BED BATH & BEYOND INC
Form PRRN14A
May 02, 2019

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14A

(Rule 14a-101)

Information Required in Proxy Statement

Schedule 14a Information

Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934

(Amendment No. 1)

Filed by the Registrant ¨

Filed by a Party other than the Registrant x

Check the appropriate box:

x Preliminary Proxy Statement

¨ Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))

¨ Definitive Proxy Statement

¨ Definitive Additional Materials

¨ Soliciting Material Under Rule 14a-12

BED BATH & BEYOND Inc.
(Name of Registrant as Specified in Its Charter)

LEGION PARTNERS HOLDINGS, LLC

LEGION PARTNERS, L.P. I

LEGION PARTNERS, L.P. II

LEGION PARTNERS SPECIAL OPPORTUNITIES, L.P. XII

LEGION PARTNERS, LLC

LEGION PARTNERS ASSET MANAGEMENT, LLC

CHRISTOPHER S. KIPER

RAYMOND T. WHITE

MACELLUM HOME FUND, LP

MACELLUM MANAGEMENT, LP

MACELLUM ADVISORS GP, LLC

JONATHAN DUSKIN

ANCORA CATALYST INSTITUTIONAL, LP

ANCORA CATALYST, LP

MERLIN PARTNERS INSTITUTIONAL, LP

ANCORA MERLIN, LP

ANCORA SPECIAL OPPORTUNITY FUND

ANCORA/THELEN SMALL-MID CAP FUND

ANCORA ADVISORS, LLC

FREDERICK DISANTO

VICTOR HERRERO AMIGO

THERESA R. BACKES

JOSEPH BOEHM

DAVID A. DUPLANTIS

JOHN E. FLEMING

SUE ELLEN GOVE

JANET E. GROVE

JEFFREY A. KIRWAN

JEREMY I. LIEBOWITZ

JON LUKOMNIK

CYNTHIA S. MURRAY

MARTINE M. REARDON

HUGH R. ROVIT

JOSHUA E. SCHECHTER

ALEXANDER W. SMITH
(Name of Persons(s) Filing Proxy Statement, if Other Than the Registrant)

Payment of Filing Fee (Check the appropriate box):

x No fee required.

¨ Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11.

(1) Title of each class of securities to which transaction applies:

(2) Aggregate number of securities to which transaction applies:

(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

(4) Proposed maximum aggregate value of transaction:

(5) Total fee paid:

¨ Fee paid previously with preliminary materials:

¨ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the form or schedule and the date of its filing.

(1) Amount previously paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed:

REVISED PRELIMINARY COPY SUBJECT TO COMPLETION
DATED MAY 2, 2019

LEGION PARTNERS HOLDINGS, LLC

_____, 2019

It is Time for the Current Board to be Held Accountable for Years of Poor Performance, Failed Initiatives, and Self-Enriching Executive Compensation Packages

Wholesale Board and Leadership Change is Necessary to Address the Magnitude of Value Destruction and Shareholders' Serious Concerns

We Believe Bed Bath Has Significant Value and Can Thrive Under New Leadership

Vote the WHITE Proxy Card Today to Support Our Highly Qualified Slate of Directors Who Are Committed to Implementing a Comprehensive Turnaround Plan

Dear Fellow Bed Bath Shareholder:

Legion Partners Holdings, LLC and the other participants in this solicitation (collectively, the "Investor Group" or "we") beneficially own a total 6,912,639 shares of Bed Bath & Beyond Inc., a New York corporation ("Bed Bath" or the "Company"), including 1,419,500 shares underlying currently exercisable call options, or approximately 5.2% of the outstanding common stock, par value $0.01 per share (the "Common Stock"), making us one of the Company's largest shareholders.

Bed Bath is a great company with tremendous potential and a dedicated workforce of approximately 62,000 employees that we believe can thrive under the right leadership. Unfortunately, CEO Steven Temares and the board of directors (the "Board") have presided over an extended period of poor stock price performance, poor operating performance, poor corporate governance, and substantial destruction of shareholder value. Since early 2015, the stock has lost over 80% of its value. Moreover, Bed Bath's CEO Steven Temares has overseen the destruction of more than $8 billion in market value over his 15-year tenure, with total shareholder returns of negative 58%, while receiving, together with Co- Chairmen Emeriti of the Board, Warren Eisenberg and Leonard Feinstein, over $300 million in total compensation over the past 15 years. Notwithstanding four consecutive failed say-on-pay votes, the Board failed to hold itself accountable and even unanimously voted to reject the resignation of a member of the compensation committee after she received more "Against" votes than "For" votes at last year's 2018 annual meeting of shareholders.

Not until faced with stockholder pressure, did the Board take steps to change its composition. We do not believe the recent Board changes go far enough to address the prolonged underperformance of the Company and destruction of shareholder value. The recent board changes were not announced with a strategic plan developed by the newly constructed Board. Instead, the Company announced it would continue the status quo - implementing its strategic initiatives that we do not believe have shown evidence of the transformational change needed to save this business, as indicated by management's 2019 guidance of a 4.0% sales decline at the midpoint and flat sales in 2020. We continue to believe that CEO Steven Temares must be replaced and new, independent directors with deep retail experience must be added to the Board. We fully appreciate that asking for control, let alone the removal of an entire Board, is no trivial matter. However, in our view, there is an urgent need for wholesale Board and leadership changes at Bed Bath before the Company's failures become irreparable.

The upcoming 2019 annual meeting of shareholders of Bed Bath (the "2019 Annual Meeting") represents a critical juncture for shareholders at Bed Bath to elect a new Board comprised of all-star executives who are both highly qualified and excited to significantly improve the operating performance, oversight, and value of the Company for the benefit of all shareholders. We have gone to great lengths to carefully select ten director nominees who will bring substantial skills directly relevant to Bed Bath's business and current challenges, including: sourcing, supply chain and private label; retail operations; marketing, branding and e-commerce; and investments, governance, real estate, and turnarounds. Notably, among our slate of director nominees are several highly accomplished executives with direct experience successfully leading some of the most well-known brands in the world or overseeing similar turnarounds at competing home furnishing companies such as Pier 1 Imports, Macy's, Guess?, Zales, Chico's, The Gap, Coach, Walmart, Target and Ellery Homestyles.

Our slate of director nominees is committed to executing on a comprehensive strategic plan that we released, which includes a quantified time and action plan that prioritizes the following initiatives: launching an immediate search for a top-flight CEO to lead the Company, addressing the Company's weak sales, improving gross margins, adopting cost-cutting measures, creating an incentive compensation structure that better aligns pay-for-performance, optimizing inventory levels, and reviewing all non-core businesses and assessing their value as part of the business or their potential value to other parties. Shareholders can see our full strategic plan at www.restorebedbath.com.

We hope that you share our excitement to seize the opportunity Bed Bath represents with a newly constituted and extraordinarily capable board of directors at the helm. We believe that shareholders have suffered long enough at Bed Bath. Fortunately, shareholders finally have the opportunity to choose a much better alternative at the 2019 Annual Meeting.

The Company may try to argue that we are seeking a level of Board representation that is disproportionate to our 5.2% ownership interest in the Company. It is important to understand, however, that this election is not about the Investor Group versus the current Board. This election is about what is best for the Company and its shareholders. We strongly believe that anything short of a full change in the Board at the 2019 Annual Meeting will be wholly inadequate to rectify the magnitude of value destruction, operational underperformance and governance issues at Bed Bath. We have gone to great lengths to identify ten highly credible director candidates who are independent-thinking business leaders who are committed to putting the best interests of Bed Bath's shareholders first. Therefore, while the election of a majority of our director candidates may be sufficient to ensure that the changes we are seeking are implemented at Bed Bath following the 2019 Annual Meeting, we have nevertheless nominated a full slate because we believe that each of the director nominees that we have identified is more qualified than the Company's nominees and that each will bring more relevant skills and experiences to the different aspects of Bed Bath's business and current challenges than the incumbent nominees the shareholders would otherwise be forced to accept. We believe shareholders deserve to have the best possible Board, comprised of the most talented and experienced individual directors.

Each of our director nominees is committed to the implementation of our comprehensive turnaround plan for Bed Bath. Therefore, in the event that our director nominees comprise a majority of the Board following the 2019 Annual Meeting, we expect that the Board, consistent with its fiduciary duties, will implement our comprehensive turnaround plan for Bed Bath. While we have confidence that our director nominees' plans for Bed Bath will put the Company on the right path towards substantial shareholder value creation, there can be no assurance that the implementation of our comprehensive turnaround plan will ultimately enhance shareholder value. In the event that our director nominees comprise less than a majority of the Board following the 2019 Annual Meeting, there can be no assurance that any actions or changes proposed by our director nominees, including the implementation of our turnaround plan, will be adopted or supported by the Board.

We urge you to carefully consider the information contained in the attached Proxy Statement and then support our efforts by signing, dating and returning the enclosed **WHITE** proxy card today. The attached Proxy Statement and the enclosed **WHITE** proxy card are first being furnished to the shareholders on or about _____, 2019.

If you have already voted for the incumbent management slate, you have every right to change your vote by signing, dating and returning a later dated **WHITE** proxy card or by voting in person at the 2019 Annual Meeting.

If you have any questions or require any assistance with your vote, please contact Saratoga Proxy Consulting LLC, which is assisting us, at its address and toll-free number listed below.

Thank you for your support,

Christopher S. Kiper
Legion Partners Holdings, LLC

*If you have any questions, require assistance in voting your **WHITE** proxy card,*

or need additional copies of the Investor Group's proxy materials,

please contact:

Shareholders call toll-free at (888) 368-0379

Email: info@saratogaproxy.com

REVISED PRELIMINARY COPY SUBJECT TO COMPLETION

DATED MAY 2, 2019

2019 ANNUAL MEETING OF SHAREHOLDERS

OF

Bed Bath & Beyond Inc.

PROXY STATEMENT
OF
LEGION PARTNERS HOLDINGS, LLC

PLEASE SIGN, DATE AND MAIL THE ENCLOSED WHITE PROXY CARD TODAY

Legion Partners Holdings, LLC, a Delaware limited liability company ("Legion Partners Holdings"), and the other participants in this solicitation (collectively, the "Investor Group" or "we") are significant shareholders of Bed Bath & Beyond Inc., a New York corporation ("Bed Bath" or the "Company"), who beneficially own, in the aggregate, approximately 5.2%[1] of the outstanding shares of common stock, $0.01 par value per share (the "Common Stock"), of the Company, including approximately 1.0% of shares underlying call options that are currently exercisable. We are furnishing this proxy statement and accompanying **WHITE** proxy card to holders of common stock, par value $0.01 per share (the "Common Stock") of Bed Bath in connection with the solicitation of proxies in connection with the Company's 2019 annual meeting of shareholders (including any and all adjournments, postponements, continuations or reschedulings thereof, or any other meeting of shareholders held in lieu thereof, the "2019 Annual Meeting"). The 2019 Annual Meeting will be held on a date, and at a time and place, to be determined by the Company.[2]

We are seeking your support at the Company's 2019 Annual Meeting of Shareholders for the following:

1. To elect Legion Partners Holdings' ten (10) director nominees, [Victor Herrero Amigo, Theresa R. Backes, Joseph Boehm, David A. Duplantis, Jonathan Duskin, John E. Fleming, Sue Ellen Gove, Janet E. Grove, Jeffrey A. Kirwan, Jeremy I. Liebowitz, Jon Lukomnik, Cynthia S. Murray, Martine M. Reardon, Hugh R. Rovit, Joshua E. Schechter and Alexander W. Smith] (each a "Nominee" and, collectively, the "Nominees") to hold office until the 2020 Annual Meeting of Shareholders (the "2020 Annual Meeting") and until their respective successors have been duly elected and qualified;

---

[1] Because the Company has not yet publicly disclosed how many shares of Common Stock are outstanding as of [ ], 2019, the record date for the Annual Meeting, the percentages of ownership reported throughout this Proxy Statement are based upon 132,089,269 shares outstanding, as of March 30, 2019, which is the total number of shares outstanding as reported in the Company's Annual Report on Form 10-K filed with the Securities and Exchange Commission on April 30, 2019.

[2] The Company has not yet publicly disclosed the date, time and place of the 2019 Annual Meeting. Once the Company publicly discloses such date, time and place, Legion Partners Holdings intends to supplement this Proxy Statement with such information and file revised definitive materials with the Securities and Exchange Commission.

2. To vote on a non-binding, advisory resolution to approve the compensation of the Company's named executive officers;

3. To ratify the appointment of KPMG LLP as the independent registered public accounting firm of the Company for the fiscal year ending February 29, 2020; and

4. To transact such other business, if any, as may properly come before the 2019 Annual Meeting and any adjournment thereof.

The Investor Group is seeking to elect a full slate of nominees to the Company's Board of Directors (the "Board") because we believe that the magnitude of value destruction, gravity of corporate governance issues and deterioration in operational performance necessitates wholesale change in the boardroom. Legion Partners Holdings has nominated a slate of highly qualified and capable candidates with relevant backgrounds and industry experience. If elected, the nominees will bring fresh perspectives, talented leadership, and responsible oversight in implementing a much-needed turnaround at Bed Bath.

Legion Partners Holdings believes the terms of all ten (10) directors currently serving on the Board expire at the 2019 Annual Meeting. This Proxy Statement is only soliciting proxies to elect the Nominees. Accordingly, the enclosed **WHITE** proxy card does not confer voting power with respect to any of the Company's director nominees. You can only vote for the Company's director nominees by signing and returning a proxy card provided by the Company. Shareholders should refer to the Company's proxy statement for the names, backgrounds, qualifications, and other information concerning the Company's director nominees.

As of the date hereof, Legion Partners Holdings, together with Legion Partners, L.P. I, a Delaware limited partnership ("Legion Partners I"), Legion Partners, L.P. II, a Delaware limited partnership ("Legion Partners II"), Legion Partners Special Opportunities, L.P. XII, a Delaware limited partnership ("Legion Partners Special XII"), Legion Partners, LLC, a Delaware limited liability company ("Legion LLC"), Legion Partners Asset Management, LLC, a Delaware limited liability company ("Legion Partners Asset Management"), Christopher S. Kiper, Raymond T. White (collectively, the "Legion Group"), Macellum Advisors GP, LLC, a Delaware limited liability company ("Macellum GP"), Macellum Home Fund, LP, a Delaware limited partnership ("Macellum Home"), Macellum Management, LP, a Delaware limited partnership ("Macellum Management"), Jonathan Duskin (collectively, the "Macellum Group"), Ancora Catalyst Institutional, LP, a Delaware limited partnership ("Ancora Catalyst Institutional"), Ancora Catalyst, LP, a Delaware limited partnership ("Ancora Catalyst"), Merlin Partners Institutional, LP, a Delaware limited partnership ("Merlin Institutional"), Ancora Merlin, LP, a Delaware limited partnership ("Ancora Merlin", and together with Ancora Merlin Institutional, Ancora Catalyst Institutional and Ancora Catalyst, the "Ancora Funds"), Ancora Special Opportunity Fund, a series of the Ancora Trust, an Ohio business trust ("Ancora Special Opportunity"), Ancora/Thelen Small-Mid Cap Fund, a series of the Ancora Trust, an Ohio business trust ("Ancora/Thelen"), Ancora Advisors, LLC, a Nevada limited liability company ("Ancora Advisors"), Frederick DiSanto (together with the Ancora Funds, the "Ancora Group"), and each of the other Nominees (each a "Participant") collectively beneficially own 6,912,639 shares of Common Stock (the "Investor Group Shares"), including 1,419,500 shares of Common Stock underlying call options that are currently exercisable. We intend to vote the Investor Group Shares **FOR** the election of the Nominees, **AGAINST** the approval of the non-binding advisory resolution on the compensation of the Company's named executive officers, and **FOR** the ratification of the selection of KPMG LLP as the independent registered public accounting firm of the Company for the fiscal year ending February 29, 2020, as described herein.

