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

30 November 2016

Re: Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters (Release No. 33-10198 and No. 34-78687; File No. S7-18-16)

Dear Mr. Fields:

Ernst & Young LLP is pleased to provide comments to the Securities and Exchange Commission (SEC or the Commission) for consideration in its review of the disclosure requirements in Subpart 400 of Regulation S-K.

Earlier this year, we recommended that the Commission embed disclosure objectives[1] that clearly articulate the intent of each nonfinancial disclosure requirement in Regulation S-K. Such principles-based disclosure objectives should be supplemented with nonexclusive and non-presumptive lists of possible disclosures, the applicability of which registrants could consider to achieve the stated objectives. In this manner, the disclosure framework can move from prescriptive line-item requirements to one in which registrants can craft more concise, focused and effective disclosures to communicate material information to investors. We also believe the items within Subpart 400 of Regulation S-K should include such disclosure objectives.

Corporate governance, and the quality of related disclosures, is the joint responsibility of a company's management and board of directors. We offer our perspectives gained as observers and advisers to various companies on improving disclosure, transparency and corporate risk oversight.

Item 401: Identification of executive officers

Currently, many registrants choose to identify and provide biographical information about their executive officers only in the annual report. Similar information about directors is required and provided later in the proxy or information statement. In our view, splitting such disclosures between two separate filings is counterproductive. It is not conducive to investors' assessing the diversity and complementary mix of experience of the board in conjunction with that of the executive officers. Accordingly, we recommend the Commission encourage or require the annual proxy or information statement to include all Item 401 disclosures of the registrant.

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[1] For more details, see our 21 July 2016, comment letter on the SEC concept release on business and financial disclosures required by Regulation S-K (Release No. 33-10064; 34-77599; File No. S7-06-16).

Item 402: Compensation of directors and executive officers

Given the significant developments to enhance transparency about executive compensation matters, largely in response to "say on pay" voting requirements, we believe it is an opportune time to revisit Item 402. In addition to reconsidering its prescriptive disclosure requirements in light of underlying disclosure objectives, we have the following specific recommendations.

Timing of compensation disclosures

The existing requirements related to when executive compensation disclosures must be updated are complex and vary depending on whether the issuer is a well-known seasoned issuer or otherwise eligible to forward incorporate by reference. The Commission partially addressed this complexity in its pay ratio disclosure rulemaking by including an instruction to Item 402(u), specifying that pay ratio information with respect to the registrant's last completed fiscal year is not required until the filing of Form 10-K or, if later, a definitive annual meeting proxy or information statement filed no later than 120 days after the end of that fiscal year. We believe it is appropriate to apply the same timing to the other disclosure requirements in Item 402 of Regulation S-K.

Currently, registration statements on Form S-1 are required to include executive compensation disclosures for the most recently completed fiscal year.[2] When a reporting company files a Form S-1 registration statement after its fiscal year end but prior to its annual meeting proxy or information statement, the registrant must accelerate preparation of executive compensation disclosures and include them in the S-1 registration statement. By contrast, the audited annual financial statements for the most recently completed fiscal year have to be included in the Form S-1 registration statement a minimum of 45 days and up to 90 days[3] after the fiscal year end depending on the issuer's status. As a result, companies may be required to provide executive compensation disclosures for periods that are more recent than any other financial information in the registration statement. Given the significant complexity and effort involved in preparing executive compensation disclosures, compliance with the disclosure requirements in Form S-1 presents a significant impediment to accessing the capital markets for companies that are not shelf eligible (including IPO candidates).

Currently, an issuer filing and seeking effectiveness of a nonautomatic shelf registration statement on Form S-3 after filing its annual report but before filing its annual meeting proxy statement must include in such registration statement all executive compensation disclosures and analyses under Item 402 for the most recently completed fiscal year, except the pay ratio disclosures in Item 402(u). [4] Conversely, well-known seasoned issuers can file automatic shelf registration statements on Form S-3 in the same time frame and defer providing updated executive compensation disclosures and analyses until they file their definitive annual meeting proxy statement.

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2 Item 11(l) of Form S-1 and Regulation S-K C&DI 117.05, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

3 Under Rule 3-01(c) and (i) of Regulation S-X, the period extends to 90 days if a non-accelerated issuer expects to report income from continuing operations before taxes in the most recently completed year and has reported income from continuing operations before taxes in at least one of the two immediately preceding fiscal years.

