. We believe that public reporting companies are accustomed to analyzing the materiality of potential trends, events or uncertainties, and that having additional tests of materiality would lead to situations where a trend, event or uncertainty might be viewed as not material in one context, but could still require disclosure in a periodic report. Accordingly, we support the application of the *Basic v. Levinson* probability/magnitude standard for MD&A disclosure.

Additionally, we do not believe that Item 303 should be further revised to require that companies, to the extent practicable, quantify the material effects of known trends and uncertainties. Even if an event was certain to occur, companies would be speculating on the future financial impact of that event.   For example, in the case of a litigation proceeding, it is nearly impossible to estimate the amount a jury may award for damages, and, if a material award has been made, the secondary effects, such as loss of reputation, additional litigation from other parties with similar types of claims, additional legal fees to appeal a verdict or other unforeseen costs.   We do not think that requiring companies to speculate as to the impact of identified trends or uncertainties will provide meaningful information to investors. Further, a requirement to quantify the potential impact of an identified trend or uncertainty would discourage companies, at least in marginal cases, from identifying a trend in their MD&A in the first place. This likely consequence would not be supportive of enhanced MD&A disclosure.

Questions 103 and 104

Companies in the high technology and life sciences industries often disclose various non-financial performance metrics in their periodic reports. The types of metrics disclosed can vary by industry and also by individual companies within the same industry. For example, software companies with a subscription model will often discuss renewal rates. However, the manner in which these are calculated can vary widely. Some companies may calculate these rates in terms of the number of customers renewing in each period, while others may calculate renewal rates taking into account the dollar value of the renewed contract. In our experience, other metrics similarly named may be calculated differently by companies in the same industry and some companies do not track metrics that other companies in the same or similar industry track, whether because of the nature of their internal systems or because management does not otherwise use the metric. Because of the range of ways in which companies can track metrics, even those that sound similar, we believe that it would be burdensome for companies to be required to disclose prescribed metrics, particularly if their internal computing systems were unable to track those metrics.

Further, a fixed requirement to provide metrics of any sort is contrary to a key aim of MD&A which it to have this section address the business through the eyes of management. This goal would hardly be supported by requiring companies to create and disclose metrics that management does not otherwise use.

In order to maintain the confidence and support of industry analysts and investors, companies are strongly incented to provide in MD&A financial metrics that help them understand the financial performance and condition, and the likely direction of future performance. We believe that companies will provide the most effective information to these audiences under a disclosure regime similar to the existing MD&A requirements, with a principles-based focus that requires management to provide the most relevant information.

Results of Operations

Questions 107, 109, 110 and 112

Currently, for most companies that are not "emerging growth companies," the results of operations discussion in annual reports contains a year over year comparison of the three year periods covered by the audited financial statements. In virtually all cases, the comparison of the third and second year is largely identical to what was contained in the prior year's annual report. As such, this is simply redundant disclosure. With the pervasiveness of the Internet, we believe investors who were interested in what drove changes two years prior could easily access the prior year's Form 10-K. We also do not believe that a hyperlink to the prior year Form 10-K would be necessary as we think the EDGAR system is sufficiently user-friendly such that an investor could easily access the report through EDGAR.

With respect to companies that have yet to generate revenues, we do not believe that adding additional disclosure about the company or its plans for operations in MD&A would provide additional useful disclosure to investors. For these companies, much of what a company would describe in response to such a requirement is already required to be described in the "Business" section in response to Item 101, and given the non-financial nature of this disclosure is better contained there.

Question117

For the reasons noted above, we also believe that a comparison of the three-year covered by the statement of cash flows results in redundant disclosure from the prior year Form 10-K and recommend only requiring a comparison of the most recent two years.

Off-Balance Sheet Arrangements

Questions 125-130

In our experience, a large number of companies in the technology and life sciences industries do not have any "off-balance sheet arrangements" that are (or could potentially be) material to their businesses. Many companies will still include in their periodic reports statements defining an "off-balance sheet arrangement" and a statement to the effect that the company has no such arrangements. We do not believe that asserting a lack of applicability to the company helps investors, and instead has the effect of increasing the volume of disclosure within a report that is perceived as "boilerplate," and potentially reducing the effectiveness and informative nature of the remaining disclosures. We recommend that the instruction for Item 303(a)(4) be made more clear that disclosure is only required if off-balance sheet arrangements are material to a company or if they pose a material risk to a company.

Contractual Obligations

Questions 131-136

Many companies in the technology and life sciences industries do not have complicated balance sheet components. In many cases, the most significant contractual commitment might be the lease of a headquarters building, or equipment leases for computer equipment. For these companies, the items that are responsive to Item 303(a)(5) also appear in the notes to their financial statements. For these situations where contractual commitments and other contractual obligations are not otherwise material or unusual, investors could easily understand a company's future commitments by reading the notes to the financial statements. In such cases, we do not see the benefit of repeating this same disclosure in the MD&A section, and much like in the case of the off-balance sheet disclosures, we see a risk that the report could be perceived as including a high level of disclosure that appeared to be repetitive and boilerplate in nature. Where a company's financial commitments represent a challenge to its liquidity and ability to operate the business, a disclosure of this situation would be required in the narrative discussion required by Item 303. Accordingly, we support the elimination of the contractual commitments table of Item 305.

Critical Accounting Estimates

Questions 139, 141, 142

In the 2003 MD&A Interpretative Release, the Staff proposed the inclusion of a Critical Accounting Estimates section to "supplement, not duplicate, the description of accounting policies already disclosed in the notes to the financial statements." (2003 MD&A Release at 13). In practice, as noted in the Concept Release, the disclosures in these two sections have become quite redundant (or are the subject of cross references to the other) and may do as much to confuse investors as to the potential differences between the two similarly titled sections as to promote effective disclosure. The description of accounting policies in the financial statement footnotes is typically quite expansive, and may address some policies that do not involve the "levels of subjectivity and judgment necessary to account for highly uncertain matters" referred to in the 2003 MD&A Interpretive Release. However, in our experience it is virtually always the case that any policy that the company would separately identify in the Critical Accounting Estimates section is covered, and usually extensively, in the footnote disclosure. For this reason, we do not believe that the inclusion of a Critical Accounting Estimates section in MD&A provides additional meaningful information to investors beyond that which is contained in the footnotes. If the Staff believes that MD&A should alert investors to the significant judgments involved in certain accounting policies that can effect reported operating results, then we think that expressly permitting reporting companies to include a cross reference and an identification of the significant accounting policies from the notes to the financial statements would accomplish the goal of highlighting those policies, while at the same time reducing the repetition contained in periodic reports.