2

The Company has set the close of business on [_____] [__], 2019 as the record date for determining shareholders entitled to notice of and to vote at the 2019 Annual Meeting (the "Record Date"). The mailing address of the principal executive offices of the Company is 650 Liberty Avenue, Union, New Jersey 07083. Shareholders of record at the close of business on the Record Date will be entitled to vote at the 2019 Annual Meeting. The Company has not yet publicly disclosed how many shares of Common Stock are outstanding as the Record Date. As of March 30, 2019, there were 132,089,269 shares of Common Stock outstanding, which is the total number of shares outstanding as reported in the Company's Annual Report on Form 10-K filed with the Securities and Exchange Commission ("SEC") on April 30, 2019. Once the Company publicly discloses the number of shares of Common Stock outstanding as of the Record Date, Legion Partners Holdings intends to supplement this Proxy Statement with such information and file revised definitive materials with the SEC.

THIS SOLICITATION IS BEING MADE BY THE INVESTOR GROUP AND NOT ON BEHALF OF THE BOARD OF DIRECTORS OR MANAGEMENT OF THE COMPANY. WE ARE NOT AWARE OF ANY OTHER MATTERS TO BE BROUGHT BEFORE THE 2019 ANNUAL MEETING OTHER THAN AS SET FORTH IN THIS PROXY STATEMENT. SHOULD OTHER MATTERS, WHICH THE INVESTOR GROUP IS NOT AWARE OF A REASONABLE TIME BEFORE THIS SOLICITATION, BE BROUGHT BEFORE THE 2019 ANNUAL MEETING, THE PERSONS NAMED AS PROXIES IN THE ENCLOSED **WHITE** PROXY CARD WILL VOTE ON SUCH MATTERS IN OUR DISCRETION.

THE INVESTOR GROUP URGES YOU TO SIGN, DATE AND RETURN THE **WHITE** PROXY CARD IN FAVOR OF THE ELECTION OF THE NOMINEES.

IF YOU HAVE ALREADY SENT A PROXY CARD FURNISHED BY COMPANY MANAGEMENT OR THE BOARD, YOU MAY REVOKE THAT PROXY AND VOTE ON EACH OF THE PROPOSALS DESCRIBED IN THIS PROXY STATEMENT BY SIGNING, DATING, AND RETURNING THE ENCLOSED **WHITE** PROXY CARD. THE LATEST DATED PROXY IS THE ONLY ONE THAT COUNTS. ANY PROXY MAY BE REVOKED AT ANY TIME PRIOR TO THE 2019 ANNUAL MEETING BY DELIVERING A WRITTEN NOTICE OF REVOCATION OR A LATER DATED PROXY FOR THE 2019 ANNUAL MEETING OR BY VOTING IN PERSON AT THE 2019 ANNUAL MEETING.

Important Notice Regarding the Availability of Proxy Materials for the 2019 Annual Meeting—This Proxy Statement and our WHITE proxy card are available at

www.restorebedbath.com

IMPORTANT

Your vote is important, no matter how few shares of Common Stock you own. The Investor Group urges you to sign, date, and return the enclosed WHITE proxy card today to vote FOR the election of the Nominees and in accordance with the Investor Group's recommendations on the other proposals on the agenda for the 2019 Annual Meeting.

- If your shares of Common Stock are registered in your own name, please sign and date the enclosed **WHITE** proxy card and return it to the Investor Group, c/o Saratoga Proxy Consulting LLC ("Saratoga") in the enclosed postage-paid envelope today.

- If your shares of Common Stock are held in a brokerage account or bank, you are considered the beneficial owner of the shares of Common Stock, and these proxy materials, together with a **WHITE** voting form, are being forwarded to you by your broker or bank. As a beneficial owner, you must instruct your broker, trustee or other representative how to vote. Your broker cannot vote your shares of Common Stock on your behalf without your instructions.

- Depending upon your broker or custodian, you may be able to vote either by toll-free telephone or by the Internet. Please refer to the enclosed voting form for instructions on how to vote electronically. You may also vote by signing, dating and returning the enclosed voting form.

Since only your latest dated proxy card will count, we urge you not to return any proxy card you receive from the Company. Even if you return the Company's proxy card marked "withhold" as a protest against the incumbent directors, it will revoke any proxy card you may have previously sent to us. Remember, you can vote for our ten (10) Nominees only on our **WHITE** proxy card. So please make certain that the latest dated proxy card you return is the **WHITE** proxy card.

*If you have any questions, require assistance in voting your **WHITE** proxy card,*

or need additional copies of the Investor Group's proxy materials,

please contact:

Shareholders call toll-free at (888) 368-0379

Email: info@saratogaproxy.com

4

BACKGROUND OF THE SOLICITATION

- From September 2016 to January 2019, the Macellum Group regularly reached out to Janet M. Barth, Vice President of Investor Relations, to discuss the Company's business and quarterly results.

- In November and December 2018, the Legion Group and Macellum Group began to discuss their shared concerns with the Company's prolonged underperformance, sustained shareholder value destruction and egregious corporate governance practices, including the Board's disregard for the shareholder vote at the 2018 Annual Meeting of Shareholders (the "2018 Annual Meeting"), in which Victoria Morrison received 56% of the votes cast against her but the Board unanimously reappointed her to the Board, notwithstanding four consecutive failed say-on-pay votes.

- On January 10, 2019, the Legion Group called Ms. Barth, to discuss questions related to the Company's performance and to try to set up a meeting with Chief Executive Officer (CEO) Steven H. Temares.

- On January 11, 2019, the Legion Group and Macellum Group formally agreed to work together as a group and to engage with the Company regarding their concerns. The Legion Group and Macellum Group subsequently reached out to the Company to try to schedule a meeting with CEO Temares but were largely ignored.

- On February 27, 2019, the Legion Group and Macellum Group sent a letter to Mr. Temares expressing their frustration that their prior requests to meet were ignored. In the letter, the Legion Group and Macellum Group noted their serious concerns with the Company's prolonged underperformance and requested a meeting within two weeks to discuss their concerns and to better understand his plans for improving Bed Bath and stopping what the Legion Group and Macellum Group believed was a downward spiral of results that has led to the significant destruction of shareholder value.

- On March 14, 2019, representatives of the Legion Group and Macellum Group met with Mr. Temares, Chief Financial Officer and Treasurer, Robyn M. D'Elia, Chief Operating Officer and President, Eugene A. Castagna, Chief Administrative Officer, Susan E. Lattmann and Ms. Barth at the Company's headquarters in New Jersey to discuss their concerns with the Company's underperformance, poor shareholder returns, and executive compensation.

- On March 15, 2019, the Legion Group requested from the Company the forms of director questionnaire (the "Questionnaire") and representation agreement (the "Representation Agreement") required under the Company's Amended By-laws (the "Bylaws") to be completed by each nominee nominated by a shareholder in order to nominate directors at the 2019 Annual Meeting.

- On March 18, 2019, representatives of the Legion Group and Macellum Group, along with their legal counsel, Olshan Frome Wolosky LLP ("Olshan"), met with former Executive Chairmen, Warren Eisenberg and Leonard Feinstein, member of the Board, Patrick Gaston, Ms. Barth and the Company's legal counsel, Wachtell, Lipton, Rosen & Katz ("Wachtell"). At the meeting, representatives of the Legion Group and Macellum Group repeated their

concerns with the Company's underperformance and executive compensation and expressed the need for a change of a majority of the Board. The Company advised that they believed their strategy was working and initiatives adopted to address the Company's performance were "ahead of plan." The Company argued that results would come in 2020. Messrs. Eisenberg, Feinstein and Gaston also informed the Legion Group and Macellum Group that they had kept Victoria Morrison on the Board despite shareholders having voted to unseat her at the 2018 Annual Meeting due to her past contributions and legal skills.

5

- Between March 19, 2019 and March 25, 2019, Olshan and Wachtell spoke and communicated via email on behalf of their respective clients to discuss the March 18, 2019 meeting as well as certain problematic provisions in the Questionnaire and Representation Agreement, which Olshan believed were not valid under New York law in order to nominate directors for election at a company's annual meeting.

- On March 20, 2019, Olshan sent a letter to Wachtell requesting an affirmative waiver to the requirement in the Questionnaire that each Nominee consent to being named in the Company's proxy statement (the "Nominee Consent Requirement"). Olshan also noted that the Representation Agreement required the Nominating Shareholder to become a party thereto which was inconsistent with the Bylaws that only required each Nominee to execute a Representation Agreement.

- Also on March 20, 2019, the Legion Group, the Macellum Group, the Ancora Funds, Ancora Advisors and Frederick DiSanto entered into a group agreement, pursuant to which the members agreed to, among other things, work together to nominate directors and solicit proxies for their election (the "Group Agreement").

- On March 21, 2019, Wachtell communicated to Olshan a proposal from the Company to add two (2) new directors to the Board to replace two (2) independent directors. Olshan indicated it would speak with its clients and requested a response to its March 20, 2019 letter.

- On March 25, 2019, Olshan and Wachtell spoke about the Company's proposal. Olshan communicated to Wachtell that the Investor Group believed more meaningful change was warranted at the Company and the replacement of two independent directors would not be sufficient. Olshan and Wachtell also discussed the issues set forth in Olshan's March 20, 2019 letter. Wachtell communicated that it did not interpret the Nominee Consent Requirement to permit the Company to name any of the Nominees on the Company's proxy card. Olshan requested written confirmation of the same.

- On March 25, 2019, each of Ancora Special Opportunity Fund, Ancora/Thelen Small-Mid Cap Fund, Victor Herrero Amigo, Theresa R. Backes, Joseph Boehm, David A. Duplantis, John E. Fleming, Sue Ellen Gove, Janet E. Grove, Jeffrey A. Kirwan, Jeremy I. Liebowitz, Jon Lukomnik, Cynthia S. Murray, Martine M. Reardon, Hugh R. Rovit, Joshua E. Schechter and Alexander W. Smith entered into a Joinder Agreement with the other parties to the Group Agreement pursuant to which they agreed, among other things, to become parties to the Group Agreement and be bound by the terms and conditions thereof.

- On March 26, 2019, Legion Partners Holdings delivered a 1,035 page letter (the "Nomination Letter") to Bed Bath nominating the Nominees for election to the Board at the 2019 Annual Meeting. Accompanying the Nomination Letter was a cover letter from Olshan to Wachtell relaying a verbal communication by Wachtell that the consents the Nominees were providing under the Questionnaires would not be interpreted by the Company to give the Company the right to include any of the Nominees in their proxy card in connection with the 2019 Annual Meeting.

- Later on March 26, 2019, the Investor Group issued a press release announcing the nomination of sixteen highly-qualified independent candidates for election to the Board at the Annual Meeting. In the press release, the Investor Group noted that given the magnitude of value destruction at the Company, wholesale Board and leadership

changes were warranted, including a search to replace CEO Steven Temares. The Investor Group noted that the Company has lost more than $8 billion in market value over Mr. Temares' 15-year tenure as CEO, with total shareholder returns of negative 58% and, since early 2015, the stock has lost over 80% of its value. The Investor Group also noted issues with the Board's lengthy average tenure of 19 years, the Company's excessive executive pay packages, certain governance issues, among other things. The Investor Group also announced that it intended to deliver a detailed plan to turn the Company around in the near term that will focus on, among other things, recruiting a highly qualified CEO to lead the Company going forward, addressing the Company's weak sales, improving gross margins, adopting cost-cutting measures, creating an incentive compensation structure that better aligns pay for performance, and reviewing all non-core businesses and assessing their value as part of the business or their potential value to other parties.

- Also on March 26, 2019, Bed Bath issued a press release confirming receipt of the Nomination Letter from Legion Partners Holdings. The Company also publicly disclosed its intent to accelerate its Board refreshment program with investor input and repeated its belief that its strategy to transform the Company was ahead of plan.

- On March 28, 2019, Legion Partners Holdings delivered a letter (the "Change-in-Control Letter") to the Board explaining its concerns that following the Annual Meeting, should Legion Partners Holdings' candidates constitute a majority of the Board, their appointment could trigger certain change in control provisions under certain of the Company's material contracts and agreements unless they have been certified by the current Board as "continuing directors" in advance of such election. Accordingly, in order to maintain a level playing field, and to allow shareholders to make their voting decisions based solely on the merits, the letter requested written confirmation from the Company that, prior to the Annual Meeting, the Board will take all necessary steps to use its discretionary authority under such agreements to certify Legion Partners Holdings' candidates as "continuing directors" and otherwise approve of their nomination such that the change in control provisions would not be triggered by the election of Legion Partners Holdings' candidates to serve on the Board. Legion Partners Holdings requested to receive a response from the Company no later than April 3, 2019.

- On March 29, 2019, Legion Partners Holdings delivered to Bed Bath a demand to inspect the Company's books and records under Section 624 of the New York Business Corporation Law. The parties subsequently discussed and entered into a customary confidentiality agreement with respect to the information to be provided to Legion Partners Holdings.

- On March 29, 2019, the Investor Group filed a Schedule 13D disclosing it had nominated the Nominees for election at the Annual Meeting and a collective beneficial ownership of approximately 5.0% of the Common Stock.

- Also on March 29, 2019, Wachtell delivered a letter to Legion Partners Holdings identifying certain purported deficiencies in the Nomination Letter and alleging the nomination was not made in good faith because Legion Partners Holdings nominated more persons for election than vacancies expected at the 2019 Annual Meeting.