4 Securities Act Forms C&DI 123.01, https://www.sec.gov/divisions/corpfin/guidance/safinterp.htm#123-01.

We recommend aligning the timing of executive compensation disclosures required by non-IPO registration forms under the Securities Act of 1933[5] with that required by the Securities Exchange Act of 1934 regardless of whether the registrant qualifies as a well-known seasoned issuer. That is, the Commission should allow all registrants that are eligible to forward incorporate by reference to provide their executive compensation disclosures under Item 402 of Regulation S-K for the most recently completed fiscal year for the first time in their annual proxy or information statement, as long as it is filed no more than 120 days after the end of the last completed fiscal year.

Similarly, for initial public offerings, we recommend aligning the timing of executive compensation disclosures with that for updating the annual audited financial statements included in the prospectus (i.e., 45 days after the end of the last completed fiscal year, except for smaller reporting companies that can have up to 90 days).[6]

Summary compensation table and related disclosures

In December 2009, the Commission amended[7] the summary compensation table (SCT) in Item 402(c) to require disclosure of compensation based upon the grant date fair value of share-based awards granted to named executive officers and directors in the year of grant. The SEC revised the SCT measurement to inform investors of all compensation activities and report total compensation that was reflective of compensation decisions made by the compensation committee in the current period. At that time, we supported continued alignment of the amount and timing of compensation reported in the SCT with the recognition and measurement of compensation cost in the registrant's financial statements in accordance with Accounting Standards Codification 718, *Share-based payments*, so that the SCT would have continued to reflect compensation earned in the respective fiscal year. [8]

We continue to believe that reporting the grant date fair value of share-based awards as compensation in the SCT in the year of grant distorts compensation earned related to service and performance rendered when awards have service, performance or market conditions that span multiple years. While we appreciate the interest of investors in grant date fair value, we believe that information is sufficiently captured by the tabular disclosure required by Item 402(d) of Regulation S-K.

Over the last few years, many companies in sectors experiencing significant stock price decline or volatility (e.g., oil and gas, precious metals) have provided supplemental compensation disclosures to report executive pay that is "realizable" or "realized."[9] Equilar reported that nearly half of the S&P 100

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5 Forms S-3, S-4 and non-IPO S-1.

6 Rules 3-12(d) and 8-08 of Regulation S-X.

7 SEC Release 33-9089 and 34-61175, *Proxy Disclosure Enhancements*, https://www.sec.gov/rules/final/2009/33-9089.pdf.

8 Comment letter dated 10 April 2006, at https://www.sec.gov/rules/proposed/s70306/ey041006.pdf and comment letter dated 15 September 2009, at https://www.sec.gov/comments/s7-13-09/s71309-110.pdf.

9 The term realizable share-based compensation is generally used by reporting entities to describe the value of share-based awards assumed "earned" as of a balance sheet date and is ordinarily measured by reference to the reporting entity's stock price and other appropriate assumptions as of a balance sheet date. The term realized share-based compensation, on the other hand, is generally used to describe the value of equity compensation "taken home," which comprises actual shares vested and gains on option awards exercised during the reporting period.

companies produced a graph or table furnishing an alternative pay calculation in their 2016 proxy statements.[10] The most popular supplemental measure presented by approximately 40% of the S&P 100 companies was "realized pay," which reflects the value of stock awards that vested during the period and realized gains on options exercised during the period. The same report highlighted concerns that some companies provided no explanation of how their alternative pay calculation differed from the total compensation presented in the SCT and that inadequate explanations of variants of "realized" and "realizable" pay measures were causing confusion among shareholders.

First, we urge the SEC to reconsider its choice of compensation measure related to share-based payments reported in the summary executive and director compensation tables. US GAAP provides consistency in measurement and recognition of compensation for share-based awards with identical terms across registrants and accommodates substantially all diversity in award terms while appropriately attributing compensation cost to the periods when service and performance are rendered. In our view, the timing and amount of share-based compensation reported in the registrant's financial statements in accordance with US GAAP would be the most preferable compensation measure to include within the summary executive and director compensation tables. We also believe that such a measure would facilitate more meaningful disclosures under the pay ratio disclosure requirements and proposed pay for performance disclosures.

