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October 31, 2016

Re: Comments on Subpart 400 of Regulation S-K Disclosure Requirements Relating to
Management, Certain Security Holders and Corporate Governance Matters
Release No. 33-10198
File No. S7-18-16

VIA E-MAIL: rule-comments@sec.gov

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

Dear Mr. Fields:

We are submitting this letter in response to the request by the Securities and Exchange Commission (the "**Commission**") for comment on Subpart 400 of Regulation S-K discussed in the above-referenced release (the "**Release**"). We appreciate the opportunity to comment on the Release.

We understand that the Division of Corporation Finance is reviewing the disclosure requirements in Regulation S-K and Regulation S-X and considering ways to improve the disclosure regime for the benefit of both companies and investors. We have set forth in this letter recommendations on Items 401, 404, 406 and 407 of Regulation S-K that are consistent with the goals of disclosure effectiveness, including simplifying and modernizing governance disclosure while maintaining the SEC's goals of investor protection and efficient capital markets. A separate letter will follow focused on Item 402 of Regulation S-K.

Item 401. Directors, executive officers, promoters and control persons.

Instruction 3 of paragraph (b) of this item, Identification of executive officers, states that the information regarding executive officers called for by this Item need not be furnished in proxy or information statements by registrants relying on General Instruction G of Form 10-K, provided the information is furnished in a separate item captioned "Executive officers of the registrant" and included in Part I of the registrant's annual report on Form 10-K.

Currently, some registrants include this information in the Form 10-K, while others disclose it in the proxy statement, leading to a need to examine two filings to find a list of a registrant's

executive officers. We recommend that the Commission require that this information be provided only in a registrant's Form 10-K filing. The purpose of proxy materials is to "disclose all important facts about the issues on which shareholders are asked to vote." Shareholders are not generally asked to vote on matters related to a registrant's executive officers other than with respect to executive compensation, and that information is provided in the proxy statement.

Item 401(c). Identification of certain significant employees.

Item 401(c) requires that where the registrant employs persons such as production managers, sales managers or research scientists who are not executive officers but who make or are expected to make significant contributions to the business of the registrant, such persons shall be identified and their backgrounds disclosed to the same extent as in the case of executive officers.

We recommend that the Commission eliminate Item 401(c), as the requirement is confusing, which leads to few registrants making this disclosure. Item 401(b) includes in the definition of executive officers, beyond a specific list of functional roles, "any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer." We believe this requirement is sufficiently broad to capture any employee who makes a significant contribution to a registrant's business.

Instruction 2 to Item 401(f). Involvement in certain legal proceedings.

This instruction requires that if any event specified in paragraph (f) has occurred and information in regard thereto is omitted on the grounds that it is not material, the registrant may furnish to the Commission, at time of filing, as supplemental information and not as part of the registration statement, report, or proxy or information statement, materials to which the omission relates, a description of the event and a statement of the reasons for the omission of information in regard thereto.

We recommend the elimination of this instruction. The instruction states that a registrant "may" provide supplemental information to the Commission but does not indicate what factors a registrant should consider as to whether it should provide such information and the purpose for which the supplemental information is being sent to the Commission. Most importantly, registrants routinely evaluate and determine whether information is material and can appropriately decide not to make disclosure that they view to be immaterial, and this instruction is inconsistent with how the Commission approaches other immaterial disclosure.

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

This item requires the disclosure of information regarding certain transactions between the registrant and certain related persons who have a material interest in that transaction. Instructions b(i) and b(ii) to this Item state that the term "related persons" includes the "beneficial owner[(s)] of more than five percent of any class of the registrant's voting securities," and "[a]ny immediate family member of any such security holder."

The Item requires that materiality be considered from the viewpoint of the related person. Registrants may have business transactions with large institutional shareholders who own more than five percent of the company's equity securities, such as when affiliates of those shareholders administer registrants' employee benefit plans. However, when registrants attempt to obtain information from institutions regarding whether these transactions constitute a material interest, registrants are often ignored and receive little to no information on this subjective element of the rule.