- On March 31, 2019, Olshan, on behalf of Legion Partners Holdings, delivered a response letter (the "Response Letter") to Wachtell's March 29th letter refuting its claims that the Nomination Letter was deficient and addressing the Company's concerns on a point-by-point basis. Olshan reiterated Legion Partners Holdings' firm belief that its nomination constituted a good faith nomination, that the Bylaws didn't prohibit the ability to nominate more persons than vacancies expected, that Legion Partners Holdings would only solicit votes for the number of vacancies actually existing and that the information provided in the Nomination Letter was more than sufficient according to the Company's Bylaws and applicable governing law. Nevertheless, in addition to the Response Letter, Legion Partners Holdings provided to the Company a voluntary 474 page supplement (the "Supplemental Notice") and supplements to each of the Questionnaires in order to address any purported inconsistences and provide additional disclosures as requested by the Company. The Group Agreement and Joinder Agreement were also amended as of such date to clarify that the Group Agreement will terminate immediately after the conclusion of the activities contemplated therein, but no later than the final certification by the inspector of elections of the votes for the 2019 Annual Meeting or earlier appoint by any Nominee to the Board, unless otherwise agreed to by the parties thereof.

- On April 1, 2019, Wachtell delivered to Olshan a letter acknowledging receipt of the Response Letter and the Supplemental Notice as well as reiterating certain allegations that Legion Partners Holdings' Nomination Letter was not submitted in good faith due to nominating more directors than expected vacancies.

On April 1, 2019, Olshan responded by email to Wachtell that the Company's claims that Legion Partners Holdings' Nomination Letter was not submitted in good faith were baseless because Wachtell admitted in its own letter that the Bylaws did not prohibit nominating more persons than seats available, so long as Legion Partners Holdings did not solicit in its definitive proxy statement more persons than vacancies existing at the 2019 Annual Meeting.

On April 3, 2019, the Company delivered to Legion Partners Holdings a letter in response to the Change-in-Control Letter claiming the Company would consider approving the Nominees for purposes of the change in control provisions in the Company's contracts but would need to interview the Nominees in order to assess whether they meet the standard for approval.

On April 5, 2019, Legion Partners Holdings delivered a letter to the Company noting that well over 1,400 pages of information was provided to the Company in connection with the nomination of the Nominees, providing more than sufficient information to the Board to assess the qualifications of the Nominees. Legion Partners Holdings also noted that if shareholders conclude that the Nominees should be elected to the Board, that determination alone should suffice. Legion Partners Holdings concluded that the Board's suggestion that it can override shareholder wishes and risk a default under its material agreements is improper and unlawful. Legion Partners Holdings asked again for the Company to, no later than April 15, 2019, approve of the Nominees as "continuing directors" in order to avoid any harm to shareholders' inalienable rights to elect directors.

On April 5, 2019, Olshan delivered on Legion Partners Holdings' behalf a letter to Wachtell to follow up on certain open matters including (i) requesting written confirmation no later than April 15, 2019 that the Company would not use the consents given pursuant to the Nominee Consent Requirement to name any Nominee in the Company's proxy card, and (ii) a supplement to Mr. Duskin's Questionnaire, which provided updated ownership information of shares of common stock of the Company beneficially owned by Mr. Duskin and certain other matters.

- On April 8, 2019, the Investor Group issued a press release calling on the Board and management team of Bed Bath to increase its level of disclosure and transparency when it reports fourth quarter results on April 10, 2019. In its press release, the Investor Group compiled a list of ten questions for management to address that it believes shareholders deserve to know.

On April 10, 2019, Bed Bath announced its fourth quarter and full-year 2018 financial results, which included annual sales decline. Additionally, the Company named Patrick Gaston as Lead Independent Director despite the fact that he has been a director since 2007 and announced that it was accelerating its Board refreshment program and would anticipate further changes to the Board in the near term.

Later on April 10, 2019, the Investor Group issued a press release commenting on the Company's fourth quarter 2018 earnings and what it believed was evidence of an acceleration of the Company's operating deterioration. The Investor

Group also expressed its deep concerns that management suggested they would reduce their coupon availability to improve profitability. The Investor Group stated its view that it would not make sense to make any couponing adjustments prior to executing on initiatives that would fundamentally improve the in-store experience for customers and drive retail traffic. The Investor Group also announced it planned to release its detailed operational plan over the next two weeks.

On April 12, 2019, Wachtell delivered a letter on behalf of the Board to Legion Partners Holdings responding to Legion Partners Holdings' letter sent April 5, 2019. Wachtell's letters did not respond to the request to confirm it would not name any Nominee in the Company's proxy statement or proxy card. Instead, the Board merely responded to the request to approve the Nominees to avoid triggering certain change of control provisions under the Company's material agreements. In the letter, the Board claimed it was not clear under New York law that the Board had the right to approve of potential director candidates that it was not endorsing. The Board further argued it needed to interview the Nominees in light of purported inaccuracies in the Questionnaires submitted by each Nominee, without identifying what purported inaccuracies existed. The Board noted it was "many weeks away" from filing its proxy statement and would continue to consider the matters raised in Legion Partners Holdings' prior letters.

On April 17, 2019, Olshan delivered a letter to Wachtell to follow up on its letters dated March 26, 2019 and April 5, 2019 that sought to confirm the Company would not name any Nominee in the Company's proxy statement or proxy card. Given the lack of response from the Company to these letters, Olshan stated that Legion Partners Holdings would expect the Company to either agree to (i) the use of a universal proxy card and to deliver to Legion Partners Holdings, written consents of the Company's director nominees to be named in Legion Partners Holdings' proxy card or (ii) provide written confirmation that the Company would not name any Nominee in the Company's proxy statement or proxy card.

- On April 19, 2019, Wachtell delivered a letter to Olshan on behalf of the Company in response to Olshan's letter dated April 17, 2019 to confirm that the Company would not name any of the Nominees in the Company's proxy card without their consent.

- Later on April 19, 2019, the Company's advisor, The Goldman Sachs Group, Inc. ("Goldman Sachs"), emailed Mr. Kiper to have a discussion regarding a potential settlement between the Company and Legion Partners Holdings. Goldman Sachs and Mr. Kiper had several calls later that day whereby Goldman Sachs suggested the Investor Group enter into a limited duration non-disclosure agreement to discuss potential changes at the Board level.

- On April 21, 2019, at the urging of the Company, the Investor Group entered into a non-disclosure agreement with the Company and a proposal for settlement was delivered by Wachtell to Olshan. Given the Easter holiday, Olshan advised Wachtell that it would respond back to the proposal the next morning. The fact that the Investor Group had entered into a non-disclosure agreement was deemed confidential until April 24, 2019.

- On April 22, 2019, less than 24 hours after entering into a non-disclosure agreement with the Investor Group, for the purposes of discussing a potential settlement agreement and without giving the Investor Group an opportunity to respond, the Company issued a press release and investor presentation announcing that it had reconstituted the Board, effective May 1, 2019, by having five current directors step down and appointing five new directors. The Company also announced that Co-Founders and Executive Chairmen Warren Eisenberg and Leonard Feinstein would transition to the role of Co-Founders, Co-Chairmen Emeriti and would retire from the Board and that Patrick Gaston, who has been with the Board since 2007, would be named the Current Lead Independent Director.

- On April 22, 2019, the Investor Group released a statement responding to the Company's Board changes, stating that it believed the Board changes were not nearly enough when measured against what is needed to address the issues with the current Board and management, including that CEO Steven Temares must be held accountable for the Company's prolonged poor performance and destruction of shareholder value. The Investor Group also noted that the Company's announcement lacked any detailed strategic vision for driving value creation at the Company and, as a result, the Investor Group would continue to move forward with its campaign to install fresh, experienced and independent oversight and management at the Company. The Investor Group could not publicly disclose the fact that it had entered into a non-disclosure agreement with the Company until April 24, 2019, since that fact was deemed confidential information.

- Also on April 22, 2019, Olshan, on behalf of Legion Partners Holdings, sent a letter to Wachtell requesting the use of a universal proxy card in light of the Board changes announced by the Company earlier that day. The letter explained Legion Partners Holdings' belief that the use of a universal proxy card was best corporate governance and would provide shareholders the ability to elect the most qualified group of directors.

- On April 24, 2019, Wachtell delivered a letter to Olshan indicating that the Company did not believe there was a need for the use of a universal proxy card.

- On April 26, 2019, the Investor Group released a comprehensive presentation outlining their strategic plan for the Company. The strategic plan outlines a path forward to modernizing the Company's retail practices and delivering a significant earnings per share improvement, including to (i) revamp the executive management team by hiring a world class CEO, (ii) reverse sales weakness by fixing the merchandise over-assortment problem through a detailed SKU rationalization process as well as developing a merchandise architecture that will better resonate with customers, (iii) turnaround the Company's culture with an increased focus on employee training and education to improve motivation; (iv) significantly expand gross margins through improved vendor relations and drive profits by establishing a direct sourcing strategy and private label program as well as fixing mix issues created by the Company's shift to commoditized and lower margin products, (v) implement cost cutting measures, (vi) improve inventory by increasing inventory turns and (vii) fix capital allocation by reviewing all non-core businesses and assessing their value as part of the business or their potential value to other parties, among other things. The Investor Group also released a statement in conjunction with the strategic plan. The Investor Group stated that the recent Board changes announced by the Company are not nearly enough and appear hastily constructed. The Investor Group reiterated its belief that CEO Steven Temares must be terminated as soon as possible and new directors must be added to the Board that have direct experience in the following areas: customer-centricity, retail operations, sourcing, supply chain, private label, marketing, branding, e-commerce, and turnarounds.

- Later on April 26, 2019, the Company issued a statement in response to the Investor Group's comprehensive presentation, claiming it was executing on a comprehensive multi-year strategy that was "well underway and delivering results", despite little evidence of improvements to the business. The Company also falsely stated that it had offered the Investor Group the opportunity to participate in the recent Board changes, when, in fact, the Investor Group had clearly stated it would respond to the Company's proposal within 24 hours. Rather than wait for a response and work towards a settlement in good faith, the Company publicly announced its newly constructed board.

REASONS FOR THE SOLICITATION

WE BELIEVE THE TIME FOR SUBSTANTIAL CHANGE IS NOW

For far too long, the Board has presided over an extended period of poor stock price performance, decelerating operational performance, excessive compensation, and poor corporate governance. Prior to the recent board changes, which we view as reactive and hastily constructed in response to our active engagement, the average director tenure was approximately 19 years, which, in our view, hindered proper oversight of management. Even with the recent Board changes, we believe the Board lacks sufficient retail expertise and has left CEO Temares at the helm, implementing strategic initiatives that in our view have shown little evidence of success. Furthermore, we believe the Board has failed at its basic duty to oversee the creation of a viable strategy, prioritize initiatives, measure success and ensure management is held accountable for execution.

Until recently, the Board was presided over by Co-Founders, Co-Chairmen Emeriti Warren Eisenberg and Leonard Feinstein who have both served on the Board for 48 years, while the Company seems to be growing more out of touch with modern retail with every passing day. In our view, the Company has not demonstrated an ability to appropriately respond to a changing retail landscape that demands a greater aptitude for how to compete in an omnichannel world. While Messrs. Eisenberg and Feinstein have some very dated retail experience primarily through their 48-year tenure at Bed Bath, the CEO and the rest of the independent directors have very minimal retail experience. The recent Board changes are also equally troubling as only two of the five newly appointed directors have direct retail experience. This lack of meaningful outside retail experience and relevant expertise may explain why more than $8 billion in market value has been destroyed during CEO Temares' 15-year tenure. While overseeing Mr. Temares' reign of prolific shareholder value destruction, Messrs. Eisenberg and Feinstein were each paid over $60 million over the past 15 years. For his part, CEO Steven Temares has been paid over $180 million over this same period.

The problem with the new Board is that it appears to have been constructed to perpetuate the status quo. While on the surface, the resignation of seven (7) directors and the appointment of five (5) new directors looks like change, the new directors lack much in the way of retail experience and they are faced with several challenges, including the following:

- Steven Temares is still the CEO.
- Co-Chairman Emeriti, Leonard Feinstein and Warren Eisenberg, will continue to be paid for attending meetings and voicing their perspectives.
- The newly appointed Chairman is Patrick Gaston, who has been on the Board for 12 years and has overseen substantial value destruction while serving on the Audit Committee, Nominating and Governance Committee and the Compensation Committee. Mr. Gaston does not appear to represent any new thinking.
- The newly reconstituted Nominating and Governance Committee is comprised of three (3) of the four (4) remaining legacy directors. This committee, which has no retail experience, will have a disproportionate influence over the future of Mr. Temares.

We believe the Company's dramatic underperformance – when coupled with its poor corporate governance and excessive pay packages – necessitates wholesale Board and management changes. Given the lack of a new strategic plan formulated by the recently constructed Board, we fear the status quo will continue, as the same initiatives which haven't driven shareholder value will continue to be pursued under the helm of CEO Temares. We believe the Company has tremendous potential and a valuable and dedicated workforce of more than 62,000 employees that can thrive with the right board and management team in place.

We have nominated a slate of ten (10) highly qualified Nominees for election to the Board at the Annual Meeting. Our Nominees were carefully selected for their diverse skill sets in areas directly relevant to Bed Bath's business, its current challenges, and importantly, its opportunities. Our Nominees collectively bring decades of retail experience, leadership skills, operational execution, financial acumen, a strong respect for proper corporate governance and an unequivocal commitment to represent the best interests of all shareholders. Our Nominees, if elected, are prepared to begin executing on a strategic plan for Bed Bath that will seek to dramatically increase margins, cash flow, and restore Bed Bath's position as a dominant retailer while also holding management accountable. We believe that our Nominees, if elected, will bring about the much needed change that is urgently required at Bed Bath.

The Current Leadership Team and Board has Overseen Tremendous Value Destruction

Bed Bath's stock has significantly underperformed the S&P 500, Russell 2000, its proxy peer group and the Company's closest retail peers over a one, three, five and ten-year period as well as since April 2, 2003 when Steven Temares took the helm as the Company's CEO.

	Share Price Performance (Total Shareholder Return Including Dividends)				
	1-Year	**3-Year**	**5-Year**	**10-Year**	**Since April 2, 2003**
Bed Bath & Beyond	**(33%)**	**(70%)**	**(78%)**	**(39%)**	**(58%)**
S&P 500 Index	10%	46%	67%	328%	342%
Russell 2000 Index	1%	45%	37%	314%	397%
Proxy Peer Group[(1)]	17%	1%	28%	471%	742%
Closest Retail Peers[(2)]	11%	27%	51%	404%	592%
Relative Performance vs. S&P 500 Index	**(43%)**	**(116%)**	**(145%)**		

if we fail to pay interest when due and payable and our failure continues for 90 days and the time for payment has not been extended;

if we fail to pay the principal, premium or sinking fund payment, if any, when due and payable at maturity, upon redemption or repurchase or otherwise, and the time for payment has not been extended;

if we fail to observe or perform any other covenant contained in the debt securities or the indentures, other than a covenant specifically relating to another series of debt securities, and our failure continues for 90 days after we receive notice from the trustee or we and the trustee receive notice from the holders of at least 25% in aggregate principal amount of the outstanding debt securities of the applicable series; and

if specified events of bankruptcy, insolvency or reorganization occur.