We do not believe that prescriptive guidance relating to critical accounting estimates, or industry specific guidance as to estimates, would be useful to investors, as the particular business model of any company can be unique, with industry-specific requirements not necessarily being relevant broadly to all companies in the industry. For example, different software companies may recognize revenue much differently depending on whether hardware is also sold with the software, or the amount of integration services required in connection with the product, even though the companies could broadly be considered part of the same industry. Rather, if the Staff determines there should be additional disclosure regarding critical accounting estimates, we think an instruction should be added to Item 303 directing companies to simply highlight the estimates it they believe are most material to their business.

We also do not believe that it would be useful to require disclosure as to the qualitative and quantitative factors that form management's assessment of materiality or how they assess materiality. As noted above, there are a wide range of definitions of materiality that are used for different purposes. The determination of what is or is not material can often be the result of the weighing of a wide range of factors.

C. Risk and Risk Management

<u>Risk Factors (Item 503(c))</u>

Questions 145, 146

We do not believe that Item 503(c) should mandate a specific discussion of how registrants address each risk. If it were required, this is the sort of mandate we believe would engender unhelpful boilerplate disclosure. Similarly, we believe that companies should not be required to discuss probability of occurrence and effect on performance of each individual risk factor. While this may be a useful abstract analytical framework, as a disclosure mandate it would only serve to generate more boilerplate that is unhelpful to investors. Further, predicting the probability of occurrence would be highly speculative, so companies would frequently only be able to report that the particular event is unlikely to occur or that the company cannot predict the likelihood of occurrence. We believe that companies would be discouraged from reporting potential risks if doing so carried an attendant requirement to predict likelihood of occurrence. Further, insofar as predicting the likelihood of the occurrence of any particular risk is inherently speculative, investors would gain a false sense of security if a risk that a company identified as unlikely to occur were to actually occur. Alternatively, companies could note that a risk is more likely to occur based on facts existing at the time, or out of a desire to be conservative, which could then cause investors to act on information that ultimately did not come to fruition. We also believe that were such a prediction to be required that companies could face exposure to litigation for a mis-predicted outcome.

Question 147

We do not believe that requiring further specificity in how risks are described will improve the quality of risk information presented to investors. We believe that a principles-based approach appropriately allows companies to present risk factors in ways that are most meaningful in their circumstances. Examples of specific facts and circumstances from a company's experience are often presented in risk factor disclosures. In addition, it is our experience that companies generally position what management believes their most important risk factors at the forepart of the risk factors section.

Questions 148 – 150

We do not believe that the length of risk factor disclosures by itself hinders an investor's ability to understand a company's most significant risks. As noted above, companies generally position their most important risk factors at the beginning of the risk factors section. Often they cluster related risks together, sometimes under sub-headings for clarity. These techniques have evolved over time as risk factors have lengthened, and they seem to be effective ways to help readers comprehend lengthy risk disclosures. In addition, for many companies in the high technology and life sciences industries, specific risks are often complex and multi-faceted in how they may manifest themselves for the company. As a result, it is often difficult to simply summarize some of the risks that are specific and unique to the particular company.

It is true that many companies provide risk factor disclosures that are similar to those made by other companies. However, it is not obvious that this is a problem – in fact it only means that a company can more easily identify an applicable risk and describe it appropriately to investors, which is the objective of Item 503(c). Nor is it obvious that the occurrence of similar risk factors among companies in the same industry should be viewed as a problem, since different companies across an industry generally do face similar industry risks, though often in idiosyncratic ways.

On the other hand, some risk factors appear in virtually all public company disclosures, and typically with little or no specificity with respect to issuer-specific impacts. If there is a category of risk factors that could be excluded to promote readability and understanding of the company's overall risk profile, it is here. For example, the risk that a company's stock price may fluctuate, or that macroeconomic factors influence future outcomes, are in this category. We note that although many of these risks seem obvious, we should expect companies to continue to include them because they serve to protect the company from potential litigation claims. Companies understandably wish to have the ability, if needed, to point out to a finder of fact in potential securities litigation that the company did all it could to warn investors of the material risks associated with their investment. The existence of risk factor discussions is an essential element of modern disclosure practice, because of the safe harbor provisions, Section 21E of the Securities Exchange Act of 1934 ("Exchange Act") and Section 27A of the Securities Act of

1933 ("Securities Act"), added by the Private Securities Litigation Reform Act of 1995, as well as the judicially developed “Bespeaks Caution” doctrine. These statutes and this doctrine provide a defense for forward looking statements that turn out to be inaccurate if such statements are accompanied by meaningful cautionary language. Therefore, while we generally support the notion that the quality of risk factor disclosures could be improved by eliminating some of the most generic risk factors, we believe companies will not abandon them unless assured that litigation risk will not be increased. If the Commission identifies generic risks that issuers are instructed not to include, we believe it should also take the additional step of ensuring that the listed disclosures are deemed made by each and every public company where they may apply, so that no company suffers some disadvantage by the exclusion.

Question 151

The list of risk examples in Item 503(c) should be eliminated. The list was helpful when the item was new and the notion of specific risk factors was novel. Retaining the list may even promote the very generic risk factors that the Commission in the Concept Release identifies as potentially problematic. We also believe that the 1964 Guides and 1968 Guides are not a meaningful part of the current body of guidance on risk factor disclosures.

Question 152

As a general matter, we believe companies should have flexibility to craft their risk disclosures in the manner that they determine provides the most relevant information to investors. Accordingly, we believe that companies should not be required to identify and segregate their ten most significant risk factors. We see no reason why, across the board, risk number 11 should be regarded as less important than risk number ten. Further, if a list of the top ten risks must be presented, companies will have an incentive to write overbroad risk factors, covering multiple concepts in one section. Further, requiring the top 10 risks to be so presented would suggest that companies have a greater ability than they in fact do to predict the future and which of the potential risks will turn out to be more or less important. We also believe that no risk factor summary should be mandated. Readers wishing to scan the general nature of an issuer’s risk disclosures can do so quite simply by scanning the captions, and most companies list their most important risks first. Of course any company that believes a risk factor summary would improve its disclosure is able to do so. For the most part, we think the current best practices of descriptive captions, clustered risk factors and prominence make it easy for investors to scan risk disclosures and identify the most relevant risks.

Question 153

While we do not believe that meaningful changes to Item 503(c) are needed, if any changes are adopted, we encourage the Commission staff to conduct a comprehensive review of companies’ risk disclosures in the first year after adoption. The Staff could then summarize its observations at the conclusion of the comment process for the benefit of companies generally, rather than address the issue through ad hoc comment letters, where not all companies would be privy to the comments. This would enable issuer practices to align on best practices with a minimum of trial-and-error. We believe the October 2007 Staff Observations in the Review of Executive Compensation Disclosure is an example of a successful model for such an undertaking.