Second, to promote consistency, the SEC should encourage a private sector initiative involving various stakeholders, including a wide spectrum of investors, to develop guidance on the computation and disclosure of supplemental compensation metrics such as compensation "realizable" and compensation "realized."

Item 404: Transactions with related persons

Item 404(a) of Regulation S-K requires disclosure in annual reports, proxy statements and registration statements of registrant transactions, or proposed transactions since the beginning of the registrant's last fiscal year, exceeding $120,000 with related parties, as that term is defined therein. Currently, many companies use the $120,000 threshold to screen transactions with related parties for further consideration, and thus, might omit disclosure of transactions that could be qualitatively material but not quantitatively significant. In other cases, the $120,000 bright line can lead to voluminous disclosure of transactions that are not material either quantitatively or qualitatively to either party, particularly when both parties are large companies transacting in the normal course of business.

We recommend the SEC reconsider whether investors benefit from a bright-line threshold and whether it elicits disclosure of related party transactions and pertinent information that would be material to investors. If the Commission concludes it is appropriate to retain a quantitative threshold it should consider scaling it based on size of the issuer and perhaps further index the threshold for inflation.

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[10] 2016 Innovations in Proxy Design: An Analysis of Executive Pay Disclosures, http://marketing.equilar.com/2016-innovations-in-proxy-design.

Item 406: Code of ethics

Item 406 of Regulation S-K requires a public company to disclose whether it has adopted a code of ethics (as defined) that covers its principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions. If so, the issuer must make its code of ethics publicly available by one of the following means: (1) filing the code of ethics as an exhibit to its Form 10-K; (2) posting the code of ethics on its website, provided the Form 10-K discloses that intention and the website address; or (3) providing disclosure in its Form 10-K that a copy of the code is available without charge upon written request and explaining the manner in which such request may be made. A company also must file an Item 5.05 Form 8-K to report significant amendments to its code of ethics, or any waivers of compliance with its code of ethics, affecting the specified officers unless the issuer elects to post such information on its company website and discloses its intention and the website address in its annual report.

Investors and other stakeholders might overlook material amendments to a registrant's code of ethics or waivers granted to one or more of the specified company officers if the registrant elects only to post such events to its website. Given the importance of a strong code of ethics to a company's control environment, we believe the Commission should require the annual meeting proxy statement or information statement to disclose whether there were any amendments to the code of ethics or any waivers of compliance that were reported on a company website and not in a Form 8-K since the date of the last annual meeting proxy statement.

Item 407(c): Corporate governance — board diversity

We welcome the recent indications that the SEC staff is reviewing the current board diversity disclosure requirements to consider whether additional guidance or rulemaking is warranted.[11] We believe this review will help the Commission and stakeholders better understand the limitations of current SEC diversity disclosure requirements for public company boards and evaluate possible enhancements that would more effectively communicate material information to investors.

Current SEC disclosure rules allow diversity to be defined as the company and board find appropriate.[12] If diversity is considered when it is identifying nominees for director, the company must disclose certain related information, but there is no requirement to consider diversity.[13] While this provides for flexibility in companies' approaches to diversity, the resulting landscape of disclosure hinders investor efforts to make more informed voting and investment decisions. Based on our own research, current requirements have resulted in uneven disclosure of board diversity for even the largest of SEC registrants.

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11 The Pursuit of Gender Parity in the American Boardroom, Keynote Remarks, Women's Forum of New York Breakfast of Corporate Champions, 19 November 2015. A Conversation with Chair Mary Jo White, Keynote Session, 43rd Annual Securities Regulation Institute, 26 January 2016. Public Pension Funds Petition SEC for More Disclosure on Board Diversity, Bloomberg BNA, 3 April 2015. Diversity on Corporate Boards – October 5, 2016, Meeting of the Advisory Committee on Small and Emerging Companies.

12 Securities and Exchange Commission, 17 CFR Parts 229, 239, 240, 249 and 274, effective February 2010.

13 Item 407(c)(vii) of Regulation S-K states: "Describe the nominating committee's process for identifying and evaluating nominees for director, including … whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy…"

For example, nearly 25% of Fortune 100 companies in 2016 did not disclose board diversity based on gender, race, ethnicity or nationality in their proxy statement filings. The inconsistency and lack of specificity in disclosures related to board diversity undermines the ability of investors to make evaluations and comparisons.