We will describe in each applicable prospectus supplement any additional events of default relating to the relevant series of debt securities.

Table of Contents

If an event of default with respect to debt securities of any series occurs and is continuing, other than an event of default specified in the last bullet point above, the trustee or the holders of at least 25% in aggregate principal amount of the outstanding debt securities of that series, by notice to us in writing, and to the trustee if notice is given by such holders, may declare the unpaid principal, premium, if any, and accrued interest, if any, due and payable immediately. If an event of default arises due to the occurrence of certain specified bankruptcy, insolvency or reorganization events, the unpaid principal, premium, if any, and accrued interest, if any, of each issue of debt securities then outstanding shall be due and payable without any notice or other action on the part of the trustee or any holder.

The holders of a majority in principal amount of the outstanding debt securities of an affected series may waive any default or event of default with respect to the series and its consequences, except defaults or events of default regarding payment of principal, premium, if any, or interest, unless we have cured the default or event of default in accordance with the indenture. Any waiver shall cure the default or event of default.

Subject to the terms of the indentures, if an event of default under an indenture shall occur and be continuing, the trustee will be under no obligation to exercise any of its rights or powers under such indenture at the request or direction of any of the holders of the applicable series of debt securities, unless such holders have offered the trustee reasonable indemnity or security satisfactory to it against any loss, liability or expense. The holders of a majority in principal amount of the outstanding debt securities of any series will have the right to direct the time, method and place of conducting any proceeding for any remedy available to the trustee, or exercising any trust or power conferred on the trustee, with respect to the debt securities of that series, provided that:

- the direction so given by the holder is not in conflict with any law or the applicable indenture; and
- subject to its duties under the Trust Indenture Act, the trustee need not take any action that might involve it in personal liability or might be unduly prejudicial to the holders not involved in the proceeding.

The indentures provide that if an event of default has occurred and is continuing, the trustee will be required in the exercise of its powers to use the degree of care that a prudent person would use in the conduct of its own affairs. The trustee, however, may refuse to follow any direction that conflicts with law or the indenture, or that the trustee determines is unduly prejudicial to the rights of any other holder of the relevant series of debt securities, or that would involve the trustee in personal liability. Prior to taking any action under the indentures, the trustee will be entitled to indemnification against all costs, expenses and liabilities that would be incurred by taking or not taking such action.

A holder of the debt securities of any series will have the right to institute a proceeding under the indentures or to appoint a receiver or trustee, or to seek other remedies only if:

- the holder has given written notice to the trustee of a continuing event of default with respect to that series;
- the holders of at least 25% in aggregate principal amount of the outstanding debt securities of that series have made a written request and such holders have offered reasonable indemnity to the trustee or security satisfactory to it against any loss, liability or expense or to be incurred in compliance with instituting the proceeding as trustee; and

the trustee does not institute the proceeding, and does not receive from the holders of a majority in aggregate principal amount of the outstanding debt securities of that series other conflicting directions within 90 days after the notice, request and offer.

These limitations do not apply to a suit instituted by a holder of debt securities if we default in the payment of the principal, premium, if any, or interest on, the debt securities, or other defaults that may be specified in the applicable prospectus supplement.

Table of Contents

We will periodically file statements with the trustee regarding our compliance with specified covenants in the indentures.

The indentures provide that if a default occurs and is continuing and is actually known to a responsible officer of the trustee, the trustee must mail to each holder notice of the default within the earlier of 90 days after it occurs and 30 days after it is known by a responsible officer of the trustee or written notice of it is received by the trustee, unless such default has been cured or waived. Except in the case of a default in the payment of principal or premium of, or interest on, any debt security or certain other defaults specified in an indenture, the trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee or a trust committee of directors, or responsible officers of the trustee, in good faith determine that withholding notice is in the best interests of holders of the relevant series of debt securities.

Modification of Indenture; Waiver

Subject to the terms of the indenture for any series of debt securities that we may issue, we and the trustee may change an indenture without the consent of any holders with respect to the following specific matters:

to fix any ambiguity, defect or inconsistency in the indenture;

to comply with the provisions described above under Description of Debt Securities Consolidation, Merger or Sale;

to comply with any requirements of the SEC in connection with the qualification of any indenture under the Trust Indenture Act;

to add to, delete from or revise the conditions, limitations and restrictions on the authorized amount, terms or purposes of issue, authentication and delivery of debt securities, as set forth in the indenture;

to provide for the issuance of, and establish the form and terms and conditions of, the debt securities of any series as provided under Description of Debt Securities General, to establish the form of any certifications required to be furnished pursuant to the terms of the indenture or any series of debt securities, or to add to the rights of the holders of any series of debt securities;

to evidence and provide for the acceptance of appointment hereunder by a successor trustee;

to provide for uncertificated debt securities and to make all appropriate changes for such purpose;

to add such new covenants, restrictions, conditions or provisions for the benefit of the holders, to make the occurrence, or the occurrence and the continuance, of a default in any such additional covenants, restrictions,

conditions or provisions an event of default or to surrender any right or power conferred to us in the indenture; or

to change anything that does not adversely affect the interests of any holder of debt securities of any series in any material respect.

In addition, under the indentures, the rights of holders of a series of debt securities may be changed by us and the trustee with the written consent of the holders of at least a majority in aggregate principal amount of the outstanding debt securities of each series that is affected. However, subject to the terms of the indenture for any series of debt securities that we may issue or otherwise provided in the prospectus supplement applicable to a particular series of debt securities, we and the trustee may only make the following changes with the consent of each holder of any outstanding debt securities affected:

extending the stated maturity of the series of debt securities;

reducing the principal amount, reducing the rate of or extending the time of payment of interest, or reducing any premium payable upon the redemption or repurchase of any debt securities; or

reducing the percentage of debt securities, the holders of which are required to consent to any amendment, supplement, modification or waiver.

Table of Contents

Discharge

Each indenture provides that, subject to the terms of the indenture and any limitation otherwise provided in the prospectus supplement applicable to a particular series of debt securities, we may elect to be discharged from our obligations with respect to one or more series of debt securities, except for specified obligations, including obligations to:

register the transfer or exchange of debt securities of the series;

replace stolen, lost or mutilated debt securities of the series;

maintain paying agencies;

hold monies for payment in trust;

recover excess money held by the trustee;

compensate and indemnify the trustee; and

appoint any successor trustee.

In order to exercise our rights to be discharged, we must deposit with the trustee money or government obligations sufficient to pay all the principal of, and any premium and interest on, the debt securities of the series on the dates payments are due.

Form, Exchange and Transfer

We will issue the debt securities of each series only in fully registered form without coupons and, unless we otherwise specify in the applicable prospectus supplement, in denominations of $1,000 and any integral multiple thereof. The indentures provide that we may issue debt securities of a series in temporary or permanent global form and as book-entry securities that will be deposited with, or on behalf of, The Depository Trust Company or another depositary named by us and identified in a prospectus supplement with respect to that series. See Legal Ownership of Securities below for a further description of the terms relating to any book-entry securities.

At the option of the holder, subject to the terms of the indentures and the limitations applicable to global securities described in the applicable prospectus supplement, the holder of the debt securities of any series can exchange the debt securities for other debt securities of the same series, in any authorized denomination and of like tenor and aggregate principal amount.

Subject to the terms of the indentures and the limitations applicable to global securities set forth in the applicable prospectus supplement, holders of the debt securities may present the debt securities for exchange or for registration

of transfer, duly endorsed or with the form of transfer endorsed thereon duly executed if so required by us or the security registrar, at the office of the security registrar or at the office of any transfer agent designated by us for this purpose. Unless otherwise provided in the debt securities that the holder presents for transfer or exchange, we will make no service charge for any registration of transfer or exchange, but we may require payment of any taxes or other governmental charges.

We will name in the applicable prospectus supplement the security registrar, and any transfer agent in addition to the security registrar, that we initially designate for any debt securities. We may at any time designate additional transfer agents or rescind the designation of any transfer agent or approve a change in the office through which any transfer agent acts, except that we will be required to maintain a transfer agent in each place of payment for the debt securities of each series.

If we elect to redeem the debt securities of any series, we will not be required to:

issue, register the transfer of or exchange any debt securities of that series during a period beginning at the opening of business 15 days before the day of mailing of a notice of redemption of any debt securities that may be selected for redemption and ending at the close of business on the day of the mailing; or

Table of Contents

register the transfer of or exchange any debt securities so selected for redemption, in whole or in part, except the unredeemed portion of any debt securities we are redeeming in part.

Information Concerning the Trustee

The trustee, other than during the occurrence and continuance of an event of default under an indenture, undertakes to perform only those duties as are specifically set forth in the applicable indenture and is under no obligation to exercise any of the powers given it by the indentures at the request of any holder of debt securities unless it is offered reasonable security and indemnity against the costs, expenses and liabilities that it might incur. However, upon an event of default under an indenture, the trustee must use the same degree of care as a prudent person would exercise or use in the conduct of his or her own affairs.

Payment and Paying Agents

Unless we otherwise indicate in the applicable prospectus supplement, we will make payment of the interest on any debt securities on any interest payment date to the person in whose name the debt securities, or one or more predecessor securities, are registered at the close of business on the regular record date for the interest payment.

We will pay principal of and any premium and interest on the debt securities of a particular series at the office of the paying agents designated by us, except that unless we otherwise indicate in the applicable prospectus supplement, we will make interest payments by check that we will mail to the holder or by wire transfer to certain holders. Unless we otherwise indicate in the applicable prospectus supplement, we will designate the corporate trust office of the trustee as our sole paying agent for payments with respect to debt securities of each series. We will name in the applicable prospectus supplement any other paying agents that we initially designate for the debt securities of a particular series. We will maintain a paying agent in each place of payment for the debt securities of a particular series.

All money we pay to a paying agent or the trustee for the payment of the principal of or any premium or interest on any debt securities that remains unclaimed at the end of two years after such principal, premium or interest has become due and payable will be repaid to us, and the holder of the debt security thereafter may look only to us for payment thereof.

Governing Law

The indentures and the debt securities will be governed by and construed in accordance with the laws of the State of New York, except to the extent that the Trust Indenture Act is applicable.

Ranking Debt Securities

The subordinated debt securities will be unsecured and will be subordinate and junior in priority of payment to certain other indebtedness to the extent described in a prospectus supplement. The subordinated indenture does not limit the amount of subordinated debt securities that we may issue. It also does not limit us from issuing any other secured or unsecured debt.

The senior debt securities will be unsecured and will rank equally in right of payment to all our other senior unsecured debt. The senior indenture does not limit the amount of senior debt securities that we may issue. It also does not limit us from issuing any other secured or unsecured debt.

20

Table of Contents

DESCRIPTION OF WARRANTS

The following description, together with the additional information we may include in any applicable prospectus supplements and free writing prospectuses, summarizes the material terms and provisions of the warrants that we may offer under this prospectus, which may consist of warrants to purchase common stock, preferred stock or debt securities and may be issued in one or more series. Warrants may be offered independently or together with common stock, preferred stock or debt securities offered by any prospectus supplement, and may be attached to or separate from those securities. While the terms we have summarized below will apply generally to any warrants that we may offer under this prospectus, we will describe the particular terms of any series of warrants that we may offer in more detail in the applicable prospectus supplement and any applicable free writing prospectus. The terms of any warrants offered under a prospectus supplement may differ from the terms described below. However, no prospectus supplement will fundamentally change the terms that are set forth in this prospectus or offer a security that is not registered and described in this prospectus at the time of its effectiveness.

We will issue the warrants under a warrant agreement that we will enter into with a warrant agent to be selected by us. The warrant agent will act solely as an agent of ours in connection with the warrants and will not act as an agent for the holders or beneficial owners of the warrants. We will file as exhibits to the registration statement of which this prospectus is a part, or will incorporate by reference from a current report on Form 8-K that we file with the SEC, the form of warrant agreement, including a form of warrant certificate, that describes the terms of the particular series of warrants we are offering before the issuance of the related series of warrants. The following summaries of material provisions of the warrants and the warrant agreements are subject to, and qualified in their entirety by reference to, all the provisions of the warrant agreement and warrant certificate applicable to a particular series of warrants. We urge you to read the applicable prospectus supplement and any applicable free writing prospectus related to the particular series of warrants that we sell under this prospectus, as well as the complete warrant agreements and warrant certificates that contain the terms of the warrants.

General

We will describe in the applicable prospectus supplement the terms relating to a series of warrants, including:

- the offering price and aggregate number of warrants offered;
- the currency for which the warrants may be purchased;
- if applicable, the designation and terms of the securities with which the warrants are issued and the number of warrants issued with each such security or each principal amount of such security;
- if applicable, the date on and after which the warrants and the related securities will be separately transferable;
- in the case of warrants to purchase debt securities, the principal amount of debt securities purchasable upon exercise of one warrant and the price at, and currency in which, this principal amount of debt securities may

be purchased upon such exercise;

in the case of warrants to purchase common stock or preferred stock, the number of shares of common stock or preferred stock, as the case may be, purchasable upon the exercise of one warrant and the price at which these shares may be purchased upon such exercise;

the effect of any merger, consolidation, sale or other disposition of our business on the warrant agreements and the warrants;

the terms of any rights to redeem or call the warrants;

any provisions for changes to or adjustments in the exercise price or number of securities issuable upon exercise of the warrants;

Table of Contents

- the dates on which the right to exercise the warrants will commence and expire;
- the manner in which the warrant agreements and warrants may be modified;
- United States federal income tax consequences of holding or exercising the warrants;
- the terms of the securities issuable upon exercise of the warrants; and
- any other specific terms, preferences, rights or limitations of or restrictions on the warrants.

Before exercising their warrants, holders of warrants will not have any of the rights of holders of the securities purchasable upon such exercise, including:

- in the case of warrants to purchase debt securities, the right to receive payments of principal of, or premium, if any, or interest on, the debt securities purchasable upon exercise or to enforce covenants in the applicable indenture; or
- in the case of warrants to purchase common stock or preferred stock, the right to receive dividends, if any, or payments upon our liquidation, dissolution or winding up or to exercise voting rights, if any.

Exercise of Warrants

Each warrant will entitle the holder to purchase the securities that we specify in the applicable prospectus supplement at the exercise price that we describe in the applicable prospectus supplement. Unless we otherwise specify in the applicable prospectus supplement, holders of the warrants may exercise the warrants at any time up to the specified time on the expiration date that we set forth in the applicable prospectus supplement. After the close of business on the expiration date, unexercised warrants will become void.