Question 154

We believe that companies do in fact interpret their disclosure responsibilities under Item 503(c) as requiring them to identify and disclose new and emerging risks. Consequently, we do not believe that Item 503(c) needs to be amended to reinforce this obligation.

<u>Quantitative and Qualitative Disclosures about Market Risk (Item 305)</u>

Questions 157- 160

We believe that as a general matter investors do not consider the disclosures about market risks and risk management by technology and life sciences companies to be important in their investment decisions with respect to those securities. For example, we have observed that questions on analyst conference calls rarely relate to this disclosure. For the most part, disclosures under Item 305 are relatively straightforward recitations of interest rate and foreign currency exposure, and related sensitivity analysis. The disclosures are simple because most of these companies do not have exposure to complex market risks. In fact, we think these disclosures are for the most part the type of check-the-box disclosures that could be eliminated in a more clearly articulated principles-based disclosure format. Accordingly, we do not think that expanding the definition of "market risk sensitive instruments" would lead to improved disclosure, unless limited to a specific class of companies for which the Commission has identified this disclosure as particularly meaningful.

Questions 161, 163

Financial institutions and financial services firms are more likely to produce Item 305 disclosure that is meaningful to investors than would be the case for typical technology and life sciences companies. For the latter companies, the most likely risk is foreign exchange rate risk, and to a lesser extent, interest rate risk, which can shift quickly in response to external events but are relatively well-understood issues. We note that, consistent with a principles-based approach, companies whose operating results are materially affected by changes in foreign exchange rates typically disclose these effects with some specificity in MD&A. Accordingly, we would support elimination of Item 305 or the limitation per a principles-based approach such that this disclosure is made only when meaningful to investors in the company.

<u>Disclosure Alternatives and Coordination with Financial Statement Disclosures</u>

Questions 166, 167

We generally support flexibility for companies in complying with their disclosure obligations, so we would welcome a "management approach" presenting risk management in the way the company sees it, as an alternative to otherwise structured Item 305 disclosure. To the extent that Item 305 disclosure repeats financial statement disclosure it should be eliminated; we see no benefit to repeating this disclosure outside the context of the financial statements. We also note that when the Commission adopted Item 305 in 1997, minimal authoritative accounting literature on accounting for options and derivatives existed (Concept Release, text at note 526).

Since that is no longer the case, perhaps the original reason for Item 305 no longer exists.

Disclosure of Approach to Risk Management and Risk Management Process

Questions 169 – 173

We believe requiring new disclosure about issuers' risk management systems is unnecessary and inadvisable. A company's business and MD&A disclosures should adequately describe how it manages the entire business, including its risk management if material. For some companies it may be the case that particularly large exposure to market risks (e.g., interest rate risk, commodity price risk) requires them to provide more information about how they manage risk, or where their system of risk management broke down, but for most companies such would not be the case because normal risk management is a natural business function.

We believe that the traditional approach to risk factor disclosure, in response to Item 503 or otherwise, appropriately highlights for investors the peculiar risks related to those business activities and in the case of Item 503 disclosures appropriately excludes mitigating factors.

Any general mandate that companies describe their approach to risk management strikes us as likely to produce boilerplate disclosure. Most technology and life sciences companies manage risk as part of the day-to-day life of the business and not as a separate task. Their principal risks revolve around execution of a business plan or conduct of a clinical trial, not financial and commodity risk management. Where companies have risk management processes that are important to their businesses, they should be encouraged to disclose under general principles of materiality.

Questions 174 - 179

Integrated, or at least coordinated, discussion of risk and risk management would be a convenience for readers of periodic reports and could improve disclosure. While we oppose the addition of a requirement to provide risk-ameliorating language to risk factors disclosure, we see no reason why other risk-related disclosures could not be addressed in the same part of a periodic report where risk factors appear. For example, legal proceedings disclosures under Item 103, compensation risk disclosure and board oversight of risk from Item 407(h) could be consolidated in a section of this nature. On the other hand, discussions about risk occurring in MD&A or Business should remain in those sections.

The argument for consolidating disclosures about all risk matters is straightforward – consolidation eliminates redundancy and enables investors to perceive in full the company's panoply of risks and risk mitigation or management. Ideally, consolidation would create a context within which risk management disclosures could be better understood. Finally, it would encourage companies and investors to see the company's risk environment holistically, not as an unrelated collection of specific risks in specified narrow contexts. We believe it is not necessary to mandate any new over-arching discussion of risk, along the lines of MD&A and CD&A. All businesses face many risks and must attempt to deal with them in order to succeed.

Companies should not be required to address their mitigation measures for each risk factor. To do so would likely lead to lengthy and duplicative disclosures, with an unfortunate amount of boilerplate. In addition, disclosure of the risk mitigation measures may provide investors with a false sense of security that a risk is actually not material. If companies are required to discuss mitigation measures and such measures were insufficient to prevent a particular event from occurring, companies could be exposed to litigation. We also believe that including cross-references in the text of risk factors can be distracting and unhelpful.

Consolidating Risk-Related Disclosure

Questions 180 - 182

While there may be merit in consolidating all risk-related disclosures in one place, the suggestion in the Proposal that only the risk matters other than Item 503(c) and Item 305 be consolidated would, we believe, not be worthwhile. If the major risk disclosures are excluded from the consolidation concept, the main benefit of consolidation – contextualization – is lost.

D. Securities of the Registrant

Number of Equity Holders (Item 201(d))

Questions 183- 185

We recommend eliminating Item 201(b)(1), as we do not believe that disclosure of the number of holders of each class of a company's registered securities is meaningful to investors today. Many of our clients have extremely large public floats of their common stock, with very high average daily trading volumes, yet may only have hundreds to a few thousand actual holders of record. As noted by the Staff, the vast majority of investors are beneficial holders holding in street name and we do not believe that investors suffer from any misunderstanding of the prevalence of this practice. We believe the meaningful metrics with respect to equity holders are the number of outstanding securities, which is already disclosed on the cover of Form 10-K and, at period-end, in the financial statements, and ownership concentration, which is disclosed pursuant to Item 403 of Regulation S-K and included in or incorporated by reference into Form 10-K.

Disclosure of the relative mix of beneficial and record holders also would not provide meaningful information to investors. There is no difference in the rights or transferability between record and beneficial holders, so it is difficult to appreciate why this information would be of use to an investor. Further, shares held by record holders can be transferred to street name, and vice versa, at any time. Additionally, both institutional and non-institutional investors can and do hold shares in street name, and therefore, requiring the disclosure of the number of beneficial holders does not provide any information about the type of holder. For example, many of our clients will have hundreds of stockholders of record at the time of the initial public offering, as these reflect the fact that prior to the initial public offering, the shares were held by directly by investors, as brokers and other intermediaries do not typically hold shares of private companies. As the company has a longer life as a public company, the number of these holders will decline as employees or other early investors sell their shares, or move their shares into brokerage accounts.