Research by EY and others demonstrates a correlation between corporate board and executive-level diversity and financial performance. Diversity can serve as an economic differentiator, and we believe enhanced board diversity disclosures may benefit investment decisions. In our 2014 Point of view publication, *Women on boards: global approaches to advancing diversity*, we observed the importance of public sector attention, private sector leadership and corporate transparency to support needed progress on board diversity.[14] To assist the reconsideration of Item 407(c), we provide some findings from our own and others' research on diversity, and what we are hearing from our interactions with investors.

Research shows that gender diversity in corporate leadership positions – in C-suites and boardrooms – contributes positively to firm performance and stronger corporate governance, which provides value to investors in public companies:

- A 2016 Peterson Institute for International Economics-EY study of nearly 22,000 companies in 91 countries found that an organization with 30% women leaders could add up to six percentage points to its net margin. While the study found the largest positive correlation to firm performance related to the proportion of women executives, it also identified a correlation between the presence of women on boards and the presence of women in executive ranks.[15]

- A 2015 McKinsey study of approximately 400 public companies in four markets found that companies with more diversity among board members and the executive management teams had greater market share and higher returns compared to national industry medians. This unequal performance of companies in the same industry and the same country suggested that diversity was a competitive differentiator.[16]

- A 2016 Credit Suisse study, which was based on a review of more than 3,000 firms worldwide, found that gender diversity among executives and board members correlated to higher returns on equity, price/book valuations and dividend payout ratios. For example, companies with at least one woman director outperformed others on a sector neutral basis regardless of company size or whether the time period covered extended to 2005.[17]

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14 Point of view, *Women on boards: global approaches to advancing diversity*, July 2014, http://www.ey.com/Publication/vwLUAssets/ey-women-on-boards-pov-july2014/$File/ey-women-on-boards-pov-july2014.pdf.

15 Peterson Institute for International Economics, Is Gender Diversity Profitable? Evidence from a Global Survey, Authors: Marcus Noland, Tyler Moran and Barbara Kotschwar, February 2016.

16 McKinsey & Company, Why diversity matters, Authors: Vivian Hunt, Dennis Layton, Sara Prince; published January 2015, re-released in February 2015.

17 Credit Suisse Research Institute, The CS Gender 3000: The Reward for Change, Authors: Julia Dawson, Richard Kersley, Stefano Natella, 11 September 2016.

- A study by MSCI ESG Research found that companies lacking board diversity tend to suffer more governance-related controversies than average.[18]

Our considerable interactions with investors also inform our perspective on the value of board diversity disclosures. Through EY's annual investor outreach, ongoing conversations with institutional investors and tracking of voting trends and related investor activities, we find that board diversity is a key topic of interest to the institutional investor community:

- Board diversity — specifically defined as gender, race and ethnicity considerations — is a leading priority for a majority of institutional investors when reviewing the quality of a company's board.[19]

- A broad range of investors are discussing board diversity and board composition with companies, as well as in their stewardship reports and proxy voting guidelines. Some investors are voting against board nominees when they perceive insufficient diversity, such as too few women and/or minority directors.[20]

- Institutional investors are viewing board composition as a potential governance risk. To manage that risk, they are evaluating and engaging with boards on a number of composition-related matters, including diversity, defined broadly to include gender and other protected characteristics under US federal employment law. Board diversity is being used as an indicator of a company's corporate culture and governance philosophy.

The research from EY and others provides a critical underpinning — a linkage between board diversity and economic results and strong corporate governance — which, in our view, supports SEC consideration of ways to enhance disclosures of diversity on public company boards to address the valid interests of investors in this topic.

Item 407(d): Corporate governance — audit committee financial expert

In 2002, the Commission adopted the disclosure requirements in Item 407(d)(5) regarding whether a registrant's audit committee has at least one financial expert (ACFE) in response to Section 407 of the Sarbanes-Oxley Act (SOX). The adopting release[21] acknowledged that the originally proposed definition of the term "financial expert"[22] proved to be the most controversial aspect of the proposal even though

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18 MSCI ESG Research, Inc., Global Trends in Gender Diversity on Corporate Boards, Authors: Linda-Eling Lee, Ric Marshall, Damion Rallis and Matt Moscardi, November 2015.