Holders of the warrants may exercise the warrants by delivering the warrant certificate representing the warrants to be exercised together with specified information, and paying the required amount to the warrant agent in immediately available funds, as provided in the applicable prospectus supplement. We will set forth on the reverse side of the warrant certificate and in the applicable prospectus supplement the information that the holder of the warrant will be required to deliver to the warrant agent.

Upon receipt of the required payment and the warrant certificate properly completed and duly executed at the corporate trust office of the warrant agent or any other office indicated in the applicable prospectus supplement, we will issue and deliver the securities purchasable upon such exercise. If fewer than all of the warrants represented by the warrant certificate are exercised, then we will issue a new warrant certificate for the remaining amount of warrants. If we so indicate in the applicable prospectus supplement, holders of the warrants may surrender securities as all or part of the exercise price for warrants.

Enforceability of Rights by Holders of Warrants

Each warrant agent will act solely as our agent under the applicable warrant agreement and will not assume any obligation or relationship of agency or trust with any holder of any warrant. A single bank or trust company may act as warrant agent for more than one issue of warrants. A warrant agent will have no duty or responsibility in case of any default by us under the applicable warrant agreement or warrant, including any duty or responsibility to initiate any proceedings at law or otherwise, or to make any demand upon us. Any holder of a warrant may, without the consent of the related warrant agent or the holder of any other warrant, enforce by appropriate legal action its right to exercise, and receive the securities purchasable upon exercise of, its warrants.

Table of Contents

DESCRIPTION OF UNITS

The following description, together with the additional information we may include in any applicable prospectus supplements and free writing prospectuses, summarizes the material terms and provisions of the units that we may offer under this prospectus. While the terms we have summarized below will apply generally to any units that we may offer under this prospectus, we will describe the particular terms of any series of units in more detail in the applicable prospectus supplement. The terms of any units offered under a prospectus supplement may differ from the terms described below. However, no prospectus supplement will fundamentally change the terms that are set forth in this prospectus or offer a security that is not registered and described in this prospectus at the time of its effectiveness.

We will file as exhibits to the registration statement of which this prospectus is a part, or will incorporate by reference from a current report on Form 8-K that we file with the SEC, the form of unit agreement that describes the terms of the series of units we are offering, and any supplemental agreements, before the issuance of the related series of units. The following summaries of material terms and provisions of the units are subject to, and qualified in their entirety by reference to, all the provisions of the unit agreement and any supplemental agreements applicable to a particular series of units. We urge you to read the applicable prospectus supplements related to the particular series of units that we sell under this prospectus, as well as the complete unit agreement and any supplemental agreements that contain the terms of the units.

General

We may issue units comprised of one or more debt securities, shares of common stock, shares of preferred stock and warrants in any combination. Each unit will be issued so that the holder of the unit is also the holder of each security included in the unit. Thus, the holder of a unit will have the rights and obligations of a holder of each included security. The unit agreement under which a unit is issued may provide that the securities included in the unit may not be held or transferred separately, at any time or at any time before a specified date.

We will describe in the applicable prospectus supplement the terms of the series of units, including:

- the designation and terms of the units and of the securities comprising the units, including whether and under what circumstances those securities may be held or transferred separately;
- any provisions of the governing unit agreement that differ from those described below; and
- any provisions for the issuance, payment, settlement, transfer or exchange of the units or of the securities comprising the units.

The provisions described in this section, as well as those described under Description of Capital Stock, Description of Debt Securities and Description of Warrants will apply to each unit and to any common stock, preferred stock, debt security or warrant included in each unit, respectively.

Issuance in Series

We may issue units in such amounts and in numerous distinct series as we determine.

Enforceability of Rights by Holders of Units

Each unit agent will act solely as our agent under the applicable unit agreement and will not assume any obligation or relationship of agency or trust with any holder of any unit. A single bank or trust company may act as unit agent for more than one series of units. A unit agent will have no duty or responsibility in case of any default by us under the applicable unit agreement or unit, including any duty or responsibility to initiate any proceedings at law or otherwise, or to make any demand upon us. Any holder of a unit may, without the consent of the related unit agent or the holder of any other unit, enforce by appropriate legal action its rights as holder under any security included in the unit.

We, the unit agents and any of their agents may treat the registered holder of any unit certificate as an absolute owner of the units evidenced by that certificate for any purpose and as the person entitled to exercise the rights attaching to the units so requested, despite any notice to the contrary. See Legal Ownership of Securities.

Table of Contents

LEGAL OWNERSHIP OF SECURITIES

We can issue securities in registered form or in the form of one or more global securities. We describe global securities in greater detail below. We refer to those persons who have securities registered in their own names on the books that we or any applicable trustee or depositary or warrant agent maintain for this purpose as the holders of those securities. These persons are the legal holders of the securities. We refer to those persons who, indirectly through others, own beneficial interests in securities that are not registered in their own names, as indirect holders of those securities. As we discuss below, indirect holders are not legal holders, and investors in securities issued in book-entry form or in street name will be indirect holders.

Book-Entry Holders

We may issue securities in book-entry form only, as we will specify in the applicable prospectus supplement. This means securities may be represented by one or more global securities registered in the name of a financial institution that holds them as depositary on behalf of other financial institutions that participate in the depositary s book-entry system. These participating institutions, which are referred to as participants, in turn, hold beneficial interests in the securities on behalf of themselves or their customers.

Only the person in whose name a security is registered is recognized as the holder of that security. Global securities will be registered in the name of the depositary or its participants. Consequently, for global securities, we will recognize only the depositary as the holder of the securities, and we will make all payments on the securities to the depositary. The depositary passes along the payments it receives to its participants, which in turn pass the payments along to their customers who are the beneficial owners. The depositary and its participants do so under agreements they have made with one another or with their customers; they are not obligated to do so under the terms of the securities.

As a result, investors in a global security will not own securities directly. Instead, they will own beneficial interests in a global security, through a bank, broker or other financial institution that participates in the depositary s book-entry system or holds an interest through a participant. As long as the securities are issued in global form, investors will be indirect holders, and not legal holders, of the securities.

Street Name Holders

We may terminate a global security or issue securities that are not issued in global form. In these cases, investors may choose to hold their securities in their own names or in street name. Securities held by an investor in street name would be registered in the name of a bank, broker or other financial institution that the investor chooses, and the investor would hold only a beneficial interest in those securities through an account he or she maintains at that institution.

For securities held in street name, we or any applicable trustee or depositary will recognize only the intermediary banks, brokers and other financial institutions in whose names the securities are registered as the holders of those securities, and we or any such trustee or depositary will make all payments on those securities to them. These institutions pass along the payments they receive to their customers who are the beneficial owners, but only because they agree to do so in their customer agreements or because they are legally required to do so. Investors who hold securities in street name will be indirect holders, not legal holders, of those securities.

Legal Holders

Our obligations, as well as the obligations of any applicable trustee or third party employed by us or a trustee, run only to the legal holders of the securities. We do not have obligations to investors who hold beneficial interests in global securities, in street name or by any other indirect means. This will be the case whether an investor chooses to be an indirect holder of a security or has no choice because we are issuing the securities only in global form.

Table of Contents

For example, once we make a payment or give a notice to the holder, we have no further responsibility for the payment or notice even if that holder is required, under agreements with its participants or customers or by law, to pass it along to the indirect holders but does not do so. Similarly, we may want to obtain the approval of the holders to amend an indenture, to relieve us of the consequences of a default or of our obligation to comply with a particular provision of an indenture, or for other purposes. In such an event, we would seek approval only from the legal holders, and not the indirect holders, of the securities. Whether and how the legal holders contact the indirect holders is up to the legal holders.

Special Considerations for Indirect Holders

If you hold securities through a bank, broker or other financial institution, either in book-entry form because the securities are represented by one or more global securities or in street name, you should check with your own institution to find out:

- how it handles securities payments and notices;
- whether it imposes fees or charges;
- how it would handle a request for the holders consent, if ever required;
- whether and how you can instruct it to send you securities registered in your own name so you can be a legal holder, if that is permitted in the future;
- how it would exercise rights under the securities if there were a default or other event triggering the need for holders to act to protect their interests; and
- if the securities are in book-entry form, how the depositary s rules and procedures will affect these matters.

Global Securities

A global security is a security that represents one or any other number of individual securities held by a depositary. Generally, all securities represented by the same global securities will have the same terms.

Each security issued in book-entry form will be represented by a global security that we issue to, deposit with and register in the name of a financial institution or its nominee that we select. The financial institution that we select for this purpose is called the depositary. Unless we specify otherwise in the applicable prospectus supplement, The Depository Trust Company, New York, New York, known as DTC, will be the depositary for all securities issued in book-entry form.

A global security may not be transferred to or registered in the name of anyone other than the depositary, its nominee or a successor depositary, unless special termination situations arise. We describe those situations below under Special Situations When A Global Security Will Be Terminated. As a result of these arrangements, the depositary, or its

nominee, will be the sole registered owner and legal holder of all securities represented by a global security, and investors will be permitted to own only beneficial interests in a global security. Beneficial interests must be held by means of an account with a broker, bank or other financial institution that in turn has an account with the depositary or with another institution that does. Thus, an investor whose security is represented by a global security will not be a legal holder of the security, but only an indirect holder of a beneficial interest in the global security.

If the prospectus supplement for a particular security indicates that the security will be issued as a global security, then the security will be represented by a global security at all times unless and until the global security is terminated. If termination occurs, we may issue the securities through another book-entry clearing system or decide that the securities may no longer be held through any book-entry clearing system.

Table of Contents

Special Considerations For Global Securities

As an indirect holder, an investor s rights relating to a global security will be governed by the account rules of the investor s financial institution and of the depositary, as well as general laws relating to securities transfers. We do not recognize an indirect holder as a holder of securities and instead deal only with the depositary that holds the global security.

If securities are issued only as global securities, an investor should be aware of the following:

- an investor cannot cause the securities to be registered in his or her name, and cannot obtain non-global certificates for his or her interest in the securities, except in the special situations we describe below;
- an investor will be an indirect holder and must look to his or her own bank or broker for payments on the securities and protection of his or her legal rights relating to the securities, as we describe above;
- an investor may not be able to sell interests in the securities to some insurance companies and to other institutions that are required by law to own their securities in non-book-entry form;
- an investor may not be able to pledge his or her interest in the global security in circumstances where certificates representing the securities must be delivered to the lender or other beneficiary of the pledge in order for the pledge to be effective;
- the depositary s policies, which may change from time to time, will govern payments, transfers, exchanges and other matters relating to an investor s interest in the global security. We and any applicable trustee have no responsibility for any aspect of the depositary s actions or for its records of ownership interests in the global security. We and the trustee also do not supervise the depositary in any way;
- the depositary may, and we understand that DTC will, require that those who purchase and sell interests in the global security within its book-entry system use immediately available funds, and your broker or bank may require you to do so as well; and
- financial institutions that participate in the depositary s book-entry system, and through which an investor holds its interest in the global security, may also have their own policies affecting payments, notices and other matters relating to the securities. There may be more than one financial intermediary in the chain of ownership for an investor. We do not monitor and are not responsible for the actions of any of those intermediaries.

Special Situations When A Global Security Will Be Terminated

In a few special situations described below, a global security will terminate and interests in it will be exchanged for physical certificates representing those interests. After that exchange, the choice of whether to hold securities directly

or in street name will be up to the investor. Investors must consult their own banks or brokers to find out how to have their interests in securities transferred to their own names, so that they will be direct holders. We have described the rights of holders and street name investors above.

A global security will terminate when the following special situations occur:

- if the depositary notifies us that it is unwilling, unable or no longer qualified to continue as depositary for that global security and we do not appoint another institution to act as depositary within 90 days;

- if we notify any applicable trustee that we wish to terminate that global security; or

- if an event of default has occurred with regard to securities represented by that global security and has not been cured or waived.

The applicable prospectus supplement may also list additional situations for terminating a global security that would apply only to the particular series of securities covered by the prospectus supplement. When a global security terminates, the depositary, and neither we nor any applicable trustee, is responsible for deciding the names of the institutions that will be the initial direct holders.

Table of Contents

PLAN OF DISTRIBUTION

We may sell the securities being offered hereby in one or more of the following ways from time to time:

- through agents to the public or to investors;
- to underwriters for resale to the public or to investors;
- in at the market offerings, within the meaning of Rule 415(a)(4) of the Securities Act, to or through a market maker or into an existing trading market on an exchange or otherwise;
- directly to investors; or
- through a combination of any of these methods of sale.

We will set forth in a prospectus supplement the terms of that particular offering of securities, including:

- the name or names of any agents or underwriters;
- the purchase price of the securities being offered and the proceeds we will receive from the sale;
- any over-allotment options under which underwriters may purchase additional securities from us;
- any agency fees or underwriting discounts and other items constituting agents or underwriters compensation;
- any initial public offering price;
- any discounts or concessions allowed or reallowed or paid to dealers; and
- any securities exchanges or markets on which such securities may be listed.

Agents

We may designate agents who agree to use their reasonable efforts to solicit purchases of our securities for the period of their appointment or to sell our securities on a continuing basis.

Underwriters

If we use underwriters for a sale of securities, the underwriters will acquire the securities for their own account. The underwriters may resell the securities in one or more transactions, including negotiated transactions, at a fixed public offering price or at varying prices determined at the time of sale. The obligations of the underwriters to purchase the securities will be subject to the conditions set forth in the applicable underwriting agreement. The underwriters will be obligated to purchase all the securities of the series offered if they purchase any of the securities of that series. We may change from time to time any initial public offering price and any discounts or concessions the underwriters allow or reallow or pay to dealers. We may use underwriters with whom we have a material relationship. We will describe the nature of any such relationship in any prospectus supplement naming any such underwriter. Only underwriters we name in the prospectus supplement are underwriters of the securities offered by the prospectus supplement.

Direct Sales

We may also sell securities directly to one or more purchasers without using underwriters or agents. Underwriters, dealers and agents that participate in the distribution of the securities may be underwriters as defined in the Securities Act, and any discounts or commissions they receive from us and any profit on their resale of the securities may be treated as underwriting discounts and commissions under the Securities Act. We will identify in the applicable prospectus supplement any underwriters, dealers or agents and will describe their compensation. We may have agreements with the underwriters, dealers and agents to indemnify them against specified civil liabilities, including liabilities under the Securities Act. Underwriters, dealers and agents may engage in transactions with or perform services for us in the ordinary course of their businesses.

Table of Contents

Trading Markets and Listing of Securities

Unless otherwise specified in the applicable prospectus supplement, each class or series of securities will be a new issue with no established trading market, other than our common stock and warrants, which are listed on the Nasdaq Global Market. We may elect to list any other class or series of securities on any exchange or market, but we are not obligated to do so. It is possible that one or more underwriters may make a market in a class or series of securities, but the underwriters will not be obligated to do so and may discontinue any market making at any time without notice. We cannot give any assurance as to the liquidity of the trading market for any of the securities.