Description of Capital Stock (Item 202)

Questions 186, 187, 190

We do not recommend requiring companies to provide Item 202 disclosure in Form 10-K or a description of changes to the terms and conditions of securities in Form 10-K or Form 10-Q, as we believe this would result in repetitive disclosure of little value to investors. The most broadly held type of security registered under the 1934 Act is common stock. The principal terms of common stock (such as voting, liquidation and dividend rights) are well understood by investors. Additional terms of common stock, such as those regarding corporate governance matters, are explained in the company's Registration Statement at the time of its initial public offering, Form 8-A or in its Form 10 filed under the Exchange Act if the company becomes publicly held through a manner not involving an IPO. The company's basic charter documents are also filed with any such registration statement or information statement, and are incorporated into subsequent Forms 10-K, so that an investor seeking a detailed understanding of the terms of the common stock can easily access those documents which define those terms.

Following a company's initial registration of its common stock under the Exchange Act, material changes to the rights of common stockholders through an amendment of the certificate of incorporation or other similar charter document can only be made with stockholder approval. This, of course, would require disclosure to investors in a proxy statement where votes for the change are solicited. If changes are made to stockholder rights through an amendment to the bylaws, which often can be done without stockholder approval, any such modification would be required to be disclosed under Item 5.03 of Form 8-K within four business days of the change being adopted. Such a Form 8-K filing is also required to report any change to the charter document for which disclosure was not previously provided in a proxy or information statement. These Form 8-K and proxy statement filings will, more promptly than annual or quarterly disclosure deferred to Form 10-K or Form 10-Q, alert investors to material changes in the rights of security holders.

In a similar vein, with regard to registered securities other than common stock, we note if the constituent instruments defining the rights of such securities are materially modified, the company must report such change under Item 3.03 of Form 8-K and likely under Item 1.02 of Form 8-K. Further, the most significant terms of securities other than common stock are typically described in the footnotes to the financial statements appearing in periodic reports. Accordingly, we believe that any material change would most likely be reflected in a current report and/or in the periodic report for the period in which the change occurred.

<u>Recent Sales of Unregistered Securities (Items 701(a) (e))</u>

Questions 191- 194

We recommend eliminating the Item 701 disclosure requirement from Form 10-K.

The information required under Items 701(a) (e) that is meaningful to investors is already disclosed in Form 10-Q and Form 10-K in the financial statements, footnotes to the financial statements and MD&A. The net proceeds of all sales of securities is disclosed in the statement of cash flows, the number of securities issued is disclosed in the statement of stockholders' equity in the annual report and the material terms of the issuance and sale are described in the notes to the financial statements for sales that have occurred during the periods presented. Additionally, because a material sale of securities and the resulting net proceeds affect a company's liquidity and capital resources, the material terms of the transaction are also typically described in MD&A. Furthermore, information about a registered offering is available in the form of a Securities Act registration statement. While disclosure in the periodic reports may not regularly identify the underwriters, underwriting discounts (though comparison of net proceeds to gross proceeds is readily available to investors), or identity of the purchasers, we believe that this information is very rarely meaningful to investors, and in those limited instances where it is, such information is disclosed pursuant to other disclosure requirements. For example, if a purchaser would beneficially own more than 5% of the company's outstanding common stock after the transaction, such ownership would be reported in the proxy statement pursuant to Item 403 and in Schedule 13D or 13G. We also believe that the requirement to disclose the securities exemption claimed is a technical legal disclosure and not useful to investors, and therefore, recommend eliminating Item 701(d).

Given that material transactions involving issuance of securities would be reported on a registration statement or Form 8-K promptly and disclosure of the material terms of such transactions are already disclosed in the financial statements, the notes to the financial statements and MD&A, we recommend eliminating the Item 701 disclosure requirement from Form 10-K and Form 10-Q. Further, we do not believe a cross reference would provide any additional information to investors that is not already easily discernable from the disclosure in Form 10-K and Form 10-Q and, to the contrary, would be repetitive and unnecessary.

Use of Proceeds from Registered Securities (Item 701(f))

Question 197

We recommend eliminating disclosure about the use of offering proceeds required by Item 701(f). Given the fungible nature of cash, we have observed that it is difficult for companies to determine if they are using cash from the offering or from operations. The expected use of proceeds is disclosed in the prospectus relating to the securities offering, and companies disclose sources and uses of cash in MD&A and the financial statements contained in their periodic reports. Accordingly, we believe Item 701(f) disclosure does not enhance investor understanding of the use of proceeds from a securities offering or provide meaningful disclosure.

Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703)

Questions 199- 202

We note that information related to a company's stock repurchases is presented annually in the Form 10-K in the statement of stockholders' equity included in the financial statements in such report. Cash used for stock repurchases is reflected in the statement of cash flows included in the financial statements in both Forms 10-K and 10-Q. To the extent that a material amount of cash is used for this purpose in the period covered by a Form 10-K or Form 10-Q, the liquidity and capital resources section of MD&A would also discuss these repurchases. Of course, the number of shares outstanding at the end of either a fiscal year or quarter (and at the end of the prior fiscal year for annual reports and at the end of the most recent fiscal year for quarterly reports) is prominently displayed in the financial statements contained in the particular periodic report, so the net impact of share issuances and repurchases as of the end of the period is immediately available information. We do not perceive that a presentation of the monthly detail of repurchase activity required by Item 703 provides meaningful additional disclosure beyond that required by the financial statements and MD&A.

We propose that item 703 be revised to require only a statement of the remaining balance as of the end of the period covered by the report of any repurchase program adopted by the company. Item 703 currently requires the disclosure of the amount remaining under a repurchase program at the end of each month of the relevant quarter. Providing this information as the end of the first two months of a quarter seems in particular to be of no value to investors. Additional disclosure pursuant to Item 703 is repetitive and does not provide additional meaningful information to investors.

We also note that requiring disclosure of the incurrence of indebtedness to fund repurchases would suffer the same infirmities described in the response to Question 197. Given that cash is fungible, it would be difficult to impractical for a company to determine whether the incurrence of debt was used to fund operations or fund a repurchase, which would result in arbitrary disclosure about the use of funds. In addition, the incurrence of debt is already included in the discussion of the company's liquidity and capital resources in MD&A and in its financial statements contained in the periodic reports.