19 EY Center for Board Matters, 2016 proxy season preview: a focus on the long term, March 2016.

20 EY Center for Board Matters, Three things nominating committees need to know, February 2016.

21 Release No. 33-8177; 34-47235; File No. S7-40-02, *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*.

22 The SEC originally proposed to define the term "financial expert" to mean a person who has, through education and experience as a public accountant, auditor, principal financial officer, controller or principal accounting officer, of a company that, at the time the person held such position, was required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act, or experience in one or more positions that involve the performance of similar functions (or that results, in the judgment of the company's board of directors, in the person's having similar expertise and experience), the following attributes:

(1) An understanding of generally accepted accounting principles and financial statements

it closely tracked the guidance and qualifying work experience outlined in Section 407 of SOX. Most commenters thought that the proposed definition was too restrictive because it required the person to have attained the five attributes of expertise through education and experience as a public accountant, auditor, principal financial officer, controller or principal accounting officer of a company with Exchange Act periodic reporting requirements. Many corporate and other commenters were concerned with the potential board turnover this new requirement might trigger and the competitive effects of recruiting and retaining audit committee members with direct audit or accounting experience related to financial statements of "comparable issuers." The Commission addressed these concerns by allowing "experience actively supervising" and "other relevant experience" to qualify.[23]

In the ensuing years, corporate governance practices, board independence and engagement with shareholders have considerably strengthened. We have observed that most audit committees report having at least one financial expert,[24] and many report having multiple financial experts. Still, a recent survey by the EY Center for Board Matters shows that institutional investors continue to demand more specific information about board composition, skill sets and diversity in proxy and information statements.[25]

As part of its comprehensive review of the corporate governance disclosure requirements in Subpart 400 of Regulation S-K, the Commission should consider revising its definition of ACFE to align it more closely with the five attributes of financial expertise Congress articulated in Section 407(b) of SOX. Consistent with an objectives-oriented disclosure approach, the revised definition of ACFE should retain the five attributes of financial expertise without prescribing any specific work experience, titles or roles necessary to have accomplished those attributes. Instead, the board of directors should be allowed to exercise judgment in evaluating whether the experience of a member has been sufficient to attain all five attributes of financial expertise.

We also recommend that the SEC revise Item 407(d)(5) of Regulation S-K to require an annual assessment of the status of an audit committee member as ACFE based on changes in the registrant's business, as well as developments in accounting, auditing, financial reporting and internal control.

Item 407(g): Audit committee financial expert — exemption for SRC

Currently, a registrant that qualifies as a smaller reporting company (SRC) is not required to provide the audit committee financial expert disclosures outlined in Item 407(d) in its first annual report filed pursuant to the Exchange Act. The Commission may want to reconsider this accommodation as it could discourage companies that are contemplating an IPO from adding on a timely basis board members

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(2) Experience applying such generally accepted accounting principles in connection with the accounting for estimates, accruals and reserves that are generally comparable to the estimates, accruals and reserves, if any, used in the registrant's financial statements
(3) Experience preparing or auditing financial statements that present accounting issues that are generally comparable to those raised by the registrant's financial statements
(4) Experience with internal controls and procedures for financial reporting
(5) An understanding of audit committee functions

[23] Item 407(d)(5)(iii) of Regulation S-K.

[24] EY Center for Board Matters, *Audit committee reporting to shareholders in 2016*, September 2016.

[25] EY Center for Board Matters, Three things nominating committees need to know, February 2016.

with deep financial reporting expertise who could exercise valuable oversight during the IPO process. In our experience, all companies would benefit from having at least one audit committee financial expert prior to undertaking their IPO and during their first year as a reporting company. Accordingly, we believe removing the ACFE first year disclosure accommodation for SRCs would likely contribute to enhanced board oversight over financial reporting and audits of smaller issuers with a concomitant reduction in compliance risk.

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We would be pleased to discuss our comments with the Commission or its staff at your convenience.

Yours sincerely,

Ernst + Young LLP

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