Stabilization Activities

Any underwriter may engage in overallotment, stabilizing transactions, short covering transactions and penalty bids in accordance with Regulation M under the Securities Exchange Act of 1934, as amended, or the Exchange Act. Overallotment involves sales in excess of the offering size, which create a short position. Stabilizing transactions permit bids to purchase the underlying security so long as the stabilizing bids do not exceed a specified maximum. Short covering transactions involve purchases of the securities in the open market after the distribution is completed to cover short positions. Penalty bids permit the underwriters to reclaim a selling concession from a dealer when the securities originally sold by the dealer are purchased in a covering transaction to cover short positions. Those activities may cause the price of the securities to be higher than it would otherwise be. If commenced, the underwriters may discontinue any of these activities at any time.

Passive Market Making

Any underwriters who are qualified market makers on the Nasdaq Global Market may engage in passive market making transactions in the securities on the Nasdaq Global Market in accordance with Rule 103 of Regulation M, during the business day prior to the pricing of the offering, before the commencement of offers or sales of the securities. Passive market makers must comply with applicable volume and price limitations and must be identified as passive market makers. In general, a passive market maker must display its bid at a price not in excess of the highest independent bid for such security. If all independent bids are lowered below the passive market maker s bid, however, the passive market maker s bid must then be lowered when certain purchase limits are exceeded.

Table of Contents

LEGAL MATTERS

DLA Piper LLP (US), San Diego, California will pass for us upon the validity of the securities being offered by this prospectus and applicable prospectus supplement, and counsel named in the applicable prospectus supplement will pass upon legal matters for any underwriters, dealers or agents. Certain attorneys affiliated with DLA Piper LLP (US) collectively own an aggregate of 34,698 shares of our common stock.

EXPERTS

The consolidated financial statements of GenMark Diagnostics, Inc. appearing in the GenMark Diagnostic, Inc. s Annual Report (Form 10-K) for the year ended December 31, 2015, and the effectiveness of GenMark Diagnostics, Inc. internal control over financial reporting as of December 31, 2015 have been audited by Ernst & Young LLP, independent registered public accounting firm, as stated in their reports thereon, and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such reports given upon the authority of such firm as experts in accounting and auditing.

WHERE YOU CAN FIND ADDITIONAL INFORMATION

We are a reporting company and file annual, quarterly and current reports, proxy statements and other information with the SEC. We have filed with the SEC a registration statement on Form S-3 under the Securities Act with respect to the securities we are offering under this prospectus. This prospectus does not contain all of the information set forth in the registration statement and the exhibits to the registration statement. For further information with respect to us and the securities we are offering under this prospectus, we refer you to the registration statement and the exhibits and schedules filed as a part of the registration statement. You may read and copy the registration statement, as well as our reports, proxy statements and other information, at the SEC s Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549. You can request copies of these documents by writing to the SEC and paying a fee for the copying cost. Please call the SEC at 1-800-SEC-0330 for more information about the operation of the Public Reference Room. The SEC maintains an internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC, where our SEC filings are also available. The address of the SEC s web site is http://www.sec.gov. We maintain a website at http://www.genmarkdx.com. Information contained in or accessible through our website does not constitute a part of this prospectus.

INCORPORATION OF CERTAIN INFORMATION BY REFERENCE

The SEC allows us to incorporate by reference information that we file with it into this prospectus, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this prospectus. Information in this prospectus supersedes information incorporated by reference that we filed with the SEC prior to the date of this prospectus, while information that we file later with the SEC will automatically update and supersede the information in this prospectus. We incorporate by reference into this registration statement and prospectus the following documents, and any future filings we will make with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act after the date of the initial registration statement but prior to effectiveness of the registration statement and after the date of this prospectus but prior to the termination of the offering of the securities covered by this prospectus (other than current reports or portions thereof furnished under Item 2.02 or Item 7.01 of Form 8-K):

Our Annual Report on Form 10-K for the year ended December 31, 2015, filed with the SEC on February 23, 2016, including the information specifically incorporated by reference into the Annual Report on Form 10-K from our definitive proxy statement for the 2016 Annual Meeting of Stockholders;

Table of Contents

Our Quarterly Report on Form 10-Q for the quarter ended March 31, 2016, filed with the SEC on May 3, 2016;

Our Current Reports on Form 8-K filed with the SEC on February 3, 2016, February 24, 2016, March 24, 2016, and June 8, 2016; and

The description of our common stock contained in our registration statement on Form 8-A filed with the SEC on May 24, 2010, and any amendment or report filed with the SEC for the purpose of updating the description.

We will provide each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the information that has been incorporated by reference into this prospectus but not delivered with this prospectus upon written or oral request at no cost to the requester. Requests should be directed to: GenMark Diagnostics, Inc., 5964 La Place Court, Carlsbad, CA 92008, Telephone: (760) 448-4300.

Table of Contents

$125,000,000

Common Stock

Preferred Stock

Debt Securities

Warrants

Units

Prospectus

, 2016

Table of Contents

The information in this prospectus is not complete and may be changed. These securities may not be sold until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell nor does it seek an offer to buy these securities in any jurisdiction where the offer or sale is not permitted.

Subject to completion, dated June 14, 2016

Prospectus

Up to $30,000,000 of Shares

Common stock

We have entered into an equity distribution agreement with Canaccord Genuity Inc. relating to shares of our common stock offered by this prospectus. In accordance with the terms of the equity distribution agreement, under this prospectus we may offer and sell shares of our common stock, $0.0001 par value per share, having an aggregate offering price of up to $30,000,000 from time to time through Canaccord Genuity Inc., acting as sales agent.

Our common stock is listed on the Nasdaq Global Market under the symbol GNMK. On June 13, 2016, the last reported sale price of our common stock on the Nasdaq Global Market was $8.74 per share.

Sales of our common stock, if any, under this prospectus may be made in sales deemed to be at-the-market equity offerings as defined in Rule 415 promulgated under the Securities Act of 1933, as amended, or the Securities Act, including sales made directly on or through the Nasdaq Global Market, the existing trading market for our common stock, sales made to or through a market maker other than on an exchange or otherwise, in negotiated transactions at market prices prevailing at the time of sale or at prices related to such prevailing market prices, and/or any other method permitted by law, including in privately negotiated transactions. While there is no requirement that Canaccord Genuity Inc. sell any specific number or dollar amount of securities, it will act as sales agent on a best efforts basis and use commercially reasonable efforts to sell on our behalf all of the shares of common stock requested to be sold by us, consistent with its normal trading and sales practices, on mutually agreed terms between Canaccord Genuity Inc. and us. There is no arrangement for funds to be received in any escrow, trust or similar arrangement.

Canaccord Genuity Inc. will be entitled to compensation at a fixed commission rate of 3.0% of the gross sales price per share sold. In connection with the sale of our common stock on our behalf, Canaccord Genuity Inc. may be deemed to be an underwriter within the meaning of the Securities Act and the compensation of Canaccord Genuity Inc. may be deemed to be underwriting commissions or discounts.

INVESTING IN OUR COMMON STOCK INVOLVES RISK. SEE RISK FACTORS BEGINNING ON PAGE 6.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

Canaccord Genuity

Table of Contents

TABLE OF CONTENTS

Table of Contents

ABOUT THIS PROSPECTUS

This prospectus relates to the offering of our common stock. Before buying any of the common stock that we are offering, we urge you to carefully read this prospectus, together with the information incorporated by reference as described under the heading Where You Can Find More Information and Information Incorporated by Reference. This equity distribution agreement prospectus is deemed a prospectus supplement to the base prospectus contained in the registration statement of which this prospectus forms a part. These documents contain important information that you should consider when making your investment decision.

This prospectus describes the specific terms of the common stock we are offering and also adds to and updates information contained in the documents incorporated by reference into this prospectus. To the extent there is a conflict between the information contained in this prospectus, on the one hand, and the information contained in any document incorporated by reference in this prospectus, on the other hand, you should rely on the information in this prospectus. If any statement in one of these documents is inconsistent with a statement in another document having a later date for example, a document incorporated by reference into this prospectus the statement in the document having the later date modifies or supersedes the earlier statement.

You should rely only on the information contained in, or incorporated by reference into, this prospectus and in any free writing prospectus that we may authorize for use in connection with this offering. We have not, and Canaccord Genuity Inc., or Canaccord, has not, authorized any other person to provide you with different information. If anyone provides you with different or inconsistent information, you should not rely on it. We are not, and Canaccord is not, making an offer to sell or soliciting an offer to buy our securities in any jurisdiction where an offer or solicitation is not authorized or in which the person making that offer or solicitation is not qualified to do so or to anyone to whom it is unlawful to make an offer or solicitation. You should assume that the information appearing in this prospectus, the documents incorporated by reference into this prospectus, and in any free writing prospectus that we may authorize for use in connection with this offering, is accurate only as of the date of those respective documents. Our business, financial condition, results of operations and prospects may have changed since those dates. You should read this prospectus, the documents incorporated by reference into this prospectus, and any free writing prospectus that we may authorize for use in connection with this offering, in their entirety before making an investment decision. You should also read and consider the information in the documents to which we have referred you in the sections of this prospectus entitled Where You Can Find More Information and Information Incorporated by Reference.

We are offering to sell, and seeking offers to buy, shares of common stock only in jurisdictions where offers and sales are permitted. The distribution of this prospectus and the offering of the common stock in certain jurisdictions may be restricted by law. Persons outside the United States who come into possession of this prospectus must inform themselves about, and observe any restrictions relating to, the offering of the common stock and the distribution of this prospectus outside the United States. This prospectus does not constitute, and may not be used in connection with, an offer to sell, or a solicitation of an offer to buy, any securities offered by this prospectus by any person in any jurisdiction in which it is unlawful for such person to make such an offer or solicitation.

When we refer to we, us, our, GenMark, the Company and similar designations, we are refering to GenMark Diagnostics, Inc. and its consolidated subsidiaries, unless otherwise indicated or as the context otherwise requires, unless otherwise specified. When we refer to you, we mean the holders of common stock of the Company.

GenMark®, eSensor®, XT-8® and ePlex® and our other logos and trademarks are the property of GenMark Diagnostics, Inc. or its subsidiaries. All other brand names or trademarks appearing in this prospectus are the property of their respective holders. Our use or display of other parties trademarks, trade dress or products in this prospectus does not imply that we have a relationship with, or the endorsement or sponsorship of, the trademark or trade dress

owners.

Table of Contents

MARKET, INDUSTRY AND OTHER DATA

This prospectus, including the information incorporated by reference, contains estimates, projections and other information concerning our industry, our business, and the markets for certain products, including data regarding the estimated size of those markets, their projected growth rates and the incidence of certain medical conditions. Information that is based on estimates, forecasts, projections or similar methodologies is based on a number of assumptions and is inherently subject to uncertainties, including those described in Risk Factors and elsewhere in this prospectus and documents incorporated by reference in this prospectus, and actual events or circumstances may differ materially from events and circumstances reflected in this information. You are cautioned not to give undue weight to such estimates, projections and other information.

Unless otherwise expressly stated, we obtained this industry, business, market and other data from reports, research surveys, studies and similar data prepared by third parties, industry, medical and general publications, government data and similar sources. In some cases, we do not expressly refer to the sources from which this data is derived. In that regard, when we refer to one or more sources of this type of data in any paragraph, you should assume that other data of this type appearing in the same paragraph is derived from the same sources, unless otherwise expressly stated or the context otherwise requires.

Table of Contents

PROSPECTUS SUMMARY

This summary provides a general overview of selected information and does not contain all of the information you should consider before buying our common stock. Therefore, you should read the entire prospectus and any free writing prospectus that we have authorized for use in connection with this offering carefully, including the information incorporated by reference, before deciding to invest in our common stock. Investors should carefully consider the information set forth under Risk Factors beginning on page S-6 and incorporated by reference to our annual report on Form 10-K and our quarterly reports on Form 10-Q.

Overview

We are a molecular diagnostics company focused on developing and commercializing our proprietary eSensor® detection technology. Our proprietary eSensor electrochemical technology enables fast, accurate and highly sensitive detection of multiple distinct biomarkers in a single sample. We are currently focused on developing and commercializing eSensor-based instruments and diagnostic tests for performing highly multiplexed reactions to simultaneously detect numerous, clinically relevant pathogens and/or genetic markers in rapidly expanding market segments. We currently sell our XT-8 instrument and related diagnostic and research tests, which collectively we refer to as our XT-8 system, in the United States. In addition, we have developed and intend to commercially launch our sample-to-answer ePlex instrument and its associated diagnostic tests, which we collectively refer to as our ePlex system, in Europe and the United States during 2016.

Our XT-8 system received 510(k) clearance from the United States Food and Drug Administration, or FDA, and is designed to support a broad range of molecular diagnostic and research tests with a compact and easy-to-use workstation and disposable test cartridges. Our XT-8 system supports up to 24 separate test cartridges, each of which can be run independently, resulting in a highly convenient and flexible workflow for our XT-8 customers, which are primarily hospitals and reference laboratories.

Since inception, we have incurred net losses from operations each year, and we expect to continue to incur losses for the foreseeable future. Our net losses for the three months ended March 31, 2016 and 2015 were approximately $12,958,000 and $9,869,000, respectively. As of March 31, 2016, we had an accumulated deficit of $317,627,000. Our operations to date have been funded principally through sales of capital stock, borrowings and cash from operations. We expect to incur increasing expenses over the next several years, principally to develop and commercialize our ePlex system and additional diagnostic tests, as well as to further increase our manufacturing capabilities and domestic and international commercial organization.

Our Products and Technology

We have a menu of eight tests for use with our XT-8 instrument. Four diagnostic tests which run on our XT-8 instrument have received FDA clearance: our Respiratory Viral Panel; our Cystic Fibrosis Genotyping Test; our Warfarin Sensitivity Test; and our Thrombophilia Risk Test. We have also developed a number of hepatitis C virus, or HCV, genotyping tests and custom manufactured reagents, as well as other research-based and pharmacogenomics products, versions of which are available for use with our XT-8 instrument for research use only (RUO).

In addition, we have developed our sample-to-answer ePlex instrument, which integrates automated nucleic acid extraction and amplification with our eSensor detection technology to enable operators using ePlex to place a raw or a minimally prepared patient sample directly into our test cartridge and obtain results without any additional steps. This sample-to-answer capability is enabled by the robust nature of our eSensor detection technology, which is not impaired by sample impurities that we believe hinder competing technologies. We have designed our ePlex system to

further simplify workflow and provide powerful, cost-effective molecular diagnostics

Table of Contents

solutions to a significantly expanded group of hospitals and reference laboratories. We have initiated development programs for seven assays for our ePlex instrument, which include: a respiratory panel (RP); gram-positive (GP), gram-negative (GN), and fungal pathogen (FP) blood culture identification panels; a gastrointestinal (GI) pathogen panel; an HCV genotyping test (HCVg); and a central nervous system (CNS) panel. We intend to continue investing in our ePlex system and its related test menu for the foreseeable future.