Questions 203, 204

As discussed above in response to Questions 199, 200, 201 and 202, we recommend that any disclosure regarding repurchases of securities beyond that required in the financial statements be included quarterly, to the extent material, in a discussion of the company's liquidity and capital resources in MD&A. If, as proposed above, the requirement to provide the remaining amount authorized at period-end under any repurchase program is retained, it is difficult to see that reporting the timing of any such repurchases any more frequently than quarterly is useful to investors. It is our experience that companies routinely announce in a press release or a Form 8-K the adoption of a new, or expansion of an existing, share repurchase program, so if a program is adopted or expanded subsequent to the end of the most recent quarter, we would expect that investors would be advised of this event before repurchases commence.

G. Exhibits

<u>Exhibits (Item 601)</u>

Questions 224, 227 and 228

We acknowledge that many exhibit filing requirements have a prescriptive statutory basis and believe that this has created a costly, time consuming burden for reporting companies that produces filings of marginal interest, at most, to investors. As we explain below, we believe that the burden on companies could be substantially reduced, and with little impact on the provision of relevant information to investors, by a significant reduction of exhibit filing requirements.

We believe that exhibit filings should be limited to a requirement to file those documents that set forth the rights of investors in their securities, and in discrete exhibits that serve a unique disclosure purpose. As such, we would limit exhibit filing requirements to Items (3)(i) and (ii) - articles of incorporation and bylaws; (4) - instruments defining the rights of security holders, including indentures; (5) - opinions re legality; (7) - correspondence from an independent public accountant regarding non-reliance on a previously issued audit report or completed interim review; (8) - opinion re tax matters; (9) - voting trust agreements; (13) - annual report to security holders, form 10-Q or quarterly report to security holders; (14) - code of ethics; (17) - correspondence on departure of director; (22) - published report regarding matters submitted to vote of security holders; (23) - consents of experts and counsel; (24) - power of attorney; (25) - statement of eligibility of trustee; (26) - invitations for competitive bids; (31)-(32) - certifications; (95) - mine safety disclosure exhibit; and (99) - additional exhibits. We discuss below the exhibits that we believe should no longer be required, or whose requirements should be significantly reduced. We recognize in doing so that some of such exhibit filing requirements have a statutory basis that would need to be addressed if the exhibit filing requirement were removed.

Underwriting agreement (1). In virtually all situations in which this filing requirement exists, we believe that it provides no meaningful information to investors. Other than the typical terms by which the company and underwriters are bound to indemnify each other after an offering, these agreements are fully executed by the parties coincident with the offering of the securities at hand. We believe that the only matter of significance to investors from these agreements is the amount of compensation to the underwriters and any unusual factors regarding the plan of distribution of the securities. Of course this information is required by other Regulation S-K items (Item 501(b)(3) and Item 508). The representations and warranties, covenants and closing conditions of these agreements have become quite standardized and do not represent meaningful information, and by definition the closing conditions have been satisfied or, in rare instances, waived or the securities would not be issued to the investors in the first place.

Plan of acquisition, reorganization, arrangement, liquidation or succession (2). By far the most common filings pursuant to this requirement are contracts by which the company agrees to make, or has made, a material acquisition, and to a lesser extent, a disposition, of a business. We submit that these plans of acquisition and disposition should not be required to be filed as exhibits, except in the limited circumstances identified below.

The material aspects of acquisitions and dispositions transactions are (i) the assets or business that the company is acquiring or disposing of, (ii) the consideration that the company will pay or receive, and (iii) for contracts with a delayed closing date, any material conditions to the consummation of the transaction. Each of these items is subject to reporting on Form 8-K, Item 1.01, upon the entry into the agreement. The assets received and consideration paid are reflected in the financial statements for the periods in which the transaction was completed, and disclosed in the relevant financial statement footnotes following the completion of the transaction. Commitments to use material amounts of cash or company securities, or other assets, and the nature, and financial implications, of the business to be acquired or disposed of are disclosable under S-K Item 303 for the period in which the agreement is entered into and the period in which completed.

While the out-of-pocket costs of filing the agreements required by Item 601(b)(2) is not material, there is, of course, an indirect cost to these filings. These costs relate to the company being required to publicly post agreements which are typically very heavily negotiated. While the nuances of these negotiating gives and takes are immaterial to an investor's understanding of the impact of the transaction on the company, these specific negotiating points are often of keen interest to third parties looking to enter into similar agreements with the company in the future. Such potential counterparties, and not investors, are, we believe, the primary beneficiaries of the filing of these agreements. As further discussed below, companies may also seek confidential treatment for portions of these agreements, and this can often be a costly process.

We submit that plans of acquisition and disposition should be required to be filed as exhibits only when shareholder approval of the transaction that is the subject of the agreement is required. Where this approval is required or sought, whether under state law, stock exchange listing requirements or the company's charter documents, we believe that security holders should have the opportunity to review the entire document governing the transaction. We also believe it is appropriate to continue to require the filing of plans of reorganization, readjustment, liquidation or arrangement.

We note one additional fact that we believe is worthy of consideration in regards to the costs and benefits of filing material plans of acquisition and disposition. Because of their smaller size and related materiality thresholds, smaller companies generally bear, both relatively and in absolute terms, a larger burden of compliance costs associated with these filings than do larger companies. Where, as we believe is the case here, relevant information regarding these agreements is already provided to investors in a much more effective manner than through the filing of an exhibit, we believe this is further justification for eliminating this filing requirement.

To summarize, we believe that the requirement to file agreements for material plans of acquisition and disposition (other than as noted above) provides exhibit information that is redundant with other existing disclosure requirements. We further believe that this filing requirement imposes a material, albeit largely indirect, cost on reporting companies, and that this cost falls disproportionately on smaller companies. Accordingly, we believe that except as otherwise noted above these agreements should no longer be required to be filed. We note that in those instances where a company believes that filing such an agreement would be an effective means of disclosing material information to investors that the company could elect to file the document under item 99.

We further believe that it is not appropriate to require the filing of immaterial amendments to the agreements covered by Item 601(b)(2) (even in the context of the more limited requirement to file these agreements that we propose). In the principles-based disclosure environment that we support, we believe that investors should be able to expect that the company will make the effort to discern which amendments are material and which are not, and file only the former.

<u>Material contracts (10)</u>

Similar to the immediately preceding discussion of the filing of material plans of acquisition and disposition, we believe that the exhibit filings per Item 601(b)(10) produce information that is already required to be disclosed under other Regulation S-K items and to be reflected on, and disclosed in the notes to, financial statements and involves even greater costs to companies. As such, we believe the requirement to file these agreements should be significantly modified, as further discussed below.