As registrants are not able to evaluate by themselves whether a related person has a material interest in that transaction, we recommend that the Commission amend Item 404(a) to incorporate a knowledge standard with respect to beneficial owners who own more than five percent of a registrant's voting securities such that disclosure is required only if a registrant believes that the security holder would have a material interest or is otherwise aware that the security holder has such an interest. The Commission could also permit an exception from the definition of "related person" for any entity that has made a filing under Schedule 13G pursuant to Rule 13d-1(b)(1)(ii).

Item 406. Code of ethics.

Item 406(c) requires that the registrant file with the Commission a copy of its code of ethics, as defined, post the text of such code of ethics on its Internet website and disclose, in its annual report, its Internet address and the fact that it has posted such code of ethics on its Internet website; and undertake in its annual report filed with the Commission to provide to any person without charge, upon request, a copy of such code of ethics and explain the manner in which such request may be made.

We recommend that the Commission eliminate the requirement that the registrant file its code of ethics with the Commission, and instead, allow registrants to fulfill this requirement by only posting the document on its website. This simplifies the objective of making the code accessible.

Item 406 (d) requires that if a registrant intends to satisfy the disclosure requirement under Item 10 of Form 8-K regarding an amendment to, or a waiver from, a provision of its code of ethics by posting such information on its Internet website, the registrant must disclose the registrant's Internet address and such intention in its filing.

We recommend that the Commission remove the requirement that a registrant need to first disclose its intention to post amendments or waivers on its website. Once a registrant is permitted to post its code of ethics simply on its website, the registrant can note in the same place when the code has been amended or provisions have been waived. Having the Form 8-K requirement but allowing registrants who determine in advance to fulfill it by posting only requires investors to look in two places for the information.

Item 407(c). Nominating committee.

Item 407(c)(vi) requires that a registrant describe the nominating committee's process for identifying and evaluating nominees for director, including if the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describing how this policy is implemented, and describing how the nominating committee (or the board) assesses the effectiveness of its policy.

We recommend that the Commission eliminate the requirement that registrants discuss the implementation and assessment of effectiveness of a diversity policy. We believe these requirements actually discourage registrants from adopting policies regarding the consideration of diversity in identifying director nominees. Eliminating the disclosure requirement would remove this disincentive, yet would preserve flexibility for those registrants who do adopt such policies to provide information about their policies that they believe will be useful to investors.

Item 407(d). Audit committee.

Item 407(d)(3)(i)(B) requires that the audit committee discuss with the independent auditors the matters required to be discussed by the statement on *Auditing Standards No. 61*, as amended (AICPA, Professional Standards, Vol. 1. AU section 380), as adopted by the Public Company Accounting Oversight Board (“PCAOB”) in Rule 3200T.

We recommend that the Commission update the reference in this item to PCAOB AS 16, which replaced AS 61 on August 15, 2012, and any future related amendments.

Item 407(e). Compensation committee.

Item 407(e)(4) requires the disclosure of compensation committee interlocks and insider participation. A Compliance and Disclosure Interpretation (“CDI”) states that if the only disclosure that a registrant is required to provide pursuant to Item 407(e)(4) is the identity of the members of the compensation committee, because the registrant has no transactions or relationships that trigger a further disclosure obligation, the registrant may omit the Item 407(e)(4) caption.

We recommend that the Commission codify this CDI to clarify that disclosure under Item 407(e)(4) is only required if there is a transaction that meets the interlock and insider participation requirements. In our experience, many registrants are unaware of the CDI, which leads to the caption and an affirmative negative statement that there are no interlocks.

Item 407(h). Board leadership structure and role in risk oversight.

Item 407(h) requires registrants to disclose “the effect of the board’s role in the risk oversight of the registrant, such as how the board administers its oversight function, *and the effect that this has on the board’s leadership structure.*” (emphasis added).

We recommend that the Commission eliminate the requirement to disclose the effect that the board’s role in risk oversight of the registrant has on the board’s leadership structure. We believe any impact from the board’s leadership structure on how the board oversees risk at a registrant is already captured in the requirement. For most registrants, the board’s role in risk oversight is unrelated to its decisions of board leadership structure, leading most registrants to either affirmatively state that there is no effect or to make a boilerplate statement that the board’s leadership structure supports or enhances its role in risk oversight, which is of little use to investors.

We appreciate the opportunity to participate in the process, and would be pleased to discuss our comments or any questions the Commission or its staff may have, which may be directed to Ning Chiu, Melissa Glass or Joe Hall of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP