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January 2, 2018

Re: FAST Act Modernization and Simplification of Regulation S-K  
File No. S7-08-17

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 for comment on the proposed amendments to Regulation S-K detailed in the above-referenced proposing release. Parenthetical references below are to questions in the proposing release. While we set forth some specific suggested revisions below, we are in overall support of the amendments in the proposing release. We appreciate the opportunity to comment.

**1. Exhibit containing a description of registered securities (Item 601(b)(4)(vi))**

The proposed requirement to file Item 202 disclosure, consisting of a description of registered securities, as a separate exhibit to Form 10-K is intended to increase investors' ease of access to information about the terms of registered securities. For many classes of registered securities, this objective can easily be met through incorporation by reference with an active hyperlink to the relevant disclosure appearing in a previously filed document (see question 44). Without the option to incorporate by reference, preparation of new exhibits by a registrant with multiple classes of registered debt securities would substantially exceed the 0.5 hours of paperwork burden estimated on page 158 of the proposing release, since exhibit preparation would require making conforming edits to the "Description of Notes" for each class of security and might also involve combining disclosure from a base prospectus and prospectus supplement into one narrative. We also anticipate that a registrant would request outside transaction counsel to review the exhibit, increasing the cost and preparation time.

We suggest that the Commission amend proposed Item 601(b)(4)(vi) to allow information to be incorporated by reference to one or more documents or any portion of a document (see our

comment in section 5 below) filed with the Commission on EDGAR. We further suggest that the Commission consider amending Item 601(a)(2) (and similar language appearing in Commission forms) to specify that an exhibit index hyperlink may link to a document filed with the Commission on EDGAR (rather than to a separately filed exhibit) when such document or part thereof is incorporated by reference.

## **2. Description of property (Item 102)**

We support the proposal to amend Item 102. We believe that the amendments would guide registrants to focus their properties discussion on material information and reduce required disclosures that usually are not material, such as the location of company headquarters (see question 1). A collective description of properties encourages disclosure that could assist investors in understanding features that are germane to the specific company or industry, such as aggregated data of properties that are owned or leased, stores that are company-operated vs. franchise-operated, total mileage of gas transmission lines or aggregate square feet of storage space.

The proposing release asks whether Item 102 should require additional disclosure about material properties, including uncertainties such as information about properties that are located near designated areas where natural disasters are more likely to occur (see question 3). We do not think it is necessary to prescribe additional disclosures in this Item, particularly with respect to uncertainties, since disclosure of material uncertainties that could affect a registrant's future results, cash flows, assets or liabilities is already required by the Item 303 requirement to disclose known trends and uncertainties and risk factor disclosures mandated by Item 503(c).

## **3. Management's discussion and analysis (Item 303)**

We support the proposed revisions to Item 303 to facilitate disclosure that focuses on material information and eliminates immaterial information that does not promote understanding of a registrant's financial health. We do not believe it is necessary to include additional conditions on allowing registrants to exclude the earliest of three years, such as prohibiting the exclusion when there has been a restatement or retrospective adoption of a new accounting principle (see question 7). Instead, a registrant should have the latitude to exclude a discussion of the earliest year when it concludes that the earlier information is not needed in order to understand what is important about its changes in financial condition and results of operations.

We do not believe that the instruction in Item 303 should be revised to include specific alternative formats to a year-to-year comparison (see question 8). Consistent with a principles-based, materiality-centered approach, the presentation, focus and content of MD&A should be specific to the facts and circumstances of the registrant and should reflect the material aspects of the registrant's business in the judgment of its senior management. Specific alternative formats are likely to produce cookie-cutter disclosures that may be no more appropriate to a particular registrant than the standard year-to-year format.

We also support similar revisions to Item 303 when a Form S-1 is used in follow-on offerings (see question 5).

**4. Information omitted from exhibits (Item 601)**

We endorse proposed Item 601(a)(5) and believe that it would lessen the burden of compliance for registrants and reduce disclosure of immaterial or repetitive information. Given the limited value to investors of much of the information in schedules and other attachments to filed agreements, we believe that the proposed modification would meaningfully reduce the burden to registrants without sacrificing information needed by investors (see question 45). We likewise support the amendments to Item 601(a)(6) to codify the ability to omit personally identifiable information and to Item 601(b)(10)(iv) to permit a registrant to omit confidential information from material contracts, in each case, without the prior submission of a confidential treatment request (see questions 48 and 49). We believe that this change in practice would simplify the process without diminishing the registrant's responsibility to disclose all material information in the filed exhibit.

We agree that redactions made by registrants under proposed Item 601(b)(10)(iv) should be supported by a rigorous materiality and competitive harm analysis (see question 50). One way to ensure this would be for the Commission to suggest that companies update their internal disclosure controls and procedures to include substantiation of the process for such redactions and omissions. Procedures related to redaction under Item 601(b)(10)(iv) would continue to be informed by Staff guidance regarding confidential treatment requests, such as Staff Legal Bulletin No. 1A.

**5. Incorporation by reference (Securities Act Rule 411, Exchange Act Rule 12b-23 and Rule 105(e) of Regulation S-T)**

The proposed amendments to include active hyperlinks to information incorporated by reference would not require registrants to correct nonfunctioning or inaccurate hyperlinks unless the hyperlinks are in a registration statement that is not yet effective. So long as the disclosure includes a clear and express statement describing the location of information incorporated by reference with specificity, as required in the proposed amendments, we do not believe it should be necessary for registrants to re-file disclosure for the sole purpose of fixing a nonworking or inaccurate hyperlink (see question 73). Additionally, in connection with consolidating and updating the incorporation by reference rules, we suggest that the Commission make clear that incorporating only a portion of a document filed on EDGAR is permissible (see question 78).

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We appreciate the opportunity to comment, and would be pleased to discuss our comments or any questions the Commission or its Staff may have, which may be directed to Derek Dostal, Joseph A. Hall, Sophia Hudson, Michael Kaplan, Shane Tintle or Nicole Green of this firm at 212-450-4000.

Very truly yours,

*Davis Polk & Wardwell LLP*