In considering the benefits to investors of retaining the exhibit filing requirement of Item 601(b)(10), we believe that consideration must be given to the context in which these filing requirements were first imposed as juxtaposed against the current disclosure environment. In particular, one must appreciate that when these exhibits were first required, and for decades thereafter, there was no requirement to report on Form 8-K the entry into material agreements. With the adoption of 8-K Item 1.01in 2004, investors are now advised of the company's entry into a material agreement weeks or months before Item 601 will require the agreement to be attached to a periodic filing. These 8-K filings will, more effectively than an exhibit filing, alert investors to the entry into such an agreement. Moreover, having signaled to investors via a Form 8-K filing that it has entered into a material agreement, a company will be predisposed to addressing the effects of these agreements under the relevant disclosure requirements of the ensuing periodic reports.

In our experience with our technology and life science clients, the agreements most typically filed pursuant to Item 601(b)(10) are leases, credit agreements, commercial agreements (such as contracts with customers and vendors, including licensors) and compensatory plans and arrangements with executive officers and directors. While we believe that the financial significance of many compensatory agreements would suggest that they are not sufficiently material to the company to be filed, we appreciate that heightened level of investor interest in compensation matters. This being the case, we would not suggest revising the requirement to file such plans and agreements per Item 601(b)(10)(iii). Because of the sensitive nature of related party agreements, we would also not suggest revising Item 601(b)(10)(ii)(A).

We believe that other than the compensatory and related party transaction documents referred to at the end of the prior paragraph, the appropriate manner to convey meaningful information about material contracts is by a description of such contracts in the body of the periodic filings. We also believe the substantial disclosure items that currently exist already require such information. As noted above in the discussion of the Description of Property, the financial implications of leases are required to be disclosed in financial statement footnotes and per S-K Item 303(a)(5). Information about the direct financial implications of credit agreements is also required to be disclosed in the financial statement footnotes and per Item 303(a)(5). Further, other information about material terms of material credit arrangements, such as the covenants and events of default, are described in financial statement footnotes and if material to an understanding of a company's liquidity should be disclosed per S-K Items 303(a)(1) and (2). We do not believe that filing the full forms of these leases and credit facilities provides material information beyond that which is required to be provided pursuant to these other requirements.

The requirement to file what we generally refer to as commercial agreements is even more burdensome to companies than the filing of leases and credit agreements, and likely produces even less useful information. For technology and life science companies, the agreements most frequently filed are those with vendors to and customers of the company, or in some cases licenses of key intellectual property. Vendor and purchase agreements typically establish a framework for the parties to conduct their business relationship, but generally do not require either party to commit to specific purchases and sales over a longer term than that which is to be fulfilled per schedules or orders that are exchanged on a regular basis. These agreements are usually terminable within a year or even a shorter period (although this is often not the case for technology licenses). In many cases they are highly technical and difficult to digest even for investors with expertise in the particular industry.

In those infrequent cases in which material commercial agreements provide for a fixed payment schedule, such a schedule would be described in the relevant financial statement footnotes. To the extent material to an understanding of the company's operating results, which is not frequently the case, the terms of the agreement would be discussed with the relevant line item of the operating statement per S-K Item 303(a)(3). If material on a stand-alone basis, any such agreement would be appropriately discussed in the Annual Report on Form 10-K pursuant to S-K Item 101(c)(i), (iii), (iv), (vii) or (ix). More likely, the type of agreements upon which the company relies for its purchases and sales of products and services are more generally described per those disclosure items. The primary relevance of these types of agreements is the manner in which they collectively impact the company's financial performance, as reflected in the statement of operations and, to a lesser extent the statement of cash flows and balance sheet. If terms of any such agreement could reasonably be expected to make past operating results not reflective of future performance, than these terms should be discussed per Item 303(a)(3).

The requirement to file commercial agreements is very frequently quite burdensome to the company. Agreements of this nature are highly negotiated, with both the company and its counterparty having a legitimate commercial interest in not publicly releasing the fully negotiated terms. Similar to the discussion above of the indirect costs of filing acquisition and disposition agreements, the company incurs the indirect cost associated with its future contracting parties having access to the full terms of the agreement. Once again, we believe that potential contracting parties are the most interested readers of these agreements.

This context frequently leads to the company's seeking confidential treatment pursuant to Exchange Act Rule 24b-2. This process itself is typically very burdensome as it involves the company's detailed discussions with its contractual counterparty about the matters for which confidential treatment will be sought. Not surprisingly, the counterparty typically insists upon seeking expansive confidentiality. This, in turn, frequently results in multiple rounds of submission of these agreements as the staff comments on the terms for which it will allow confidential treatment. We reviewed seven different confidential treatment requests on which we assisted our clients since 2012. Normalizing the fees to our current rates, our fees alone ranged from approximately $35,000 to over $200,000. These are only the external legal costs to the company without giving any effect to the usually substantial time spent by company personnel.

Once again, because of their smaller size and related materiality thresholds, smaller companies generally bear, both relatively and in absolute terms, a much larger burden of compliance costs associated with these filings than do larger companies. Where, as is the case here, the relevant information can be provided to investors in a much more efficient manner, that is through disclosure in the relevant report, we believe this is further justification for eliminating this filing requirement.

Question 229

Above we propose that filings of plans of acquisition and disposition be limited to those situations where the transaction that is called for by the agreement is subject to stockholder approval. While we believe that providing the definitive agreement is appropriate in such instances, we do not believe that the filing of schedules and attachments to the definitive agreement would provide meaningful information to investors. In many instances this information would be regarded as highly confidential to an existing counterparty with the company, or regarded as sensitive by the counterparty in the acquisition or disposition transaction. If so, this would activate the burdensome CTR process referred to above. In those very unusual situations where information in a schedule or attachment to a definitive agreement would be material to investors' understanding of the definitive agreement, we believe that disclosure would be compelled in the form 8-K in which the agreement is described or in those elements of the ensuing periodic reports that discuss those aspects of the company's operating results or financial condition that could be impacted by such a factor.

Questions 230 - 232

Above we propose that the situations in which material contracts are required to be filed be significantly reduced. If the requirement to file such contracts is retained, we believe that the cost to companies of filing schedules and attachments significantly outweighs the benefits to investors of the making of such filings. As noted above, existing disclosure requirements should compel the disclosure of information contained in such schedules and attachments in those very rare instances where such information would be material to investors. The company-specific information typically contained in these schedules has a greater likelihood than even the terms of the contract itself of being information in which the company has a compelling interest in confidentiality. As a general matter, the subject matter of omitted attachments would usually be discernable from those sections of the agreement that call for such attachment. As such, we do not believe that the burden of completing such a list of omitted schedules is offset by any meaningful advantage to investors. We believe that if in its examination of a Commission filing the staff requests to review an omitted schedule, that the company would provide such attachment for the staff's review.

We believe that the staff's position on the ability to redact PII is sufficiently well understood that a formal rule in respect of such redaction is not required.

Questions 233, 234

Similar to our remarks above in the discussion of amendments to agreements covered by Item 601(b)(2), in the principles-based disclosure environment that we support, we believe that investors should be able to expect that the company will make the effort to discern which amendments are material and which are not, and file only the former. Accordingly, we believe that Item 601(a)(4) should be amended to exclude the filing of immaterial amendments.

Question 234, in questioning the utility to investors of "amendment-only" exhibits, helps to illustrate our concern with the value of exhibit filings in the first instance. Other than with respect to those very discrete matters where we support continued exhibit filings, we do not think that the filing of a material agreement should be expected to be an effective manner of communicating material information about that agreement to investors. Rather, the description of the material terms in the periodic report under the appropriate disclosure items is much more effective in providing useful information. We do not believe that refiling "amended and restated" agreements when an amendment has been entered into will meaningfully advance investors' understanding of the amendment. For those investors intent on parsing a filed amendment, it is a simple enough matter to retrieve the amended document on EDGAR to evaluate the specific changes. Further, a material amendment of a material agreement would be disclosed per Item 1.01 of Form 8-K, which would be a more effective manner of disclosure than refiling the original exhibit, as amended.

Question 238, 239

We believe that the distinction currently embedded in Item 601(b)(10) between contracts made in the ordinary course of business, or not, is not a meaningful guideline for disclosure. In our experience, companies very rarely enter into agreements that they regard as beyond the ordinary course of business. As such, we do not believe that the adoption of thresholds to identify which agreements fall within this ill-defined category would enhance disclosure.

If the requirement to file material agreements under Item 601(b)(10) is retained for agreements beyond the scope of Items 601(b)(10)(ii)(A) and 601(b)(10)(iii), we believe that greater disclosure certainty would be attained by adopting the guidance provided in Instruction 1 to Item 101. This would require the filing of agreements that are material to an overall understanding of the company's business taken as a whole. We believe that if this standard were adopted, that it should contain an instruction similar to Item 601(b)(10)(ii)(B), clarifying that agreements to sell the registrant's products and services, or to acquire the necessary raw materials and other elements necessary to produce and provide the company's products and services, would not be regarded as material to an overall understanding of the company's business unless the company's business is substantially dependent on such agreements as set forth in Item 601(b)(10)(ii)(B). An additional disclosure instruction would, we believe, be necessary to compel the filing of agreements covered by Items 601(b)(10)(ii)(A) and 601(b)(10)(iii), as these in most instances would not be regarded as important to an overall understanding of the business.

Question 240

We believe that the current implicit requirement of Item 601(b)(10) to file agreements that no longer require any performance by the company after the date of the filing does not provide any useful information to investors and any burden on companies to file such agreements is not justified. Further, we do not understand how even in the case of newly reporting companies the filing of an agreement under which no further performance is required would be expected to provide material information to investors. Under Item 303, if a recently-expired contract materially impacted a company's operating results or liquidity in the periods covered by the periodic report and the expiration of that contract would be expected to have a material impact on the company's operating results or financial condition, disclosure of the impact of such contract would clearly be required. On the other hand, if such a contract expired and a similar new contract covering future periods were entered into, Item 303 would not require any discussion of the prior, or new, contract and there seems to be no justification for the cost to the company of filing the now-expired agreement.

Question 241

We believe that the expansion of Item 601(b)(10) to include agreements made in the ordinary course of business would not provide meaningful information to investors and would impose a substantial additional burden on companies. Please see our response to questions 224, 227 and 228 above. Accordingly, we believe Item 601(b)(10) should not be expanded.

Question 242

As set forth in our response to questions 224, 227 and 228 above, we believe that the overall approach to Item 601(b)(10) should be revised. We submit that this item should require only the exhibits currently required by Items 601(b)(10)(ii)(A) and 601(b)(10)(iii).

If Item 601(b)(10) continues to require the filing of material agreements beyond those described in the preceding paragraph, we believe that Item 601(b)(10) should eliminate the ambiguous distinction between agreements entered into in, or not in, the ordinary course of business. As noted above in our responses to questions 238 and 239, we believe that greater disclosure certainty would be attained by adopting the guidance provided in Instruction 1 to Item 101. This would require the filing of agreements that are material an overall understanding of the company's business taken as a whole. We believe that if this standard were adopted, that it should contain an instruction similar to Item 601(b)(10)(ii)(B), clarifying that agreements to sell the company's products and services, or to acquire the necessary raw materials and other elements necessary to produce and provide the company's products and services, would not be regarded as material to an overall understanding of the business unless the business is substantially dependent on such agreements as set forth in Item 601(b)(10)(ii)(B). As proposed in the prior paragraph, an additional instruction would, we believe, be necessary to compel the filing of agreements covered by Items 601(b)(10)(ii)(A) and 601(b)(10)(iii). We believe that Items 601(b)(ii)(C) and (D) would not be necessary if this exhibit filing requirement were adopted, and the company would be required to make a principles-based decision about the materiality to investors of leases and asset purchase/sale agreements.

Question 243

Please see our response to questions 224, 227 and 228 above.

Question 244, 245

We believe that the triggering qualification contained in Item 601(b)(10)(ii) requires companies to make principles-based disclosure decisions about which of the enumerated agreements must be filed. As such, we believe this is an appropriate instruction and do not support its replacement with a prescriptive standard, including the standard set forth in Item 404(a).

Question 246

Please see our response to questions 224, 227 and 228 and our response to question 242.

Questions 247 - 250

We believe that the principles-based disclosure standard in Item 601(b)(10)(ii) (other than subsection (C) thereof) requires companies to make principles-based disclosure decisions about which of the enumerated agreements to be filed. As such, we believe this is an appropriate instruction. We respectfully submit that in the past, staff comment letters have suggested that contracts with customers or vendors that account for 10% or more of a company's revenue should be filed per Item 601(b)10)(ii)(B). Absent highly unusual circumstances, we do not believe that a fair reading of Item 601(b)(10)(ii) would include customers and vendors accounting for as little as 10% of the company's revenue. If the staff does in fact believe that 10% customers and vendors are within the scope of Item 601(b)(10)(ii), we would support the adoption of a specific threshold consistent with such item's reference to "the major part" of the company's goods or services or raw materials. We believe that such a threshold would tie to agreements for 50% or more of the company's revenue. As stated in our response to questions 224, 227 and 228, we do not believe that such agreements should be filed at all, but should be the subject of appropriate disclosure.