Recent Developments

ePlex System CE Mark

On June 8, 2016, we announced that we have achieved CE Mark under the European In-Vitro Diagnostic Devices Directive (98/79/EC) for our ePlex Instrument System and ePlex Respiratory Pathogen (RP) Panel.

Loan and Security Agreement

On June 10, 2016, we borrowed an additional $10,000,000, or Term Loan B, pursuant to the terms of our Loan and Security Agreement, or the Agreement, with Solar Senior Capital, Ltd. (as successor-in-interest to General Electric Capital Corporation) following our satisfaction of regulatory requirements necessary to CE Mark our ePlex® system in Europe. Amounts borrowed under Term Loan B will accrue interest at a rate equal to 1.00%, plus (b) an applicable margin between 4.95% and 5.90% per annum based on certain criteria set forth in the Agreement. We are only required to make interest payments on amounts borrowed pursuant to Term Loan B until March 1, 2017, or the Interest Only Period. Following the Interest Only Period, monthly installments of principal and interest under Term Loan B will be due until the original principal amount and applicable interest is fully repaid by January 12, 2019.

Corporate Information

GenMark Diagnostics, Inc. was formed by Osmetech plc, a Delaware corporation, in February 2010. We had no operations prior to our initial public offering, which was completed in June 2010. Our principal corporate offices are located at 5964 La Place Court, Carlsbad, California 92008 and our telephone number is (760) 448-4300. We were incorporated in Delaware in February 2010. Our internet address is www.genmarkdx.com. The information found on our Internet site is not part of this prospectus. Our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K, and amendments to reports filed pursuant to Sections 13(a) and 15(d) of the Securities Exchange Act of 1934, as amended, or the Exchange Act, will be made available free of charge on our website as soon as reasonably practicable after we electronically file such material with, or furnish it to, the SEC.

Table of Contents

THE OFFERING

Common stock offered by us	Shares of our common stock having an aggregate offering price of up to $30,000,000.
Common stock to be outstanding after this offering	Up to 3,432,494 shares (as more fully described in the notes following this table) of our common stock in this offering at an assumed offering price of $8.74 per share, which was the last reported sale price of our common stock on the Nasdaq Global Market on June 13, 2016, for aggregate proceeds of up to $30,000,000. The actual number of shares issued will vary depending on the sales price under this offering.
Manner of offering	At-the-market offering that may be made from time to time through our sales agent, Canaccord Genuity Inc. See Plan of Distribution on page S-11.
Use of proceeds	We intend to use the net proceeds from this offering, if any, for general corporate purposes, which may include, among other things, increasing our working capital and funding research and development, and capital expenditures. See Use of Proceeds on page S-9.
Risk factors	You should read the Risk Factors section of this prospectus and in the documents incorporated by reference in this prospectus for a discussion of factors to consider before deciding to purchase shares of our common stock.
Symbol on the Nasdaq Global Market	GNMK

The number of shares of common stock to be outstanding after this offering is based on 42,787,585 shares of common stock outstanding as of March 31, 2016, and excludes, in each case as of March 31, 2016:

- 2,875,220 shares of common stock issuable upon the exercise of outstanding stock options, having a weighted average exercise price of $9.78 per share
- 2,382,999 shares of common stock issuable upon the vesting of outstanding restricted stock units, market-based stock units, and performance stock units; and

618,893 shares of common stock reserved for issuance under the 2010 Equity Incentive Plan and the 2013 Employee Stock Purchase Plan.

Unless otherwise stated, all information contained in this prospectus reflects an assumed public offering price of $8.74 per share, which was the last reported sale price of our common stock on the Nasdaq Global Market on June 13, 2016.

Table of Contents

RISK FACTORS

You should consider carefully the risks described below and discussed under the section captioned Risk Factors contained in our annual report on Form 10-K for the year ended December 31, 2015 and in our quarterly report for the quarterly period ended March 31, 2016, as updated by our subsequent filings under the Exchange Act, each of which is incorporated by reference in this prospectus in their entirety, together with other information in this prospectus, and the information and documents incorporated by reference in this prospectus, and any free writing prospectus that we have authorized for use in connection with this offering before you make a decision to invest in our common stock. If any of the following events actually occur, our business, operating results, prospects or financial condition could be materially and adversely affected. This could cause the trading price of our common stock to decline and you may lose all or part of your investment. The risks described below are not the only ones that we face. Additional risks not presently known to us or that we currently deem immaterial may also affect our business operations.

Risks Relating to this Offering

Resales of our common stock in the public market during this offering by our stockholders may cause the market price of our common stock to fall.

We may issue common stock from time to time in connection with this offering. The issuance from time to time of these new shares of our common stock, or our ability to issue new shares of common stock in this offering, could result in resales of our common stock by our current stockholders concerned about the potential dilution of their holdings. In turn, these resales could have the effect of depressing the market price for our common stock.

You may experience immediate and substantial dilution in the net tangible book value per share of the common stock you purchase.

The price per share of our common stock being offered may be higher than the net tangible book value per share of our common stock outstanding prior to this offering. Assuming that an aggregate of 3,432,494 shares are sold at a price of $8.74 per share, the last reported sale price of our common stock on the Nasdaq Global Market on June 13, 2016, for aggregate proceeds of $30,000,000 in this offering, and after deducting commissions and estimated aggregate offering expenses payable by us, you will suffer immediate and substantial dilution of $7.33 per share, representing the difference between the as adjusted net tangible book value per share of our common stock as March 31, 2016 after giving effect to this offering and the assumed offering price. See the section entitled Dilution below for a more detailed discussion of the dilution you will incur if you purchase common stock in this offering.

You may experience future dilution as a result of future equity offerings.

In order to raise additional capital, we may in the future offer additional shares of our common stock or other securities convertible into or exchangeable for our common stock. We cannot assure you that we will be able to sell shares or other securities in any other offering at a price per share that is equal to or greater than the price per share paid by investors in this offering, and investors purchasing shares or other securities in the future could have rights superior to existing stockholders. The price per share at which we sell additional shares of our common stock or other securities convertible into or exchangeable for our common stock in future transactions may be higher or lower than the price per share in this offering.

If securities and/or industry analysts fail to continue publishing research about our business, if they change their recommendations adversely or if our results of operations do not meet their expectations, our stock price and

trading volume could decline.

The trading market for our common stock will be influenced by the research and reports that industry or securities analysts publish about us or our business. If one or more of these analysts cease coverage of our

Table of Contents

company or fail to publish reports on us regularly, we could lose visibility in the financial markets, which in turn could cause our stock price or trading volume to decline. In addition, it is likely that in some future period our operating results will be below the expectations of securities analysts or investors. If one or more of the analysts who cover us downgrade our stock, or if our results of operations do not meet their expectations, our stock price could decline.

Our management team may invest or spend the proceeds of this offering in ways with which you may not agree or in ways which may not yield a significant return.

Our management will have broad discretion over the use of proceeds from this offering. The net proceeds from this offering will be used for general corporate purposes, which may include, among other things, increasing our working capital and funding research and development, and capital expenditures as more fully described in the section entitled Use of Proceeds. You will not have the opportunity, as part of your investment decision, to assess whether the proceeds are being used appropriately. The net proceeds may be used for corporate purposes that do not increase our operating results or enhance the value of our common stock. Because of the number and variability of factors that will determine our use of the net proceeds from this offering, their ultimate use may vary substantially from their currently intended use. The failure by our management to apply these funds effectively could harm our business. Pending their use, we may invest the net proceeds from this offering in short-term, investment-grade, interest-bearing securities. These investments may not yield a favorable return to our stockholders. If we do not invest or apply the net proceeds from this offering in ways that enhance stockholder value, we may fail to achieve expected financial results, which could cause our stock price to decline.

Because we do not intend to declare cash dividends on our shares of common stock in the foreseeable future, stockholders must rely on appreciation of the value of our common stock for any return on their investment.

We have never declared or paid cash dividends on our common stock. We currently anticipate that we will retain future earnings for the development, operation and expansion of our business and do not anticipate declaring or paying any cash dividends in the foreseeable future. In addition, the terms of any existing or future debt agreements may preclude us from paying dividends. As a result, we expect that only appreciation of the price of our common stock, if any, will provide a return to investors in this offering for the foreseeable future.

Table of Contents

SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

This prospectus and the documents incorporated herein by reference contain forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. These statements are based on our management s current beliefs, expectations and assumptions about future events, conditions and results and on information currently available to us. Discussions containing these forward-looking statements may be found, among other places, in the Sections entitled Business, Risk Factors and Management s Discussion and Analysis of Financial Condition and Results of Operations incorporated by reference from our most recent Annual Report on Form 10-K and in our Quarterly Report on Form 10-Q, as well as any amendments thereto, filed with the SEC. This prospectus and the documents incorporated by reference herein also contain estimates and other statistical data made by independent parties and by us relating to market size and growth and other data about our industry. This data involves a number of assumptions and limitations, and you are cautioned not to give undue weight to such estimates. In addition, projections, assumptions and estimates of our future performance and the future performance of the markets in which we operate are necessarily subject to a high degree of uncertainty and risk.

All statements, other than statements of historical fact, included or incorporated herein regarding our strategy, future operations, financial position, future revenues, projected costs, plans, prospects and objectives are forward-looking statements. Words such as expect, anticipate, intend, plan, believe, seek, estimate, think, may, coul should, continue, potential, likely, opportunity and similar expressions or variations of such words are intended t identify forward-looking statements, but are not the exclusive means of identifying forward-looking statements. Additionally, statements concerning future matters such as our expectations of business and market conditions, development and commercialization of new products, enhancements of existing products or technologies, and other statements regarding matters that are not historical are forward-looking statements. Such statements are based on currently available operating, financial and competitive information and are subject to various risks, uncertainties and assumptions that could cause actual results to differ materially from those anticipated or implied in our forward-looking statements due to a number of factors including, but not limited to, those set forth above under the section entitled Risk Factors in this prospectus. Given these risks, uncertainties and other factors, many of which are beyond our control, you should not place undue reliance on these forward-looking statements.

Except as required by law, we assume no obligation to update these forward-looking statements publicly, or to revise any forward-looking statements to reflect events or developments occurring after the date of this prospectus, even if new information becomes available in the future.

Table of Contents

USE OF PROCEEDS

We may issue and sell shares of our common stock having aggregate sales proceeds of up to $30,000,000 from time to time. The amount of proceeds from this offering will depend upon the number of shares of our common stock sold and the market price at which they are sold. There can be no assurance that we will be able to sell any shares under or fully utilize the equity distribution agreement with Canaccord as a source of financing. Because there is no minimum offering amount required as a condition to close this offering, the actual total public offering amount, commissions and proceeds to us, if any, are not determinable at this time.

We intend to use the net proceeds, if any, from this offering for general corporate purposes, which may include, among other things, increasing our working capital and funding research and development and capital expenditures.

As of the date of this prospectus, we cannot specify with certainty all of the particular uses of the net proceeds of this offering. Our management will have significant flexibility in applying the net proceeds from this offering, and investors will be relying on the judgment of our management regarding the application of these net proceeds. Pending the uses described above, we intend to invest the net proceeds from this offering in short-term, interest-bearing obligations, investment-grade instruments, certificates of deposit or direct or guaranteed obligations of the U.S. government.

DIVIDEND POLICY

We have never declared or paid any cash dividends on our capital stock and do not anticipate paying any cash dividends in the foreseeable future. We expect to retain available cash to finance ongoing operations and the potential growth of our business. Any future determination to pay dividends on our common stock will be at the discretion of our board of directors and will depend upon, among other factors, our results of operations, financial condition, capital requirements, business prospects and other factors our board of directors may deem relevant, and subject to the restrictions contained in any future financing instruments. In addition, our ability to pay dividends is currently restricted by the terms of a loan and security agreement we entered into with Solar Capital Partners in January 2015.

Table of Contents

DILUTION

Our net tangible book value as of March 31, 2016 was approximately $36.4 million, or $0.85 per share. Net tangible book value per share is determined by dividing our total tangible assets, less total liabilities, by the number of shares of our common stock outstanding as of March 31, 2016. Dilution in net tangible book value per share represents the difference between the amount per share paid by purchasers of shares of common stock in this offering and the as adjusted net tangible book value per share of our common stock immediately after giving effect to this offering.

After giving effect to the sale of our common stock in the aggregate amount of $30,000,000 in this offering at an assumed offering price of $8.74, the last reported sale price of our common stock on the Nasdaq Global Market on June 13, 2016, and after deducting commissions and estimated aggregate offering expenses payable by us, our as adjusted net tangible book value as of March 31, 2016 would have been approximately $65.2 million, or $1.41 per share. This represents an immediate increase in net tangible book value of $0.56 per share to existing stockholders and immediate dilution in net tangible book value of $7.33 per share to new investors purchasing our common stock in this offering. The following table illustrates this dilution on a per share basis:

Assumed public offering price per share		$ 8.74
Net tangible book value per share as of March 31, 2016	$ 0.85	
Increase per share attributable to the offering	$ 0.56	
As adjusted net tangible book value per share after this offering	$ 1.41	
Dilution per share to new investors		$ 7.33

The shares sold in this offering, if any, will be sold from time to time at various prices. An increase of $1.00 per share in the price at which the shares are sold from the assumed offering price of $8.74 per share shown in the table above, assuming all of our common stock in the aggregate amount of $30,000,000 is sold at that price, would cause our as adjusted net tangible book value per share after the offering to be $1.42 per share and would increase the dilution in net tangible book value per share to new investors to $8.32 per share, after deducting commissions and estimated aggregate offering expenses payable by us. A decrease of $1.00 per share in the price at which the shares are sold from the assumed offering price of $8.74 per share shown in the table above, assuming all of our common stock in the aggregate amount of $30,000,000 is sold at that price, would cause our as adjusted net tangible book value per share after the offering to be $1.40 per share and would decrease the dilution in net tangible book value per share to new investors to $6.34 per share, after deducting commissions and estimated aggregate offering expenses payable by us. This information is supplied for illustrative purposes only.

To the extent that outstanding options are exercised or outstanding restricted stock or market-based stock units vest, investors purchasing our common stock in this offering will experience further dilution. In addition, we may choose to raise additional capital due to market conditions or strategic considerations even if we believe we have sufficient funds for our current or future operating plans. To the extent that we raise additional capital through the sale of equity or convertible debt securities, the issuance of these securities could result in further dilution to our stockholders.

The above discussion and table are based on 42,787,585 shares of common stock outstanding as of March 31, 2016, and exclude as of that date:

2,875,220 shares of common stock issuable upon the exercise of outstanding stock options, having a weighted average exercise price of $9.78 per share

2,382,999 shares of common stock issuable upon the vesting of outstanding restricted stock units, market-based stock units, and performance stock units; and

618,893 shares of common stock reserved for issuance under the 2010 Equity Incentive Plan and the 2013 Employee Stock Purchase Plan.

