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FAST Act Modernization and Simplification of Regulation S-K

Authors: Jeffrey Nadler and Rachel Charney

Securities disclosure requirements in the United States are complex, and compliance can be a challenge. Compliance with Regulation S-K, which contains requirements applicable to the content of the non-financial statement portions of certain registration statements, annual reports and other documents needed under U.S. securities law, can be particularly trying for registrants.

As required by the *Fixing America's Surface Transportation Act*, the U.S. Securities and Exchange Commission (SEC) is proposing amendments to Regulation S-K based on the recommendations made in the SEC staff's Report on Modernization and Simplification of Regulation S-K, released in the last quarter of 2016. These amendments are intended to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms. The SEC is focusing on reducing costs and burdens on registrants and is aiming to improve the readability and navigability of disclosure documents while continuing to provide all material information to investors.

Below is a brief summary of the key proposed changes to Regulation S-K that, if implemented, may contribute to a more efficient securities regime in the United States. Some of the proposed changes relate to annual reports of foreign private issuers that are filed with the SEC, including annual reports on Form 40-F filed by Canadian foreign private issuers using the multijurisdictional disclosure system.

Management's Discussion and Analysis (MD&A) (item 303)

This item requires registrants to discuss their financial condition, changes in financial condition, and results of operations. Instruction 1 to item 303(a) provides that, generally, discussion of financial statements and other statistical data must cover the three-year period included in the financial statements and use year-to-year comparisons or any other format that, in the registrant's judgment, enhance a reader's understanding. Instruction 1 also provides that where trend information is relevant, reference to the five-year selected financial data may be necessary. The SEC is proposing three amendments to this item:

a. providing that discussion about the earliest year would not be required when financial statements included in a filing cover three years, if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations; and (ii) the registrant has filed its prior year annual report on Form 10-K on EDGAR containing MD&A of the earliest of the three years included in the financial statements of the current filing;

b. eliminating the reference to trend information in Instruction 1 in order to decrease duplication because the disclosure requirements for liquidity, capital resources and results of operations already require trend disclosure; and

c. emphasizing that registrants may use any presentation in their discussion that, in the registrant's judgment, would enhance a reader's understanding.

Conforming changes to Form 20-F are also being proposed, which would impact foreign private issuers currently using a Form 20-F for their annual report. The SEC has not proposed conforming changes to Form 40-F because MD&A contained in Form 40-F is largely prepared in accordance with Canadian disclosure standards.

Risk Factors (item 503(c))

This item requires disclosure of the most significant factors that make the offering speculative or risky, and enumerates specific examples of possible risk factors. The SEC is proposing to eliminate the enumerated examples to encourage registrants to focus on their own identification process and ensure that registrants address only risk factors that are significant to the registrant's business. The SEC is also

proposing to relocate this item from Subpart 500 (which contains offering-related disclosure requirements) to Subpart 100 to reflect the application of risk factor disclosure requirements to registration statements on Form 10 and periodic reports, in addition to offering-related disclosure.

Information Omitted from Exhibits (item 601)

This item generally requires registrants to file complete copies of exhibits, but under item 601(b)(2) a registrant need not file schedules or similar attachments to material plans of acquisition, reorganization, arrangement, liquidation or succession unless they contain information material to an investment decision that is not otherwise disclosed in the agreement or the disclosure document. The SEC is proposing to expand the existing accommodation in item 601(b)(2) to include all exhibits filed under item 601. Additionally, the SEC is proposing the codification of its practice of permitting personally identifiable information such as bank account numbers, social security numbers and home addresses to be redacted from exhibits filed under item 601. Conforming changes have been proposed to Form 20-F. The SEC is also proposing to add language that would significantly reduce the need for registrants to submit applications for confidential treatment of information in material contract exhibits required by item 601,

Material Contracts (item 601(b)(10))

This item requires registrants to file every material contract not made in the ordinary course of business so long as the contract (i) must be performed in whole or in part at or after the filing of the registration statement or report, or (ii) was entered into not more than two years before the filing. The SEC is proposing to limit the test in part (ii) above to (a) newly reporting registrants, which would be defined as any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of section 13(a) or 15(d) of the *Exchange Act of 1934,* as amended (Exchange Act), whether or not such registrant has ever previously been subject to such reporting requirements, and (b) any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation. Conforming changes have been proposed to Form 20-F.

Various Rules Related to Incorporation by Reference

The SEC is proposing several amendments related to incorporation by reference, including the following:

- revising item 10(d) to allow incorporation by reference of documents that have been on file with the SEC for more than five years, without exception;
- eliminating the requirements under the Exchange Act and the *Securities Act of 1933*, as amended (Securities Act), that copies of information incorporated by reference be filed as exhibits to registration statements or reports; and
- requiring, under the Securities Act and the Exchange Act, that hyperlinks be provided to information that is incorporated by reference if that information is available on EDGAR.

Various Regulations' and Forms' Treatment of XBRL

The SEC is proposing several amendments related to XBRL, including the following:

- requiring all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to be tagged in Inline XBRL in accordance with the EDGAR *Filer Manual*; and
- requiring the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to include the trading symbol for each class of registered securities.

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Key Contacts: Jeffrey Nadler and Nir Servatka

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