Questions 251, 252

We submit that Item 601(b)(10)(ii)(C) should be eliminated, as discussed in our response to questions 224, 227 and 228, with the subject matter thereof to be covered by the principles-based disclosure standard that we propose. We note that technology and life science companies very infrequently engage in transactions involving the sale of 15% of their property, plant or equipment.

Question 253 - 256

The Staff's explanation of the extensive procedural and disclosure requirements of Regulation S-X and the applicable accounting standards clearly indicates that there is no meaningful benefit to investors to justify any costs associated with the filing requirement of Item 601(b)(18). We believe that Item 601(b)(18) should be eliminated. We do not believe that requiring the independent accountant to address preferability in their report would provide meaningful information to investors.

Questions 257 - 260

As indicated above, we support principles-based disclosure that enables investors to understand information that is material to the company, typically as a consolidation of the parent company and its subsidiaries taken as a whole. While the question was not posed in the questions regarding subsidiary disclosure, we do not believe that the filing of the Item 601(b)(21) exhibit provides material information to investors. Certainly the mere listing of subsidiaries whose financial characteristics exceed the "significant subsidiary" standard contributes virtually nothing to an understanding of the assets, liabilities and activities of such subsidiaries. Because investors are investing in a consolidated entity consisting of the parent and all of its consolidated subsidiaries, we do not appreciate that greater disclosure isolated to the subsidiary could be expected to be material to a reasonable investor.

V. Presentation and Delivery of Important Information

General Comment to Section V

The Staff raises in Section V of the Concept Release many interesting and closely related questions as to the advisability of modernizing rules and approaches to the presentation and delivery of information to investors. We determined that responding to these questions individually would result in us submitting substantially duplicative comments. As such, in this part of our letter we will respond to Section V of the Release generally and then respond to certain individual questions to the extent our comments provide incremental feedback or are not duplicative of the following general comments.

Consistent with our prior comments, we support the adoption of rules or instructions that promote a principles-based approach to the use of cross-references, incorporation by reference and hyperlinks and the other topics presented in Section V of the Release. We believe Regulation S-K's current flexibility is effective in promoting effective presentation of material information to investors and the existing framework enables companies to use cross-references, incorporation by reference, hyperlinks and other techniques to create effective and efficient disclosures in their filings. Accordingly, we are not in favor of adding more prescriptive requirements than currently exist in Regulation S-K. Furthermore, it is not obvious to us that making such changes to facilitate comparative analysis and large-scale automated processing of disclosure, or for other similar reasons, would materially benefit investors.

While we cannot quantify the extent to which cross-referencing, incorporation by reference and hyperlinking reduces compliance and administrative costs, from a qualitative perspective, we believe the use of cross-references, incorporation by reference and hyperlinks can materially lower the compliance and administrative burden associated with making corresponding edits across filings as disclosure is initially drafted and changes over time. See, e.g., our comments to question 297.

A. Cross-Referencing

Question 287

Given the existing flexibility within Regulation S-K allowing cross-referencing, including per the most recent Staff guidance regarding cross referencing, we believe there are only modest benefits to be gained from increasing the use of cross-referencing to reduce duplicative disclosure. Nonetheless, if the Staff identifies opportunities to improve the readability of periodic reports by expanded use of cross references, we would support appropriate changes to Regulation S-K.

Question 291

Consistent with the examples provided by the Staff, we believe that investors would benefit from selective cross-references from the Business section or MD&A to the risk factors and from the MD&A to the notes to the financial statements, particularly with respect to descriptions of debt arrangements, contingencies and commitments. In our view, referring investors to related or more comprehensive disclosure while maintaining a principles-based approach to disclosure can help companies communicate more effectively by focusing investors' attention on the key information responsive to the disclosure requirement while at the same time providing investors with the means to obtain additional relevant information that may enhance their understanding.

B. Incorporation by Reference

Question 296

While we are not proposing changes to the rules regarding incorporation by reference generally, we believe that a single self-contained filing is not always necessary to facilitate an investor's understanding of a company's disclosure. Accordingly, if the Staff identifies opportunities to improve the readability of periodic reports by expanded use of incorporation by reference, we would support appropriate changes to Regulation S-K.

Question 297

Consistent with the American Bar Association's comment cited in footnote 999, we believe Rule 12b-23(a)(3) should be revised to eliminate the requirement that copies of the pertinent pages containing incorporated disclosure be filed as an exhibit for the reasons provided therein. In our view, the exhibit requirement greatly reduces the use of incorporation by reference and thereby promotes the inclusion of more information in filings than may be necessary for effective disclosure. This is because, as a practical matter, it may take more time and effort to "EDGAR-ize" the content to be so incorporated by reference than including the same information in the filing itself. With advancements in technology, we believe hyperlinks can improve navigability and minimize concerns about eliminating this exhibit requirement. In addition, whether or not the exhibit requirement under Rule 12b-23(a)(3) is maintained, we believe that the Commission should expand the list of exceptions under Rule 12b-23(a)(3) to include a company's proxy statement given its status as the primary vehicle for many disclosures important to investors. We believe that allowing for greater flexibility to incorporate by reference within a principles-based framework will improve readability by enabling companies to craft disclosure that more succinctly communicates material information.

C. Hyperlinks

Question 303

We are not in favor of permitting companies to include external hyperlinks, such as those to a company's website, in their filings because at this time we are unable to conclude that such external hyperlinks would not pose significant challenges to maintaining the record and integrity of the information that has been hyperlinked. We believe that the forcing function of filing or submitting static documents to a trusted, publicly-accessible repository, such as EDGAR, will naturally drive more careful efforts on a consistent basis than the alternative and provide the public with a trusted record.

Questions 304 and 305

We do not see a need for or substantial benefits to be gained from expanded use of hyperlinks or disaggregation of company information into multiple filings as some commentators have suggested. As a modest suggestion, however, we recommend requiring that each filing's table of contents include hyperlinks to each section identified therein.

Question 306

We support the elimination of the requirement under Rule 12b-23(a)(3) to attach, as an exhibit, information incorporated by reference from another filing, provided that the company includes in the text a hyperlink to the other filing. As explained in our comments to question 297, we believe such a modest change would enable greater use of Rule 12b-23(a)(3) and facilitate more effective communication.

D. Company Websites

Questions 320

We believe the Commission's interpretative publications, such as Staff Observations in the Review of Executive Compensation Disclosure (October 9, 2007) and Release No. 33-8350 (Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations), have been successful in shaping better disclosure practices and we encourage the Commission to continue to release such publications in the future. If the staff would care to discuss any of the comments that we have provided in this letter, please feel free to contact Jeffrey Vetter or Daniel Winnike of this firm at 650-988-8500.

Very Truly Yours,

Fenwick & West LLP

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