Table of Contents

PLAN OF DISTRIBUTION

We have entered into an equity distribution agreement with Canaccord under which we may issue and sell shares of our common stock having an aggregate gross sales price of up to $30,000,000 from time to time through Canaccord acting as agent. The equity distribution agreement has been filed as an exhibit to our registration statement on Form S-3 of which this prospectus forms a part.

Upon delivery of a placement notice and subject to the terms and conditions of the equity distribution agreement, Canaccord may sell our common stock by any method permitted by law deemed to be an at-the-market offering as defined in Rule 415 promulgated under the Securities Act, including sales made directly on the Nasdaq Global Market, on any other existing trading market for our common stock or to or through a market maker. Canaccord may also sell our common stock by any other method permitted by law, including in privately negotiated transactions. We may instruct Canaccord not to sell common stock if the sales cannot be effected at or above the price designated by us from time to time. We or Canaccord may suspend the offering of common stock upon notice and subject to other conditions.

We will pay Canaccord commissions, in cash, for its services in acting as agent in the sale of our common stock. Canaccord will be entitled to compensation at a fixed commission rate of 3.0% of the gross sales price per share sold. Because there is no minimum offering amount required as a condition to close this offering, the actual total public offering amount, commissions and proceeds to us, if any, are not determinable at this time. We have also agreed to reimburse Canaccord for certain specified expenses, including the fees and disbursements of its legal counsel, in an amount not to exceed $50,000. We estimate that the total expenses for the offering, excluding compensation and reimbursement payable to Canaccord under the terms of the equity distribution agreement, will be approximately $250,000.

Settlement for sales of common stock will occur on the third business day following the date on which any sales are made, or on some other date that is agreed upon by us and Canaccord in connection with a particular transaction, in return for payment of the net proceeds to us. Sales of our common stock as contemplated in this prospectus will be settled through the facilities of The Depository Trust Company or by such other means as we and Canaccord may agree upon. There is no arrangement for funds to be received in an escrow, trust or similar arrangement.

Canaccord will use its commercially reasonable efforts, consistent with its sales and trading practices, to solicit offers to purchase the common stock shares under the terms and subject to the conditions set forth in the equity distribution agreement. In connection with the sale of the common stock on our behalf, Canaccord may be deemed to be an underwriter within the meaning of the Securities Act and the compensation of Canaccord may be deemed to be underwriting commissions or discounts. We have agreed to provide indemnification and contribution to Canaccord against certain civil liabilities, including liabilities under the Securities Act.

The offering of our common stock pursuant to the equity distribution agreement will terminate automatically upon the sale of all shares of our common stock subject to the equity distribution agreement or as otherwise permitted therein. We and Canaccord may each terminate the equity distribution agreement at any time upon ten days prior written notice.

Any portion of the $30,000,000 included in this prospectus that is not previously sold or included in an active placement notice pursuant to the equity distribution agreement is available for sale in other offerings pursuant to the base prospectus, and if no shares are sold under the equity distribution agreement, the full $30,000,000 of securities may be sold in other offerings pursuant to the base prospectus and a corresponding prospectus.

Canaccord and its affiliates may in the future provide various investment banking, commercial banking and other financial services for us and our affiliates, for which services they may in the future receive customary fees. To the extent required by Regulation M, Canaccord will not engage in any market making activities involving our common stock while the offering is ongoing under this prospectus.

This prospectus in electronic format may be made available on a website maintained by Canaccord and Canaccord may distribute this prospectus electronically.

Table of Contents

LEGAL MATTERS

DLA Piper LLP (US), San Diego, California will pass for us upon the validity of the securities being offered by this prospectus. Certain attorneys affiliated with DLA Piper LLP (US) collectively own an aggregate of 34,698 shares of our common stock. Canaccord Genuity Inc. is being represented in connection with this offering by Goodwin Procter LLP, New York, New York.

EXPERTS

The consolidated financial statements of GenMark Diagnostics, Inc. appearing in the GenMark Diagnostic, Inc. s Annual Report (Form 10-K) for the year ended December 31, 2015, and the effectiveness of GenMark Diagnostics, Inc. internal control over financial reporting as of December 31, 2015 have been audited by Ernst & Young LLP, independent registered public accounting firm, as stated in their reports thereon, and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such reports given upon the authority of such firm as experts in accounting and auditing.

WHERE YOU CAN FIND MORE INFORMATION

We have filed with the SEC a registration statement on Form S-3 under the Securities Act, of which this prospectus forms a part. The rules and regulations of the SEC allow us to omit from this prospectus certain information included in the registration statement. For further information about us and the securities we are offering under this prospectus, you should refer to the registration statement and the exhibits and schedules filed with the registration statement. With respect to the statements contained in this prospectus regarding the contents of any agreement or any other document, in each instance, the statement is qualified in all respects by the complete text of the agreement or document, a copy of which has been filed as an exhibit to the registration statement.

We file reports, proxy statements and other information with the SEC under the Exchange Act. You may read and copy this information from the Public Reference Room of the SEC, 100 F Street, N.E., Room 1580, Washington, D.C. 20549, at prescribed rates. You may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800- SEC-0330. The SEC also maintains an Internet website that contains reports, proxy statements and other information about issuers, like us, that file electronically with the SEC. The address of that website is *www.sec.gov*.

INFORMATION INCORPORATED BY REFERENCE

The SEC allows us to incorporate by reference information that we file with it into this prospectus, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this prospectus. Information in this prospectus supersedes information incorporated by reference that we filed with the SEC prior to the date of this prospectus, while information that we file later with the SEC will automatically update and supersede the information in this prospectus. We incorporate by reference into this registration statement and prospectus the following documents, and any future filings we will make with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act after the date of the initial registration statement but prior to effectiveness of the registration statement and after the date of this prospectus but prior to the termination of the offering of the securities covered by this prospectus (other than current reports or portions thereof furnished under Item 2.02 or Item 7.01 of Form 8-K):

Our Annual Report on Form 10-K for the year ended December 31, 2015, filed with the SEC on February 23, 2016, including the information specifically incorporated by reference into the Annual

Table of Contents

Report on Form 10-K from our definitive proxy statement for the 2016 Annual Meeting of Stockholders;

Our Quarterly Report on Form 10-Q for the quarter ended March 31, 2016, filed with the SEC on May 3, 2016;

Our Current Reports on Form 8-K filed with the SEC on February 3, 2016, February 24, 2016, March 24, 2016, and June 8, 2016; and

The description of our common stock contained in our registration statement on Form 8-A filed with the SEC on May 24, 2010, and any amendment or report filed with the SEC for the purpose of updating the description.

We will provide each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the information that has been incorporated by reference into this prospectus but not delivered with this prospectus upon written or oral request at no cost to the requester. Requests should be directed to: GenMark Diagnostics, Inc., 5964 La Place Court, Carlsbad, CA 92008, Telephone: (760) 448-4300.

Table of Contents

$30,000,000

Common stock

Prospectus

Canaccord Genuity

, 2016

Table of Contents

PART II

INFORMATION NOT REQUIRED IN PROSPECTUS

Other Expenses of Issuance and Distribution

The following table sets forth the various expenses to be incurred in connection with the registration of the securities being registered hereby, all of which will be borne by the registrant.

Securities and Exchange Commission registration fee	$ 12,588
FINRA filing fee	19,250
Transfer agent s and trustee s fees and expenses	*
Printing and engraving expenses	*
Legal fees and expenses	*
Accounting fees and expenses	*
Miscellaneous expenses	*
Total	$ *

* These fees cannot be estimated at this time, as they are calculated based on the securities offered and the number of issuances. An estimate of the aggregate expenses in connection with the sale and distribution of the securities being offered will be included in the applicable prospectus supplement.

Indemnification of Officers and Directors

Section 145 of the DGCL authorizes a court to award or a corporation s board of directors to grant indemnification to directors and officers in terms sufficiently broad to permit such indemnification under certain circumstances for liabilities (including reimbursement for expenses incurred) arising under the Securities Act of 1933, as amended, or the Securities Act.

Our certificate of incorporation includes a provision that, to the fullest extent permitted by the DGCL, eliminates the personal liability of our directors for monetary damages for breach of fiduciary duty as a director. In addition, together our certificate of incorporation and our bylaws require us to indemnify, to the fullest extent permitted by law, any person made or threatened to be made a party to an action or proceeding (whether criminal, civil, administrative or investigative) by reason of the fact that such person is or was a director, officer or employee of GenMark or any predecessor of ours, or serves or served at any other enterprise as a director, officer or employee at our request or the request of any predecessor of ours, against expenses (including attorneys fees), judgments, fines, settlements and other amounts actually and reasonably incurred in connection with any proceeding, arising by reason of the fact that such person is or was an agent of ours. Our bylaws also provide that we may, to the fullest extent provided by law, indemnify any person against expenses (including attorneys fees), judgments, fines, settlements and other amounts actually and reasonably incurred in connection with any proceeding, arising by reason of the fact that such person is or was an agent of ours. We are required to advance expenses incurred by our directors, officers, employees and agents in defending any action or proceeding for which indemnification is required or permitted, subject to certain limited exceptions. The indemnification rights conferred by our certificate of incorporation and bylaws are not exclusive.

In addition, we have entered into indemnification agreements with each of our executive officers and directors. We also maintain an officers and directors liability insurance policy.

The foregoing may reduce the likelihood of derivative litigation against our directors and executive officers and may discourage or deter stockholders or management from suing directors or executive officers for breaches of their duty of care, even though such actions, if successful, might otherwise benefit the company and our stockholders.

Table of Contents

The underwriting agreement that we may enter into, Exhibit 1.1 to this registration statement, will provide for indemnification by any underwriters of the company, our directors, our officers who sign the registration statement and our controlling persons, if any, for some liabilities, including liabilities arising under the Securities Act.

Exhibits

A list of exhibits filed herewith is contained in the exhibit index that immediately precedes such exhibits and is incorporated herein by reference.

Undertakings

The undersigned registrant hereby undertakes:

1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement: (i) to include any prospectus required by Section 10(a)(3) of the Securities Act; (ii) to reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Securities and Exchange Commission (the Commission), pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement; and (iii) to include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

Provided, however, that paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) do not apply if the registration statement is on Form S-3 or Form F-3 and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), that are incorporated by reference in the registration statement, or is contained in a form of prospectus filed pursuant to Rule 424(b) that is part of the registration statement.

2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

4) That, for the purpose of determining liability under the Securities Act to any purchaser:

i. Each prospectus filed by the registrant pursuant to Rule 424(b)(3) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

ii. Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5) or (b)(7) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii) or (x) for the purpose of providing the information required by Section 10(a) of the Securities Act shall be deemed to be part of and included in

the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of securities in the offering described in prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date

Table of Contents

an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which the prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. *Provided, however* , that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.

5) That, for the purpose of determining liability of the registrant under the Securities Act to any purchaser in the initial distribution of the securities, the undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

i. Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424;

ii. Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

iii. The portion of any other free writing prospectus relating to the offering containing material information about the undersigned registrant or its securities provided by or on behalf of an undersigned registrant; and

iv. Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

6) That, for purposes of determining any liability under the Securities Act, each filing of the registrant s annual report pursuant to section 13(a) or section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan s annual report pursuant to section 15(d) of the Exchange Act) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

7) To file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of Section 310 of the Trust Indenture Act in accordance with the rules and regulations prescribed by the Commission under Section 305(b)(2) of the Trust Indenture Act.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

Table of Contents

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-3 and has duly caused this registration statement to be signed on its behalf by the undersigned thereunto duly authorized in the City of Carlsbad, State of California, on June 14, 2016.

GENMARK DIAGNOSTICS, INC.

By: /s/ Hany Massarany
Hany Massarany
Chief Executive Officer and President

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Hany Massarany and Scott Mendel, and each of them acting individually, as his true and lawful attorneys-in-fact and agent, with full power of each to act alone, with full powers of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any and all amendments to this registration statement (including post-effective amendments and any related registration statements filed pursuant to Rule 462 and otherwise), and to file the same with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully for all intents and purposes as he might or could do in person, hereby ratifying and confirming that all said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, as amended, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

SIGNATURE	TITLE	DATE
/s/ Hany Massarany Hany Massarany	Chief Executive Officer, President and Director (Principal Executive Officer)	June 14, 2016
/s/ Scott Mendel Scott Mendel	Chief Financial Officer (Principal Financial and Accounting Officer)	June 14, 2016
/s/ James Fox, Ph.D. James Fox, Ph.D.	Chairman of the Board	June 14, 2016
/s/ Daryl J. Faulkner Daryl J. Faulkner	Director	June 14, 2016
/s/ Kevin C. O Boyle	Director	June 14, 2016

Kevin C. O Boyle		
/s/ Michael S. Kagnoff Michael S. Kagnoff	Director	June 14, 2016
/s/ Lisa M. Giles Lisa M. Giles	Director	June 14, 2016

Table of Contents

Exhibit Index

Exhibit Number	Description
1.1*	Form of Underwriting Agreement (to be filed by amendment or as an exhibit to a report pursuant to Section 13(a), 13(c) or 15(d) of the Exchange Act).
1.2	Equity Distribution Agreement, dated June 14, 2016, by and between the Company and Canaccord Genuity Inc.
4.1	Certificate of Incorporation (incorporated by reference to our Registration Statement on Form S-1 (File No. 333-165562) filed with the Commission on March 19, 2010).
4.2	Amended and Restated Bylaws (incorporated by reference to our Current Report on Form 8-K filed with the SEC on October 31, 2014).
4.3	Form of Senior Indenture
4.4	Form of Subordinated Indenture
4.5*	Form of Senior Note
4.6*	Form of Subordinated Note
4.5*	Form of Warrant Agreement
4.6*	Form of Unit Agreement
5.1	Opinion of DLA Piper LLP (US)
23.1	Consent of Ernst & Young LLP
23.2	Consent of DLA Piper LLP (US) (included in Exhibit 5.1)
24.1	Power of Attorney (included immediately following the signature page to the registration statement)
25.1*	The Statement of Eligibility on Form T-1 under the Trust Indenture Act of 1939, as amended, of the Trustee under the Senior Indenture will be incorporated herein by reference from a subsequent filing in accordance with Section 305(b)(2) of the Trust Indenture Act of 1939
25.2*	The Statement of Eligibility on Form T-1 under the Trust Indenture Act of 1939, as amended, of the Trustee under the Subordinated Indenture will be incorporated herein by reference from a subsequent filing in accordance with Section 305(b)(2) of the Trust Indenture Act of 1939

* To be filed as an exhibit to a current report of the registrant on Form 8-K or other document to be incorporated herein by reference.